IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M32 of 2016

BETWEEN: **RESOURCECO MATERIAL SOLUTIONS PTY LTD (ACN 608 316 687)**
First plaintiff

and

SOUTHERN WASTE RESOURCECO PTY LTD (ACN 151 241 093)
Second plaintiff

and

STATE OF VICTORIA
First defendant

and

ENVIRONMENT PROTECTION AUTHORITY
Second defendant

ANNOTATED SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. This submission is in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings in support of the defendants pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland
Form 27C
Dated: 21 November 2016
Per Kent Blore
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PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Statutory provisions

4. The relevant statutory provisions are set out in Annexure B to the submissions of the first defendant.

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PART V: Submissions

Summary

5. The Attorney-General adopts the submissions of the first defendant and makes additional submissions to the following effect:

(a) the test of justification in the context of s 92 involves the identification of a legitimate purpose among multiple purposes, not the determination of the law's 'true purpose';

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(b) the identification of a legitimate, non-protectionist purpose does not involve reference to the 'actual motivating objects' of reg 26(3) of the *Environment Protection (Industrial Waste Resource) Regulations 2009* (Vic) ('the Regulations');

(c) the plaintiffs' submission that the means as well as the ends of the impugned law must be non-protectionist should be rejected;

(d) in the context of s 92, the 'proportionality' test to be applied is limited to an assessment of whether the law is reasonably necessary to achieve its legitimate, non-protectionist purpose; and

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(e) in light of the above matters, the plaintiff's demurrer should be overruled.

Statement of Argument

(a) *It is necessary, but not sufficient, for validity, to identify one legitimate purpose*

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6. Where a law is found to impose a discriminatory burden of a protectionist kind, the identification of a legitimate, non-protectionist purpose is a step in working out whether the law is reasonably necessary to achieve that purpose, and therefore valid. It is to be distinguished from the identification of the 'true purpose' or 'true object' of the law.[1] That phrase was used in *Castlemaine Tooheys Ltd v South Australia* ('*Castlemaine Tooheys*')[2] to describe the outcome of an analysis of whether the

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[1] Cf Plaintiffs' summary of argument, 11 [42.2].

[2] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

means adopted by a law are reasonably necessary to achieve its legitimate object. Where the means are not reasonably necessary, the 'true purpose' of the law might be described as protectionist.[3] The majority reasoned:[4]

> The fact that a law imposes a burden upon interstate trade and commerce that is not incidental or that is disproportionate to the attainment of a legitimate object of the law may show that the true purpose of the law is not to attain that object but to impose the impermissible burden.

7. Because the phrase 'true purpose' is the conclusion of the constitutional enquiry, it does not suggest that the enquiry requires a law to have a single, non-protectionist purpose in order to be valid. Nor does the reasoning of Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ in *Betfair Pty Ltd v Western Australia* ('*Betfair [No 1]*'), support that result. Their Honours there rejected a submission that 'it is *sufficient* for validity of a law if one of several objectives is non-protectionist'.[5] The rejection of that submission does not deny that a law may be valid if it is reasonably necessary to achieve a legitimate, non-protectionist purpose, even if the law has other purposes. That is, the existence of a legitimate purpose is necessary but not sufficient for validity.

(b) ***'Actual motivating objects' are not relevant to identifying a legitimate purpose***

8. Respectfully, the plaintiffs' submission[6] that the 'actual motivating objects' of the law are relevant to the question of whether the law has a legitimate, non-protectionist purpose should be rejected.

9. The task of identifying the purpose of a law in a s 92 context is no different from the task of identifying the purpose of a law in other contexts, including other constitutional contexts. The purpose is determined objectively 'by a process of statutory construction'.[7] That process 'must begin and end with the words that are used' taking account of 'the whole of the context in which those words were and are used', including, in appropriate cases, the extrinsic material.[8] In this case, that context includes the Regulatory Impact Statement,[9] which itself must be understood in the context of the factual matters set out in [65] and [66] of the first defendant's submissions.

