IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M32 OF 2016

BETWEEN:

RESOURCECO MATERIAL SOLUTIONS PTY LTD (ACN 608 316 687)
First Plaintiff

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

and

STATE OF VICTORIA
First Defendant

ENVIRONMENT PROTECTION AUTHORITY
20 Second Defendant

ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

30 2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act* 1903 (Cth) in support of the First Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. The Attorney General for Western Australia adopts the First Defendant's statement of the applicable legislative provisions.

PART V: SUBMISSIONS

5. The Attorney General for Western Australia intervenes to make submissions in relation to the following issues:

   (a) The significance of identifying the relevant "market" for the purpose of determining whether Regulation 26(3) of the *Environment Protection (Industrial Waste Resource) Regulations* 2009 (Vic) imposes a discriminatory burden upon interstate trade;

   (b) Conclusions as to the "market" in the present case and the effect of the scheme of the *Environment Protection Act* 1970 (Vic) and the *Environment Protection (Industrial Waste Resource) Regulations* 2009 (including Regulation 26(3)), as a whole; and

   (c) The non-protectionist purposes of Regulation 26(3) and the facts as to the attainment of those purposes admitted for the purposes of the Demurrer.

THE SIGNIFICANCE OF THE MARKET AND THE FACTUAL ISSUES IN RELATION TO SECTION 92

6. The identification of the relevant market and the effect of an impugned law or regulation upon that market, for the purposes of s 92 of the *Constitution*, will be relevant to two distinct points in the analysis required by that section:

   (a) The identification of the market will be relevant to determining whether the impugned law in fact imposes a discriminatory burden that has the effect of conferring protection upon intrastate trade and commerce; and

(b) If there is such a burden, the identification of the market will also be relevant to determining whether the impugned measure is "appropriate and adapted" to[1], or is "reasonably necessary" for[2], the attainment of a legitimate non-protectionist purpose.

7. As to the first issue, the question as to whether a measure discriminates against interstate trade *and* the question as to whether that discrimination has the effect of protecting local industry are both questions of fact and degree[3]. The alleged "protectionist" effect is to be determined by reference to the effect on the interstate trade or commerce in the relevant market and whether the intrastate trade in that market is given a competitive advantage.

8. Importantly, in a case of alleged practical discrimination, the market alleged to be protected may be different from the market in which the burden is imposed[4]. Such is the position contended for by the Plaintiffs in the present case, who contend that, while the burden is imposed upon the *transport* of non-liquid prescribed industrial waste, the alleged competitive advantage is conferred upon the market for the *destruction or deposit* of non-liquid prescribed industrial waste[5].

9. This serves to emphasise the essentially factual nature of the enquiry.

10. In relation to the second issue (that is, determining whether the impugned measure is "appropriate and adapted" to, or is "reasonably necessary" for, the attainment of a legitimate non-protectionist purpose) the importance of the

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1 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Mason CJ, Brennan, Deane, Dawson & Toohey JJ at 472-474. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, per Hayne J at [422].

2 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 per Gleeson CJ, Gummow, Kirby, Hayne, Crennan & Kiefel JJ at [102]-[103].

3 *Cole v Whitfield* (1988) 165 CLR 360 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey & Gaudron JJ at 407-408; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 per French CJ, Gummow, Hayne, Crennan & Bell JJ at [37].

4 *Barley Marketing Board v Norman* (1990) 171 CLR 182 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron & McHugh JJ at 204-205.

5 Plaintiffs' Submissions at [29].

particular facts is, it is submitted, even more pronounced. For at that stage of the enquiry, the need to identify some "proportionality" between the differential burden on the out of State participant in a market and the attainment of the non-protectionist purpose, it is not only the existence of any burden but the *extent* of that burden must be identified for the purposes of that "balancing" exercise.

11. Similarly, on the other side of the scale, it is necessary to identify, as a matter of fact, the *extent* to which the measure has achieved, or will achieve, the non-protectionist object.[6]

12. Without being able to identify the *extent* of the burden on interstate trade, on one hand, and the *extent* of the need or utility of the measure's contribution to a non-protectionist object, on the other, it is not possible to carry out the comparison or balancing required by s 92[7].

13. For example, in *Castlemaine Tooheys Ltd v South Australia*, the Court could reach the conclusions that it did as it was able to compare:

(a) The fact that, without the impugned measure, the interstate share of the market for packaged beer in South Australia would have risen to 10% (from an initial share of 0.1 %)[8]; and

(b) The fact that the prescribed deposit for non-refillable bottles was well in excess of that which was sufficient to ensure the return on non-refillable bottles at the same rate as fillable bottles[9].

