IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No M32 of 2016

RESOURCECO MATERIAL SOLUTIONS PTY LTD
First Plaintiff

SOUTHERN WASTE RESOURCECO PTY LTD
Second Plaintiff

STATE OF VICTORIA
First Defendant

10 **ENVIRONMENT PROTECTION AUTHORITY**
Second Defendant

ANNOTATED SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES, INTERVENING

PART I: FORM OF SUBMISSIONS

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

PART II: BASIS FOR INTERVENTION

2. The Attorney General for the State of New South Wales ("**NSW**") intervenes pursuant
20 to s 78A of the Judiciary Act 1903 (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT PROVISIONS

4. The applicable statutory provisions are set out in Annexure B to the First Defendant's submissions.

PART V: SUBMISSIONS

Overview

5. On the facts which are assumed to be true for the purposes of the demurrer, this Court cannot be satisfied that reg 26(3) ("**reg 26(3)**") of the Environment Protection
30 (Industrial Waste Resource) Regulations 2009 (Vic) ("**Regulations**") contravenes s 92 of the Constitution.

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6. In particular, on the assumed facts, the Court cannot be satisfied that reg 26(3) is:

   (a) discriminatory;

   (b) protectionist; and

   (c) not reasonably necessary for the achievement of legitimate non-protectionist objects.

At least for the purposes of the demurrer, reg 26(3) cannot be concluded to be discriminatory against interstate trade and commerce

7. In order to succeed in their constitutional challenge to reg 26(3), it is incumbent on the Plaintiffs to demonstrate that that regulation is discriminatory in the sense of "discriminat[ory] against" interstate trade in favour of intrastate trade: see Betfair v Racing NSW (2012) 249 CLR 217 ("**Betfair (No 2)**") at 264 [35], 286 [106]; Cole v Whitfield (1988) 165 CLR 360 ("**Cole**") at 393.

8. As Gaudron and McHugh JJ observed in Castlemaine Tooheys v South Australia (1990) 169 CLR 436 ("**Castlemaine Tooheys**") at 480, "the essence of the legal notion of discrimination lies in the unequal treatment of equals, and, conversely, in the equal treatment of unequals".

9. Reg 26(3) does not involve unequal treatment. It applies on its face to all applications for the approval of the transport of prescribed industrial waste to "another premises" whether the "receiving premises" are within or without Victoria.

10. Once that is recognised, the correctness of the Plaintiffs' assertion of discrimination turns on whether it can establish that "there is a relevant difference between the entities or activities which are the object of [reg 26(3)], yet the law applies as if there is no such difference": Betfair (No 2) at 264 [35].

11. The "relevant difference" on which the Plaintiffs appear to rely is the asserted fact (admitted by the First Defendant) that premises which are not in Victoria are not eligible to be licensed (or to be exempt or exempted from requiring a licence) to receive prescribed industrial waste under the Environment Protection Act 1970 (Vic) ("**Act**") or the Regulations. The consequence of this is that "prescribed industrial waste" cannot lawfully be transported outside of Victoria in the absence of an approval of the kind contemplated by reg 26(1)(c) (which approval "must not" be given unless reg 26(3)(a) or (b) is satisfied). In contrast, "prescribed industrial waste" can be transported within Victoria to a facility which is licenced, exempt or exempted from being licenced under the Act.

12. Contrary to the Plaintiffs' submissions, it does not inevitably follow from this that reg 26(3) is discriminatory against interstate trade.

13. Before a conclusion on this issue could be reached, it would be necessary to assess the burdens and benefits that the Act and Regulations impose on interstate trade and compare that with the benefits and burdens they impose on intrastate trade of the same kind: see, eg, Barley Marketing Board v Norman (1990) 171 CLR 182 ("**Norman**") at 204-5.

14. Absent such an inquiry, it is not possible to determine whether the effect of reg 26(3) is to discriminate against interstate trade and commerce.

15. It is apparent from an assessment of the legal operation of the regulatory regime of which reg 26(3) forms part that that regime has the effect of imposing some burden on interstate trade of services for the management of hazardous waste. In particular, the Act and Regulations have the effect of prohibiting non-Victorian facilities from providing a service of destroying or depositing non-liquid prescribed industrial waste originating from Victoria unless the facility has "better environmental performance standards" than a facility which is licensed or exempt or exempted from being licensed under the Victorian legislation.