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[3] Ibid 472-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[4] Ibid 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Cole v Whitfield* (1988) 165 CLR 360, 408 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[5] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 464 (emphasis added).
[6] Plaintiffs' summary of argument, 1 [3.2], 11 [42].
[7] *McCloy v New South Wales* (2015) 325 ALR 15, 32 [67]; 89 ALJR 857, 873 [67] (French CJ, Kiefel, Bell, Keane JJ). See also *Unions NSW v New South Wales* (2013) 252 CLR 530, 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92, 147 [125] (Hayne J), 205 [317] (Crennan, Kiefel and Bell JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 61 [166] (Gummow and Bell JJ).
[8] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 462 [423] (Hayne J).
[9] *Regulatory Impact Statement for the draft Environment Protection (Industrial Waste Resource) Regulations* (Publication 1275, March 2009).

10. The process of statutory construction does not involve 'psychoanalysis of those associated with the making of the law'.[10] As French CJ and Hayne J said in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*:[11]

> The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted.

11. In the case of primary legislation, it 'is incontestable that the courts will not examine the motives which inspire members of Parliament to enact laws'.[12] Any other approach would infringe the privileges of parliament.[13]

12. In the case of delegated legislation, the actual motivating intention of the Governor in Council might be relevant to judicial review proceedings to show that its constituent members had some improper purpose.[14] But the plaintiffs have not brought proceedings of that kind. Even assuming that a court could discover the subjective intention of the Governor in Council outside of the ordinary rules of construction, which is doubtful,[15] such an intention is not relevant to whether s 92 is breached.[16]

(c) ***Section 92 does not require that the means adopted be non-protectionist***

13. The plaintiffs submit that s 92 of the *Constitution* 'requires that both the means, as well as the objects, of a law be non-protectionist'.[17] Respectfully, to the extent that submission relates to means, it should be rejected, for the following three reasons in addition to the reasons given by the first defendant.[18]

14. First, the submission is not supported by authority. In the most recent articulation of the test of justification in the context of s 92, the majority in *Betfair Pty Ltd v Racing New South Wales* ('*Betfair [No 2]*') held the requirement was a legitimate non-protectionist *purpose*, not a legitimate non-protectionist *means*.[19]

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[10] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 462 [423] (Hayne J). See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591-592 [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 133-134 [315] (Hayne J).
[11] *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 390 [25].
[12] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 225 (Mason J).
[13] *British Railways Board v Pickin* [1974] AC 765; *Queensland Harness Racing Ltd v Racing Queensland Ltd* [2013] 2 Qd R 372, 378-379 [20]-[21] (Peter Lyons J).
[14] Cf *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 296 [141] (Kiefel J) ('*Betfair [No 2]*'); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 193 (Gibbs CJ), 216 (Stephen J), 284 (Wilson J).
[15] Cf *Re the Major etc of the City of Hawthorn; Ex parte Co-operative Brick Co Ltd* [1909] VLR 27, 51 (Cussen J); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 226 (Mason J).
[16] *Betfair [No 2]* (2012) 249 CLR 217, 296 [141] (Kiefel J); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 320 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[17] Plaintiffs' summary of argument, 14 [53].
[18] First defendant's submissions, 15 [70].
[19] *Betfair [No 2]* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

15. Second, the plaintiffs' reliance[20] on a comparison with 'compatibility testing'[21] in the context of the implied freedom of political communication is misplaced. The comparison is inapt because there are fundamental differences in the analytical framework applied in each context.

16. Freedom of political communication is not an end in itself; rather, it is an 'indispensable incident' of, and serves to protect, the constitutionally prescribed system of representative government.[22] For that reason, a law's purpose and means will be legitimate where they are compatible with the constitutional system of representative government.[23] The law's means need not be compatible with free political communication. Indeed, in circumstances where the law imposes a burden on the freedom, the means will always be incompatible, to some extent, with that freedom.

17. In contrast, the object of s 92 in its application to trade and commerce is 'the elimination of protection'.[24] A law's purpose will therefore be legitimate if it is 'non-protectionist'.[25] That is, unlike in the case of the implied freedom, the purpose of the law is not tested for legitimacy against some higher order constitutional value. Rather, the purpose is tested against protectionism, the value being protected.

