IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M32 of 2016

BETWEEN:

ResourceCo Material Solutions Pty Ltd (ACN 608 316 687)
First Plaintiff

Southern Waste ResourceCo Pty Ltd (ACN 151 241 093)
Second Plaintiff

and

State of Victoria
First Defendant

Environment Protection Authority
Second Defendant

PLAINTIFFS' SUBMISSIONS IN REPLY

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INTRODUCTION

1. These submissions use the same abbreviations as the Plaintiffs' submissions in chief (**PS**), and reply to the First Defendant's submissions (**DS**), and those of the interveners, using the propositions identified at PS, paragraph 22; namely:

   1.1 regulation 26(3) discriminates against interstate trade with protectionist effect; and

   1.2 regulation 26(3) is not reasonably necessary for giving effect to a legitimate, non-protectionist purpose.

DISCRIMINATION WITH PROTECTIONIST EFFECT

2. **Demurrer does not prevent establishing discrimination and protectionist effect:** Contrary to DS, paragraphs 25, 36-39, there is no difficulty in establishing, on the Plaintiffs' demurrer, that reg 26(3) discriminates against interstate trade and commerce, and with protectionist effect.

3. The effect of a demurrer is only that the Plaintiffs are taken to admit the assertions of fact in the Defence. The ultimate denial in paragraph 19 of the Defence that reg 26(3) does not discriminate against interstate trade and with protectionist effect is a statement of legal conclusion, not a statement of fact. The Plaintiffs are taken to admit the specific facts pleaded in support of that denial, but are not bound by the denial itself.

4. Moreover, this Court is not precluded from making findings of fact that do not appear in the Defence. On a demurrer to a defence, the court considers "the facts alleged in the [defence], together with facts, if any, of which this Court can take judicial notice without proof".[1] In other words, a demurrer does not prevent this Court making findings of constitutional fact in the ordinary way, supplementary to the "evidentiary" facts pleaded as between the parties: PS, paragraph 6.

5. The Plaintiffs contend that the discriminatory effect of reg 26(3) on interstate trade and commerce is "evident from the terms of [the] law":[2] PS, paragraphs 24-26, and that the protectionist effect follows inevitably from the legal and practical operation of the law: PS, paragraphs 27-28. Both of those findings can be made on a demurrer.

6. *Hughes and Vale Pty Ltd v NSW* (where, as here, the plaintiff demurred to the defence[3]) demonstrates that a demurrer does not prevent a court from drawing obvious conclusions about the legal and practical operation of an impugned law. The Privy Council held that "[t]he direct and immediate result of [the impugned law]" was to restrict the freedom of interstate trade and commerce.[4] On remitter to this Court, Dixon CJ, McTiernan and Webb JJ said that the "nature and

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1 See *Crouch v The Commonwealth* (1948) 77 CLR 339 at 349 (Latham CJ), emphasis added.

2 *Betfair (No 2)* (2012) 249 CLR 217 at [109] (Kiefel J).

3 See *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 63 (Dixon CJ).

4 *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1 (PC) at 20.

incidence" of the impugned motor vehicle tax meant that the tax could not apply to the exclusive use in New South Wales of motor vehicles in that form of interstate trade.[5] Although those decisions were applying a different conception of s 92, that approach to fact-finding remains good law.

7. **Discrimination apparent on face of reg 26(3):** In a related point, reg 26(3) discriminates against interstate trade and commerce because "on its face [it] subjects that trade or commerce to a disability or disadvantage".[6] The disability or disadvantage is that non-liquid prescribed industrial waste can only be transported to an interstate facility for destruction or deposit if the interstate facility's environmental performance is better than that of a Victorian facility: PS, paragraph 25. That facial discrimination is a question of law, not fact, unlike any discrimination that arises from the operation of a facially neutral law.

8. The fact that reg 26(3) subjects interstate trade and commerce to a disability or disadvantage, on its face, is sufficient to establish discrimination. It is not necessary to consider whether the criteria for difference are irrelevant to the object to be attained: contra DS, paragraphs 14, 43. That type of inquiry (derived from the separate reasons of Gaudron and McHugh JJ in *Castlemaine Tooheys*)[7] goes to whether there is a justification for discrimination, not whether there is discrimination to begin with.[8] However, *Castlemaine Tooheys* and *Betfair (No 1)* establish that justification is a separate inquiry.