16. However, without facts which would permit the court to draw inferences as to the practical consequences of being required to have "better environmental performance standards" than a licensed or exempt facility, the Court is not in a position to conclude that reg 26(3) has the effect of discriminating in favour of intrastate trade of services for the management of hazardous waste. For example, for all the Court knows, the burden imposed on interstate trade by reg 26(3) may be *de minimis* with the result that it can be safely put to one side: see, by analogy, APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 at 400 [206] per Gummow J.

17. In fact, it is possible that the Regulations actually discriminate in favour of interstate trade.

18. As observed above, the parties agree that facilities outside Victoria are not relevantly eligible to be licenced or exempt or exempted from being licensed under the Act. It follows that the only route through which a non-Victorian facility can lawfully receive non-liquid prescribed industrial waste for destruction or deposit is to ensure that an approval of the kind contemplated by reg 26(1)(c) is in force.

19. This may be a blessing in disguise.

20. Licensing under the Act carries with it a number of burdens including obligations to pay licence fees (s 24), environment protection levies (s 24A) and (in some cases) a landfill levies (s 50S). It is possible that these and the other burdens which are imposed by the Act and Regulations on intrastate trade but not on interstate trade outweigh the burden imposed on interstate trade by reg 26(3). If that be the case, the practical operation of

reg 26(3) may be to discriminate in favour of interstate trade and thereby not contravene s 92 of the Constitution.

21. In order to rule on the demurrer, this Court need not (and, indeed, cannot) resolve the question of whether the burden imposed on interstate trade by the Act and the Regulations actually outweighs the burden that the Act and Regulations impose on intrastate trade of the same kind. The point for present purposes is that the question of whether reg 26(3) is discriminatory in effect raises issues of "fact and degree" (Cole at 407-8; Betfair (No 2) at 265 [37]) which cannot be resolved on a demurrer to a defence which denies that reg 26(3) discriminates against interstate trade and commerce: see Defence at [18]; DB 28.

22. If that be accepted, the demurrer must be overruled.

At least for the purposes of the demurrer, reg 26(3) cannot be concluded to be protectionist

23. The difficulties that the Plaintiffs face by reason of their decision to demur to the First Defendant's defence apply with even greater force to the question of whether reg 26(3) is protectionist.

24. In order for reg 26(3) to be regarded as protectionist, it would be necessary for the Court to conclude that that regulation operates to the competitive disadvantage of interstate trade: see, eg, Betfair v Western Australia (2008) 234 CLR 418 at 481 [118] ("**Betfair (No 1)**"); Betfair (No 2) at 269 [52], 272 [662].

25. That is plainly a matter of "fact and degree": Cole at 407-8; Betfair (No 2) at 265 [37].

26. The Plaintiffs do not appear to submit otherwise. Rather, their argument appears to be that protectionism in fact can be inferred from the "discriminatory burden" said to have been imposed by reg 26(3): see Plaintiffs' "Summary of Argument" ("**PS**") at [27]-[28].

27. That argument fails at the threshold. For the reasons already addressed at paragraphs 7 to 22 above, the Court is not in a position to conclude on the demurrer that reg 26(3) discriminates against interstate trade. If that is accepted, the Plaintiffs' submission that "protectionist effect follows from the discriminatory burden" fails: cf heading at PS [27].

28. In passing, it should also be noted that the Plaintiffs' case is not assisted by this Court's decision in Norman: cf PS at [29]-[31].

29. The barley marketing scheme there in issue was held to not contravene s 92 of the Constitution, in part, because there was (see Norman at 204):

> no evidence to suggest that the marketing scheme operates in such a way as to restrict the supply of barley to interstate maltsters. They are able to compete on an even footing with domestic maltsters in purchasing malting grade barley from the plaintiff.

30. So to here, there is "no evidence" to suggest that reg 26(3) operates in such a way as to be protectionist in favour of Victorian waste management facilities.

31. This provides a further basis on which the demurrer must be overruled.

If it be necessary to decide, the Court should conclude that reg 26(3) is reasonably necessary for the achievement of legitimate non-protectionist objects

32. Unless the Court concludes (on the facts which are assumed to be true for the purposes of the demurrer) that reg 26(3) imposes a discriminatory burden of a protectionist kind on interstate trade, it will be unnecessary for the Court to consider whether reg 26(3) can nevertheless be justified as being reasonably necessary for the achievement of non-protectionist objects: see, eg, Betfair (No 2) at 295 [136] per Kiefel J.

33. If this question of justification does arise, its resolution is (again) rendered difficult in the context of a demurrer.