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6 See for example *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 per Heydon J at [145]-[146] where his Honour did not accept that there was any basis to conclude the measure would, in fact, achieve the stated non-protectionist aim. See also the observations of the plurality at [110] – [112].

7 See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Mason CJ, Brennan, Deane, Dawson & Toohey JJ at 471-472.

8 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Mason CJ, Brennan, Deane, Dawson & Toohey JJ at 459-460.

9 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Mason CJ, Brennan, Deane, Dawson & Toohey JJ at 462-463.

THE MARKET IN THE PRESENT CASE

14. The Plaintiffs and First Defendant articulate the market in materially different ways.

15. The Plaintiffs characterise the market in relation to which the competitive advantage is conferred upon Victorian industry, to the detriment of interstate industry, as the market for the destruction or deposit of prescribed industrial waste (in particular category A waste)[10].

16. [Note, however, that there is, it is submitted, some inconsistency with this identification of the market and the Plaintiffs' Submissions at paragraph [35]-[36], to the effect that "the point at which it imposes a burden, determines the relevant aspect of the market". That proposition, it is submitted, is not established by *Bath v Alston Holdings* (1988) 165 CLR 411 as the Plaintiffs contend. Indeed, in that case both the majority and minority simply stated what the market was, without necessarily identifying how it should be determined.[11]]

17. The First Defendant, by contrast, characterises the market as being "a large national market for the management, including collection, transport, treatment, containment, re-use, recycling and disposal, of hazardous waste". This characterisation of the relevant market, it is submitted, accords with authority and principle.

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10 Further Amended Statement of Claim, paragraph 19.2 (Demurrer Book, page 22). See also Plaintiffs' Submissions at paragraph [29]. It should be noted, however, that the Plaintiffs' Submissions at [35] later refer to the burden being upon the transport of industrial waste for destruction or deposit "*including* category A waste", rather than "*in particular*" such waste.

11 Mason CJ, Brennan, Deane & Gaudron JJ identified the market as the "Victorian retail tobacco market" (165 CLR 411 at 428), whereas Wilson, Dawson & Toohey JJ (implicitly) identified the market as "all trade in tobacco in Victoria" (165 CLR 411 at 432). In that regard, in *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 the plurality noted at [22] that "by the focus upon a "market" solely at the retail level, the majority in *Bath* [may perhaps have] favoured the legal operation of the tax at the expense of the practical operation of the statute as a whole".

18. In *Betfair v Western Australia*, the market was "a developed market throughout Australia for the provision by means of the telephone and the internet of wagering services on racing and sporting events".[12] Relevant to the Court's decision to characterise the market in that fashion, was the "cross-elasticity of demand and thus of close substitutability between the various methods of wagering".[13]

19. The facts in the Defence (which by the Demurrer are taken to be accepted)[14] establish that there is similarly cross-elasticity of demand and services with respect to the management of prescribed industrial waste. Paragraph 19(hA) of the defence provides examples of ways in which prescribed industrial waste can be recycled, rather than disposed of. The Defence similarly establishes that category A waste can be (and is) treated so as to become (or be considered to be) category B waste, and both category A and B waste can be treated so as to become (or be considered to be) category C waste.[15]

20. Western Australia adopts the First Defendant's submissions as to the absence of a factual basis, on the Demurrer, for concluding that there is any

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12 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 per Gleeson CJ, Gummow, Kirby, Hayne, Crennan & Kiefel JJ at [114] - [115]. This characterisation of the market was repeated in *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 per French CJ, Gummow, Hayne, Crennan & Bell JJ at [2].

13 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 per Gleeson CJ, Gummow, Kirby, Hayne, Crennan & Kiefel JJ at [115]. To similar effect in *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, Kiefel J at [116]-[117] referred to the "close substitutability" the services offered by various market participants were, referring to *Queensland Wire Pty Ltd v Broken Hill Pty Ltd* (1989) 167 CLR 177.

14 As is pointed out by the Plaintiffs, this extends to those facts which are expressly stated, and necessarily implied: *Wurridjal v The Commonwealth* (2009) 237 CLR 309 per Gummow & Hayne JJ at [120]; *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 per Barwick CJ at 126, per Gibbs J at 135, per Mason J at 154.