18. Consequently, a requirement that a law's means be legitimate would, in a s 92 context, confound the enquiry of justification.[26] The question of justification arises only where a law has been shown to impose a 'discriminatory burden of a protectionist kind'.[27] A law will bear that character only if the means it adopts are 'protectionist', in the sense of having a protectionist effect. It follows that if the test of justification required the law's means to be non-protectionist, the test could never be satisfied.

19. Accordingly, acceptance of the plaintiffs' submission that both means and ends must be non-protectionist would extend the immunity conferred by s 92 'beyond all reason'.[28] Moreover, it would be inconsistent not only with *Cole v Whitfield* but each subsequent s 92 case in which the question of justification has arisen, all of

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[20] Plaintiff's summary of argument, 14 fn 50.

[21] In *McCloy v New South Wales* (2015) 325 ALR 15 at 18 [2], French CJ, Kiefel, Bell and Keane JJ use the phrase 'compatibility testing' to describe the process of testing whether a law's purpose and means are legitimate.

[22] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[23] *McCloy v New South Wales* (2015) 325 ALR 15, 18 [2]; 89 ALJR 857, 862 [2] (French CJ, Kiefel, Bell and Keane JJ).

[24] *Cole v Whitfield* (1988) 165 CLR 360, 394 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Betfair [No 1]* (2008) 234 CLR 418, 452 [15] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[25] *Betfair [No 2]* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[26] See HCJ 6427/02, *The Movement for Quality Government in Israel v The Knesset* [2006] IsrSC 61(1) 619, quoted and translated from Hebrew in Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 250.

[27] *Betfair [No 2]* (2012) 249 CLR 217, 295 [136] (Kiefel J).

[28] *Castlemaine Tooheys* (1990) 169 CLR 436, 472-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

which have accepted that a law which burdens the freedom guaranteed by s 92 may nonetheless be justified.[29] The plaintiffs have not sought to reopen these authorities.

20. Third, the requirement adopted in *Coleman v Power*,[30] that the means must also be legitimate (or, in the terminology of *McCloy*, 'compatible'), is unique as a matter of comparative constitutional law. The majority acknowledged as much in *McCloy v New South Wales* when their Honours said:[31]

> Other legal systems which employ proportionality testing to determine the limits of legislative power to restrict a right or freedom also require, before that testing commences, that there be a legitimate purpose, because only a legitimate purpose can justify a restriction.[32] But what is there spoken of as legitimate is that the purpose is one permitted by the relevant constitution. The test in *Lange* requires more, both as to what qualifies as legitimate, and as to what must meet this qualification. It requires, at the outset, that consideration be given to the purpose of the legislative provisions and the means adopted to achieve that purpose in order to determine whether the provisions are directed to, or operate to, impinge upon the functionality of the system of representative government.

21. This observation is reinforced by Professor Aharon Barak who notes that compatibility testing:[33]

> is carried out *without considering ... the means* used to achieve such a purpose ... Rather, this a threshold examination. It focuses on the law's *purpose rather than its consequences*. Such an examination seeks to provide an answer to the threshold question of whether, in a constitutional democracy, a constitutional right can be limited to realize the *purpose* underlying the law.

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[29] *Cole v Whitfield* (1988) 165 CLR 360, 409-410 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (conservation object justified the burden); *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411, 427-428 (Mason CJ, Brennan, Deane and Gaudron JJ) (economic equalisation object did not justify the burden); *Castlemaine Tooheys* (1990) 169 CLR 436, 475-477 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) (objects of reducing litter and conserving energy resources did not justify the burden); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 394 [179] (Gummow J), 463 [427] (Hayne J) (object of restricting legal advertising justified burden on intercourse); *Betfair [No 1]* (2008) 234 CLR 418, 477 [102]-[103], 478-480 [106]-[112] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) (objects of protecting State revenue and maintaining the integrity of the racing industry did not justify the burden); *Betfair [No 2]* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[30] *Coleman v Power* (2004) 220 CLR 1, 50-51 [92]-[96] (McHugh J), 77-78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

[31] *McCloy v New South Wales* (2015) 325 ALR 15, 32 [67]; 89 ALJR 857, 873 [67] (French CJ, Kiefel, Bell and Keane JJ).