34. This is because the justification question requires a form of "proportionality" analysis in respect of which it is necessary to have regard to the extent of any burden imposed on interstate trade as compared with intrastate trade: see Betfair (No 1) at [101]-[103]. In short, a law which imposes a relatively minor burden on interstate trade is more likely to be regarded as reasonably necessary for the achievement of a legitimate object than one which imposes a relatively major burden. "It depends on the facts": Betfair (No 2) at 272 [61] per Heydon J.

35. On the present demurrer, the Court does not have facts before it on which it can draw reliable conclusions as to the extent to which (if at all) reg 26(3) imposes a burden on interstate trade. Such facts as are pleaded in the First Defendant's Defence (and which are assumed to be true for the purposes of the demurrer) suggest that any burden that reg 26(3) imposes on interstate trade is relatively minor including because:

(a) there is no market in Victoria for the destruction and deposit of "Category A" waste (Defence at 19(d)(i); DB 30) with the result that reg 26(3) cannot be protectionist insofar as it pertains to "Category A" waste as there is no Victorian trade in relation to such waste to protect;

(b) there is little if any economic incentive on market participants in Victoria to transport "Category C" prescribed industrial waste comprising of contaminated soil to facilities outside Victoria (Defence at [19(g)]; DB 31) with the result that reg 26(3) must impose little if any burden on interstate trade insofar as it pertains to such waste;

(c) the "better environmental standards" test in respect of which the Plaintiffs complain only applies to a proposal to transport non-liquid prescribed industrial waste for destruction or deposit and does not apply to transport for the purposes of reuse or recycling: Defence at [19(h)]; DB 31-32;

(d) multiple approvals of the kind contemplated by reg 26(3) have been granted to permit transport of waste to places outside of Victoria (cf Betfair (No 1) at 481 [119] where the prospects of Betfair Pty Ltd obtaining a relevant approval were regarded as "illusory"): Defence at [19(hB)]; DB 32.

36. With the above in mind, the question which arises for determination (if the Court holds that reg 26(3) constitutes discriminatory protectionism) is whether any discriminatory burden imposed on interstate trade by reg 26(3) can be justified as being reasonably necessary to the achievement of a legitimate non-protectionist object.

37. The First Defendant's submissions identify (at [56]) two objects said to justify any such discriminatory burden: waste minimisation and "treating and disposing of hazardous waste close to its site of production".

38. Both of these objects are readily discernible from the face of reg 26. That regulation starts from the premise that transporting prescribed industrial waste is undesirable and therefore should be discouraged and *prima facie* prohibited. The regulation then provides what are in substance two exceptions to the general prohibition on the transport of prescribed industrial waste. Those exceptions apply:

(a) where the transport would have the ultimate consequence of reducing waste through reuse or recycling (see reg 26(3)(a)); or

(b) where the transport is to a facility which:

(i) is regulated under the Act (or not required to be so regulated): reg 26(1)(a) and (b); or

(ii) has "better environmental performance standards" than a facility regulated or not required to be regulated under the Act: reg 26(3)(b).

39. In general terms, these two exceptions correspond with the two regulatory objects identified by the First Defendant. The second exception also supports the first identified object (waste minimisation) by requiring that prescribed industrial waste is ordinarily transported to:

(a) facilities which are regulated under the Act (which facilities are required to pay fees and levies which could be expected to be passed onto customers – thus incentivising the reduction of waste); or

(b) facilities which have "better environmental performance standards" than facilities which are regulated under the Act or not required to be so regulated (with the result that waste will have a reduced impact on the environment than might otherwise be the case).

40. The Plaintiffs do not appear to contest the correctness of the First Defendant's contention as to the objects of reg 26 or contend that those objects are not legitimate non-protectionist objects.

41. Instead, the Plaintiffs focus is to seek to dismiss reg 26(3) by arguing that it involves "illegitimate means": see, eg, PS at [51], [56]

42. That approach distorts the correct inquiry for the purposes of s 92 of the Constitution.

43. If it be accepted (as it should be) that reg 26(3) is directed to legitimate non-protectionist ends, the appropriate inquiry is to assess whether the means adopted in reg 26(3) are "reasonably necessary" for the achievement of those ends: see Betfair (No 1) at 477 [102].

44. "Reasonable necessity" in this context does not mean "absolute necessity". If it were otherwise, the Court would be put in the "invidious position" of sitting in judgement on the "political question" of whether a particular regulation is "in fact necessary for the protection of the community": see Castlemaine Tooheys at 473.