15 See in particular 19(d)(i)(C), 19(d)(ii), 19(iA) and 19(iB) and Schedule A to the Defence **(Demurrer Book at 30, 32, 41–42)**, which shows that significantly lower quantities of category B and C waste than are generated in Victoria are ultimately disposed of to landfill in Victoria. From these facts, allied with the fact that there is little or no economic incentive to transport category C prescribed industrial waste to facilities outside of Victoria (19(g) of the Defence) **(Demurrer Book at 31)** it must necessarily be implied that the waste is either being recycled or reused, or remediated to some other form of waste before disposal.

competitive disadvantage on interstate trade in the market which it identifies[16].

21. In any event, it is submitted, having regard to the market as characterised by the Plaintiffs (i.e. market for the destruction or deposit of prescribed industrial waste (in particular category A waste)), that the protective effect on local industry cannot be established on the facts accepted for the purposes of the Demurrer.

22. Indeed, insofar as the particular waste the subject of the proceedings, (category A waste), there is no intrastate trade or market in its deposit or destruction to be protected. Such waste cannot be disposed of to landfill in Victoria - as no landfill is licenced to receive it[17], nor is it practicable to destroy that waste (or at least waste of the kind in the present case)[18].

23. Insofar as there was, for example, a market for the disposal of category A waste, that market – in Victoria – far from being protected, has been eliminated. Interstate traders who supply that service have no Victorian competitors. While it is correct that other categories of waste (category B and category C) may be disposed of to landfill in Victoria (including treated waste formerly category A) – so that there remains a large national market for the management of hazardous waste - the deliberate removal of landfill for category A waste in Victoria from that market[20] supports the conclusion that the scheme of the *Environmental protection Act* 1970 and the *Environment Protection (Industrial Waste Resource) Regulations 2009* (including Regulation 26(3), as a whole, cannot be characterised as protectionist.

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16 First Defendant's Submissions, at [35]-[41].

17 Defence, paragraph 19(d)(i)(B) **(Demurrer Book at 30)**.

18 Defence, paragraph 5(bB) **(Demurrer Book at 26)**. Whether there are forms of Category A waste which can be destroyed is not a fact revealed by the Demurrer.

20 As is also the ultimate object of the scheme that the market for the destruction of Category B waste be eliminated also (see Defence, paragraph 19A(i)) **(Demurrer Book at 34)**.

24. Also of significance, when assessing the impact of the measures, would be the actual impact on any interstate participants in the market. Other than the Second Plaintiff there is no evidence as to the impact, if any, on the market for waste disposal as a whole. The Plaintiffs draw attention to the fact that less than 2% of all prescribed industrial waste generated in Victoria was transported interstate before the measure now found in Regulation 26(3) came into effect (Plaintiffs' Submissions at paragraph [46]). That fact, it is submitted, does not advance the Plaintiffs' case. If anything it assists the First Defendant.

25. That is because it demonstrates that the prohibition could only ever have minimal impact on the market for the management of waste in the absence of the distortion resulting from the introduction of the prohibition. Prior to that introduction there was only a minimal interstate trade in prescribed industrial waste (for the reason that it is generally not economical to transport that waste, as set out in 19(g) of the Defence).

26. For the above reasons, it is submitted that a protective effect on local industry cannot be established on the facts accepted for the purposes of the Demurrer.

THE NON-PROTECTIONIST PURPOSE OF REGULATION 26(3)

27. The purposes or objects of Regulation 26(3) have been identified by the First Defendant as two-fold:

(a) Waste minimisation and reprocessing of hazardous waste to reduce quantity and hazard level of waste in landfill[21];

(b) Treating and disposing of hazardous waste close to its site of production[22].

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21 Defence, paragraph 19A **(Demurrer Book at 33).**

22 Defence, paragraph 19B **(Demurrer Book at 39).**.

28. These purposes form part of the broader overall purposes of the *Environmental Protection Act* 1970 for the protection of the environment.

29. These purposes, collectively and independently, are legitimate non-protectionist purposes[23]. The Plaintiffs, in their submissions, do not contend otherwise.

30. The identification of the object or purpose of an impugned measure is not a question of fact in the sense required by the issues identified in paragraphs [6] to [12] above. Rather, it is a matter of characterising the law, to objectively discern its object or statutory purpose[24].

10 31. The purposes of waste minimisation and reduction it is submitted are objectively borne out by the analysis of the First Defendant at paragraphs [65] to [66] of its submissions.