[32] Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 387-388; Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) 34 *Human Rights Law Journal* 12, 13-14.

[33] Barak, *Proportionality*, above n 27, 246-247 (emphasis added). Professor Barak is concerned with the same threshold enquiry, though he does not use the terminology of 'compatibility testing'.

(d) ***The test of justification in s 92 is one of 'reasonable necessity'***

22. In *Betfair [No 1]*, Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ reviewed the application of 'proportionality' in *Castlemaine Tooheys Ltd v South Australia* and found that it suggested the application of a criterion of 'reasonable necessity'.[34] Their Honours held emphatically, '[t]hat view of the matter should be accepted as the doctrine of the Court'.[35] In *Betfair [No 2]*, the majority held that a measure which burdens s 92 may be justified if it 'nonetheless is reasonably necessary for [the State] to achieve a legitimate non-protectionist purpose.'[36] It must now be accepted that the test of justification in the context of s 92 is one of 'reasonable necessity'.

23. In *Betfair [No 1]*, six judges of the Court held[37] that, in the context of s 92, as elsewhere in constitutional, public and private law, the criterion of 'reasonable necessity' should be understood in the way explained by Gleeson CJ in *Thomas v Mowbray*.[38] In generic terms, the test involves an assessment of whether the law imposes a greater restriction on the protected interest than the achievement of the legitimate end requires.[39] As recent authorities on the implied freedom have demonstrated, the restriction will be greater than the end requires if there are other, equally effective, means of achieving the end which are less restrictive and which are obvious and compelling.[40] Where such alternatives exist, the use of more restrictive measures is not reasonable and cannot be justified.

24. As pointed out in *Betfair [No 1]*, adopting a test of 'reasonable necessity' in the context of s 92 is consistent with the reasons given in *Cole v Whitfield* for upholding the prohibitions on the possession and sale of undersized crayfish.[41] It is also consistent with the reasons of the majority in *Castlemaine Tooheys*, which turned on findings that the 'refund amount fixed for non-refillable beer bottles far exceeded what was thought necessary to ensure the success of the scheme',[42] and that there were alternative, non-discriminatory measures that the State might have adopted to protect its reserves of natural gas.[43] The test was applied in *Betfair [No 1]*, where the non-discriminatory regulation adopted by Tasmania demonstrated that Western Australia's legislative choice was 'not proportionate'.[44] An approach based on

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[34] *Betfair [No 1]* (2008) 234 CLR 418, 477 [102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
[35] Ibid 477 [103].
[36] *Betfair [No 2]* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ). As regards interstate intercourse, see also: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 393-394 [177] (Gummow J), 461 [420], 463 [427] (Hayne J).
[37] *Betfair [No 1]* (2008) 234 CLR 418, 477 [103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
[38] *Thomas v Mowbray* (2007) 233 CLR 307, 331-333 [20]-[26].
[39] Ibid 332 [22] (Gleeson CJ).
[40] *McCloy v New South Wales* (2015) 325 ALR 15, 36 [81]; 89 ALJR 857, 876 [81] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [113] (Crennan, Kiefel and Bell JJ).
[41] *Betfair [No 1]* (2008) 234 CLR 418, 477 [103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Cole v Whitfield* (1988) 165 CLR 360, 409 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[42] *Castlemaine Tooheys* (1990) 169 CLR 436, 475 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[43] Ibid 477 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
[44] *Betfair [No 1]* (2008) 234 CLR 418, 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

'reasonable necessity' has a long pedigree in the context of s 92. For example, in *Commonwealth v Bank of New South Wales*,[45] the Privy Council referred to the potential validity of measures which were shown to be 'the only practical and reasonable manner of regulation'.[46]

25. The authorities do not support, in the context of s 92, an additional enquiry in each specific case amounting to a value judgment 'describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'.[47] So, for example, the law in *Cole v Whitfield* was valid once it had been shown that it was necessary for the protection of Tasmanian crayfish stocks. Here again, the test of justification applied in a s 92 context is distinguishable from that which may be applied in the context of the implied freedom of political communication.