45. Instead, where it is concluded that legislation which discriminates against interstate trade is directed to a legitimate non-protectionist end, the question for the Court is whether the means adopted fall within the range of legitimate legislative choice (noting the "fundamental consideration that, subject to the Constitution, the legislature of a State has power to enact legislation from the well-being of the people of that State": Castlemaine Tooheys at 472; Betfair (No 1) at 473 [86], 476 [100]).

46. If it becomes necessary to decide, the Court should conclude (on the facts assumed for the purposes of the demurrer) that reg 26(3) is reasonably necessary for the achievement of the non-protectionist purposes identified by the First Defendant.

47. Reg 26(3) is reasonably necessary for the achievement of the **waste minimisation** object that the Regulations seek to achieve (and is achieving: see Defence at 19(hB); DB 32).

48. As noted above, reg 26 seeks to achieve its waste minimisation object by generally permitting transport for the purpose of reuse or recycling but otherwise generally requiring that prescribed industrial waste is transported to a facility which is obliged to pay fees and levies under the Act or to facilities which have "better environmental performance standards" than facilities which are required to pay such fees and levies.

49. That object would be defeated in the absence of the "better environmental performance standards" test in reg 26(3)(b). If such a test did not exist, producers of waste could cause waste to be transported to a facility (within or without Victoria) which has similar or lesser environmental performance standards to a facility regulated under the Act. In such an event, the waste minimisation objects of reg 26 would be defeated including because:

(a) producers of waste would not be incentivised to reduce their waste (because producers could avoid the indirect impost of the fees and levies under the Act which act as a disincentive to the production of waste by transporting waste to a facility which is not licensed under the Act and therefore not required to pay fees and levies under the Act); and

(b) the environmental impact of waste will not be reduced (vis-à-vis facilities regulated or exempt from regulation under the Act) through the requirement of "better environmental performance standards".

50. These considerations are sufficient to support a conclusion that reg 26(3) is reasonably necessary for the achievement of the waste minimisation objects of the Regulations.

51. Contrary to the Plaintiffs' submissions (at [50]-[52]), such a conclusion would not be inconsistent with the reasoning in Betfair (No 1). While it may be accepted (as this Court held in Betfair (No 1) at 479 [108]) that "protecting the turnover of in-State operators from diminution as a result of competition from [out of State operators]" is not a legitimate non-protectionist object, it does not follow from that that States are constitutionally prohibited from adopting pricing mechanisms in order achieve legitimate non-protectionist objects. The regime upheld in Betfair (No 2) is an example of such a pricing mechanism.

52. Where a pricing mechanism is alleged to contravene s 92 of the Constitution, the same questions arise for determination as arise in the case of any other form of State regulation of trade and commerce – is the mechanism discriminatory against interstate trade in a protectionist sense?; if so, is it nevertheless justifiable as being reasonably necessary for the achievement of a legitimate non-protectionist end?

53. In the case of reg 26(3), the first of those questions should be answered "no". If the second of these questions arise, it should be answered "yes".

54. The other object on which the First Defendant relies as justifying any discriminatory protectionism imposed by reg 26(3) is the object of "treating and disposing of hazardous waste **close to its site of production**".

55. It may immediately be noticed (as the Plaintiffs emphasise at [64.2]) that the Regulations do not adopt a "proximity principle" along the lines of that which applies in New South Wales by virtue of cl 71 of the Protection of the Environment Operations (Waste) Regulation 2014 (NSW). That clause generally prohibits the transport of waste for more than 150km in New South Wales.

56. It does not follow from this, however, that reg 26(3) cannot be regarded as reasonably necessary for the purposes of achieving the object of treating and disposing of hazardous waste close to its site of production.

57. As observed above, the test of "reasonable necessity" is not a test of "absolute necessity". Within the bounds of "reasonable necessity", there is a range of acceptable legislative choices.

58. On the facts which are assumed for the purposes of the demurrer, reg 26(3) falls within that range. In the result, the Court should conclude (if the question arises for determination) that reg 26(3) is reasonably necessary for the achievement of a legitimate non-protectionist object.

59. The demurrer should be overruled.

Conclusion

60. On the facts assumed for the purposes of the demurrer, the Court cannot be satisfied that reg 26(3) imposes a discriminatory burden against interstate trade of a protectionist kind. The question of justification therefore does not arise. If it arises, it should be resolved in favour of the First Defendant.

61. The demurrer should be overruled.

PART VI: TIME ESTIMATE

62. NSW estimates that no more than fifteen minutes will be required for the presentation of oral argument.

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