32. Indeed, the Plaintiffs do not contend that Regulation 26(3) does not have the legitimate purpose of waste minimisation and harm reduction. That is, while the Plaintiffs contend that the Regulation has a protectionist effect (that is, its practical operation serves to protect Victorian industry from its interstate competitors) nowhere do the Plaintiffs contend that the protection of Victorian industry from its interstate competitors is the object or purpose of the Regulation.

20 33. The absence of any suggestion that Regulation 26(3) has a protectionist purpose is significant.

34. This is because the application of the requirement that the impugned measure be "appropriate and adapted" or is "reasonably necessary" for the attainment of a legitimate non-protectionist purpose may be regarded, at least in part, as a "good faith" test as to whether the putative purpose of the impugned law is

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23 *Cole v Whitfield* (1988) 165 CLR 360 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey & Gaudron JJ at 409; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Mason CJ, Brennan, Deane, Dawson & Toohey JJ at 471-472.

24 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 per Gummow J at [178], per Hayne J at [423].

in truth the purpose of the law. That is, the analysis of whether the means adopted to achieve the putative purpose are "inappropriate", "unnecessary" or "disproportionate", is directed towards whether that purpose is "in truth" the purpose of the law or whether the putative purpose is masking a "protectionist" purpose.

35. So much may be drawn from the observation in *Castlemaine Tooheys Ltd v South Australia* that 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 the 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"[25].

36. Once that is recognised, it is submitted that the Plaintiffs cannot overcome, on a Demurrer, the First Defendant's pleaded case that the measure in Regulation 26(3) is necessary, in the sense that, without it, the scheme will not work[26].

37. Indeed, according to the facts pleaded in the Defence, the practical effect of the impugned regulation has been a substantial decrease in the generation of category B waste in Victoria, and similarly a substantial decrease in the amount of category B waste which has been prescribed to landfill.

38. This practical effect thus accords with the legitimate purpose of the Regulation. It is to avoid the deposit of high level hazardous waste to landfill. By increasing the levy an incentive is provided to discover ways of managing waste other than through disposal to landfill. More importantly, an effective incentive is provided by which to *avoid* the future generation of prescribed industrial waste in the first instance (as demonstrated from Schedule A to the defence). The result is that the practical effect of the levy affords Victoria the

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25 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 per Mason CJ, Brennan, Deane, Dawson & Toohey JJ at 472.

26 Defence, paragraph 19A(p) (**Demurrer Book at 36**).

environmental advantage of reducing the amount of high level prescribed industrial waste *generated* in the State.

39. This outcome is important. It makes clear Victoria has a substantive interest in category B prescribed industrial waste generated in the State *even where* that waste is transported out of the State and disposed of to landfill in other States.

40. The Plaintiffs seek to avoid the conclusion to be drawn from the facts assumed to exist by reason of the Demurrer, by suggesting that the "means" adopted by Regulation are "illegitimate": those "illegitimate means" being said to be protecting revenue and discouraging interstate transport.

41. The Plaintiffs' submission assert, rather than explain, how - in circumstances where the purpose of the law is not "protectionist", in the relevant sense – the means can be illegitimate or protectionist. Certainly there may be some means which would be illegitimate: for example, no legitimate purpose could be pursued by means of a duty of custom or a duty of excise. That is, however, because, those particular means are prohibited by s 90 of the *Constitution*.

42. Beyond the illegitimate means prohibited by s 90, however, there is no *a priori* reason why, where the measures are appropriate and adapted to a non-protectionist purpose, a State is not able to deploy revenue or fiscal measures, or indeed market forces, to achieve that purpose. Indeed, it may be that in certain circumstances such measures are only available means for effectively achieving the legitimate purpose.[27]

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[27] See also *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 where Kenny & Middleton JJ, in the context of an argument that fiscal measures could not be legitimate non-protectionist measures, concluded that while it would be impermissible for a measure to have the *object* of raising taxation revenue for the Treasury, it would *not* be impermissible to raise revenue for other purposes – see at [315] to [320] (relying upon *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 per Gleeson CJ, Gummow, Kirby, Hayne, Crennan & Kiefel JJ at [106]-[107]. In this case, analogously, the revenue raised is to be reinvested into the waste management industry through research, technology, infrastructure and capacity building projects (see Defence at 19A(n) (**Demmurer Book at 35**)).

PART VI: LENGTH OF ORAL ARGUMENT

43. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

Dated: 21 November 2016

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