26. That a different test should apply in the context of s 92 is both unsurprising in the context of Australian constitutional law, and consistent with one of the central theses of the main proponent of proportionality, Professor Barak.

27. Professor Barak advocates the development of 'principled balancing formulas'. The purpose of these formulas is to provide an intermediate step between the abstraction of the 'basic balancing rule' (which weighs the marginal social importance of maintaining the constitutional right at stake against the marginal social importance of the law that detracts from it) and the 'specific balancing rule' (which is the application of the basic balancing rule in an individual case). In other words, Professor Barak advocates the adoption of different tests – which he calls 'principled balancing formulas' – in the context of different constitutional rights, so that each test may be calibrated to the nature of the right at stake. Each test should 'express the principled consideration which underlies the constitutional right and the justification of its limitation'.[48] The tests 'determine the conditions that the limiting law must satisfy for the limitation to be proportional *stricto sensu*.'[49] Importantly, the process of identifying a principled balancing formula against which laws limiting a particular right might be tested is, in itself, a process of 'balancing'.[50]

28. It is in this sense that 'notions of balancing may be seen in *Castlemaine Tooheys*'.[51] As recent authority makes clear, a principled formula of 'reasonable necessity' has

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[45] (1949) 79 CLR 497 ('*Banking Nationalisation Case*').
[46] Ibid 641 (Lord Porter, delivering the advice of the Privy Council).
[47] Cf *McCloy v New South Wales* (2015) 325 ALR 15, 19 [2]; 89 ALJR 857, 863 [2] (French CJ, Kiefel, Bell and Keane JJ).
[48] Barak, *Proportionality*, above n 27, 543.
[49] Ibid 543.
[50] Ibid 544. See also *McCloy v New South Wales* (2015) 325 ALR 15, 51 [146]-[147]; 89 ALJR 857, 887 [146]-[147] (Gageler J).
[51] Cf *McCloy v New South Wales* (2015) 325 ALR 15, 37 [87]; 89 ALJR 857, 877 [87], referring to observations in Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 59. The reference in Zines' book to *Castlemaine Tooheys* involving 'some notion of balancing' is immediately followed by the explanation that, in those circumstances, 'the Court is concerned to ensure that the constitutional freedom is not affected more than is reasonably necessary to achieve its legitimate object'.

been adopted by the Court as the test of justification in the context of s 92.[52] In the language of Barak, the adoption of such a test expresses the view that the marginal social importance of maintaining free interstate trade and commerce will be offset by the marginal social importance of the effect of any law that is necessary to achieve a legitimate non-protectionist purpose. That is, the adoption of the 'reasonable necessity' test is itself a 'balancing' process, as it determines the enquiry.

29. A test limited to 'reasonable necessity' is peculiarly appropriate in the context of s 92, because, respectfully, the Court is institutionally ill-suited to weighing contestable policy ends against impacts upon the market. So much has been recognised in the dormant commerce clause jurisprudence of the Supreme Court of the United States. That jurisprudence involves the application of the '*Pike* balancing test' to laws which are 'non-discriminatory',[53] but have incidental effects on interstate commerce.[54] Under the *Pike* test, State laws will be upheld unless the burden they impose on interstate commerce is clearly excessive in relation to the putative local benefits. This test has been described as a 'true balancing test (*stricto sensu*)'.[55] It has been criticised by the Supreme Court as at times involving that Court in tasks for which 'the Judicial Branch is not institutionally suited'.[56]

30. In *Department of Revenue of Kentucky v Davis*,[57] the Supreme Court considered a Kentucky law requiring income tax to be paid on the interest received on bonds issued by other States but not on bonds issued by Kentucky. Although the law burdened interstate commerce, the Court declined to apply the *Pike* test. The law was said to harm the market and its participants in various ways. Justice Souter, delivering the opinion of the Court, noted that even if it was accepted that the harms identified eventuated from the law, 'weighing or quantifying them for a cost-benefit analysis would be a very subtle exercise'.[58] Further, it was doubtful that 'any court' would be in a position to evaluate the benefits of the law, because any attempt to do so would involve predictions about the economic consequences of terminating the

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[52] *Betfair [No 1]* (2008) 234 CLR 418, 477 [103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair [No 2]* (2012) 249 CLR 217, 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[53] Although the US case law frequently describes laws in this category as 'non-discriminatory', it would appear that some laws in this category would be considered discriminatory in an Australian context. For example, in *Pike* itself, an order prohibiting cantaloupes from being shipped out of the State unless they were first packed in certain containers was found to fall within this 'non-discriminatory' category, even though the law discriminated between in- and out-of-State economic interests by preventing the packing of cantaloupes across State boundaries: *Pike v Bruce Church Inc*, 397 US 137, 142 (Stewart J, delivering the opinion of the Court) (1969). Unlike in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, the entitlements of the packers in each of the two States were not identical: at 203 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[54] *Pike v Bruce Church Inc* 397 US 137, 142 (1970).

[55] James H Mathis, 'Balancing and proportionality in US commerce clause cases' (2008) 35 *Legal Issues of Economic Integration* 273, 274.

[56] *Department of Revenue of Kentucky v Davis*, 553 US 328, 353 (Souter J, delivering the opinion of the Court) (2008).

[57] 553 US 328 (2008).

[58] Ibid 354.

scheme.[59] After setting out some of the questions that would arise if such an analysis were attempted, Souter J said:[60]

> What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible.

31. The more appropriate arm of government to undertake the task is the legislature: 'Congress has some hope of acquiring more complete information than adversarial trials may produce, and an elected legislature is the preferable institution for incurring the economic risks of any alteration'.[61]

32. Justice Scalia, writing separately on this point, went further and would have abandoned *Pike* balancing altogether.[62] He said:

> The problem is that the courts are less well suited than Congress to perform this kind of balancing in every case. The burdens and the benefits are always incommensurate, and cannot be placed on the opposite balances of a scale without assigning a policy-based weight to each of them. It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. Here, on one end of the scale (the burden side) there rests a certain degree of suppression of interstate competition in borrowing; and on the other (the benefits side) a certain degree of facilitation of municipal borrowing. Of course you cannot decide which interest 'outweighs' the other without deciding which interest is more important to you. And that will always be the case. I would ... leave these quintessentially legislative judgments with the branch to which the Constitution assigns them.

33. Consistently with Scalia J's observations, it is respectfully submitted that if this Court were to extend the test of justification in a s 92 context beyond 'reasonable necessity', it must inevitably inject itself into a policy debate to which there exist numerous, at least, respectable alternative policy responses and iterations of such responses. The Court will be dealing with a provision in legislation which is only a component of a suite of legislative, and potentially executive, responses to a perceived social issue. Parliament, and potentially the executive, has chosen one, and is responsible to the people for such contestable policy choices. The Court

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[59] Ibid 355.

[60] Ibid 355. Justice Souter referred to authority to the effect that 'the Court is intrinsically unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them' (*General Motors Corporation v Tracy, Tax Commissioner of Ohio*, 519 US 278, 307 (Souter J, delivering the opinion of the Court) (1997)); and '[t]he complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes' (*Minneapolis Star & Tribune Co v Minnesota Commissioner of Revenue*, 460 US 575, 589-590 (O'Connor J, delivering the opinion of the Court) (1983)).

[61] *Department of Revenue of Kentucky v Davis*, 553 US 328, 356 (Souter J) (2008).

[62] Ibid 360 (Scalia J) (2008). Professor Barak has attempted to respond to Scalia J's criticism of incommensurability by abstracting the concepts on both sides of the scales to the common denominator of 'social importance': Barak, *Proportionality*, above n 27, 482-483. However, in practical reality, such abstract concepts cannot be applied without descending to the specific, where the issue of incommensurability remains.

should not second guess choices of that kind, where the choice has been shown to be reasonably necessary to achieve a legitimate, non-protectionist end.

34. The Supreme Court's observations about the balancing test, in the context of the dormant commerce clause, support the decisions of this Court which limit the enquiry of justification applicable to s 92 to one of 'reasonable necessity'. That is an enquiry which the Court is well-equipped to make.[63] On the other hand, the Supreme Court's observations may not apply in the context of the implied freedom of political communication, given that the burdens and benefits there weighed are matters which the Court may be better equipped to assess.

(e) ***The plaintiffs' demurrer should be overruled***

35. The plaintiffs' contention that a protectionist effect of reg 26(3) can be inferred from the discriminatory burden it imposes on interstate trade[64] should be rejected for the reasons given by the first defendant.[65] However, even if that submission of the plaintiffs is accepted, the principles identified above have the result that the plaintiffs' demurrer must be overruled.

36. First, because the plaintiffs' contention that certain means adopted by the Regulations are 'illegitimate'[66] should be rejected, none of the means the law adopts can be 'disregarded'. Once the scheme is assessed 'as a whole',[67] the 'better than' requirement in reg 26(3) clearly supports (or is 'rationally connected'[68] to) the waste minimisation objects identified in paragraph 19A of the defence.

37. The existence of that connection between means and ends in this case is reflected in the approach of the Supreme Court of the United States in *United Haulers Association Inc v Oneida-Herkimer Solid Waste Management Authority.*[69] In that matter, the Supreme Court upheld a flow control ordinance requiring all waste to be deposited at a State-owned and operated facility. Chief Justice Roberts, delivering the opinion of four judges of the Court, said:[70]

> First, [the ordinances] create enhanced incentives for recycling and proper disposal of other kinds of waste. Solid waste disposal is expensive in Oneida-Herkimer, but the Counties accept recyclables and many forms of hazardous waste for free, effectively encouraging their citizens to sort their own trash.

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[63] Cf *McCloy v New South Wales* (2015) 325 ALR 15, 36 [82]; 89 ALJR 857, 876 [82] (French CJ, Kiefel, Bell and Keane JJ).
[64] Plaintiffs' summary of argument, 1 [3.1].
[65] First defendant's submissions, 10-11 [48]-[52].
[66] Plaintiffs' summary of argument, 13-14 [50]-[54].
[67] *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 319 [22] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[68] *Unions NSW v New South Wales* (2013) 252 CLR 530, 557-560 [50]-[60], 561 [64]-[65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [140], [168]; *McCloy v New South Wales* (2015) 325 ALR 15, 36 [80]; 89 ALJR 857, 875-876 [80] (French CJ, Kiefel, Bell and Keane JJ).
[69] 55 US 330 (2007).
[70] Ibid 346-347. Although only four members of the Court joined in this part of the judgment, this reasoning has since been applied by inferior appellate courts to uphold similar waste disposal regimes: see for example *Dandlands D & D LLC v County of Horry*, 737 F 3d 45, 54 (4th Cir 2013).

> Second, by requiring all waste to be deposited at Authorised facilities, the Counties have markedly increased their ability to enforce recycling laws. If the haulers could take waste to any disposal site, achieving an equal level of enforcement would be much more costly, if not impossible.

38. Second, there is no obvious and compelling, less restrictive and equally effective alternative means of achieving the legitimate end of waste minimisation. The plaintiffs have identified none. In particular, an 'equal to' standard would not prevent an avenue of waste disposal that would undercut the legitimate end of waste avoidance and minimisation. The impugned regulation is therefore reasonably necessary to achieve that legitimate end.

39. Third, as the test of justification requires only that reg 26(3) be reasonably necessary for a legitimate end, the regulation is valid and the plaintiffs' demurrer should be overruled.

PART VI: Oral argument

40. The Attorney-General estimates that no more than 15 minutes will be required for oral argument.

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