9. **Protectionism:** The Plaintiffs contend that the protectionist effect of reg 26(3) can be determined from its practical effect. Victorian premises at which non-liquid prescribed industrial waste is destroyed or deposited are protected against competition from interstate premises that have facilities with environmental performance standards that are equal to or lower than the environmental performance standards of a facility at Victorian premises: PS, paragraph 28.

10. It is immaterial that one effect of reg 26(3) has been to reduce the amount of non-liquid prescribed industrial waste produced in Victoria. Another effect – which follows directly from the discriminatory burden imposed by reg 26(3) – is to confer a competitive advantage on Victorian facilities, at which that waste is destroyed or deposited. That protectionist effect is sufficient to engage s 92 of the Constitution, even if reg 26(3) has other, non-protectionist effects as well.[9]

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5 *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 181.

6 *Cole v Whitfield* (1988) 165 CLR 360 at 399 (the Court).

7 (1990) 169 CLR 436 at 478. Contrary to DS, fn 7, *Cole v Whitfield* at 399 simply states that not all differential treatment will be invalid (it being necessary to establish protectionism as well). *Cole v Whitfield* at 408 suggests that some laws that discriminate with protectionist effect may be justified (as was later held in *Castlemaine Tooheys*).

8 That test of discrimination is applied in other constitutional contexts, where (unlike s 92) there is no separate consideration of justification, such as s 99 of the Constitution: see *Permanent Trustee Co Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at [89], [94].

9 For example, the effect of the impugned regulation in *Castlemaine Tooheys* was not solely to advantage local brewers over interstate brewers: (1990) 169 CLR 436 at 475.

11. The relevant "trade" is not management of hazardous waste generally (contra DS, paragraph 49), but the matters dealt with by reg 26(3) – disposal or destruction of non-liquid prescribed industrial waste. A discriminatory burden on that type of prescribed industrial waste may contravene s 92 of the Constitution, even though other aspects of the wider market are not affected: PS, paragraphs 33-35.

12. The statement that s 92 protects trade, not traders, only means that a law cannot be characterised as protectionist simply because its practical operation imposes a burden on a single interstate trader.[10] The statement does not attempt to revive the discredited "total volume of trade" theory, which was unreal and impractical.[11]

13. Prescribed industrial waste is an article of commerce,[12] because the producer of the waste will pay another to treat or dispose of the waste. Restrictions on the interstate movement of prescribed industrial waste to be destroyed or deposited therefore impose a burden on interstate trade and commerce, regardless of whether prescribed industrial waste is itself a "good": cf Cth, paragraphs 13, 32.

14. When a law imposes a discriminatory burden on interstate trade on its face (like reg 26(3)), the protectionist effect of the law can be ascertained without requiring any market analysis: contra DS, paragraphs 51-52. It is not necessary to quantify the burden on interstate trade and commerce any more precisely than finding that the burden imposed is real. In this respect, reg 26(3) is similar to the facially discriminatory laws held invalid in *Bath v Alston Holdings*: see PS, paragraphs 37-38. Equally, it was apparent on the face of the law in *Fox v Robbins*[13] that the practical effect of the fee imposed was to deter businesses in Western Australia from purchasing wine from other States.[14]

NO PERMISSIBLE JUSTIFICATION

15. **Identifying the objects of reg 26(3):** The "objects" of a law are the counterpart to the mischief sought to be addressed by a law, and must be discoverable from the historical record.

16. The actual objects are different from the subjective motivations of particular legislators (which the Plaintiffs accept are irrelevant). However, the identification of the "true object"[15] of a law precludes any ex post facto justifications for the operation of the law: see PS, paragraph 42. The test for determining whether a law is one with respect to a head of Commonwealth legislative power does not assist in determining "objects" (contra DS, paragraph 61), because the connection with the head of power in that context may come from the operation of the law, not its objects.[16]

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10 *Betfair (No 2)* 249 CLR 217 at [61] (Heydon J).

11 *Hughes and Vale (No 1)* (1954) 93 CLR 1 (PC) at 17.

12 See, for example, *City of Philadelphia v New Jersey* 437 US 617 at 622-623 (1978).

13 (1909) 8 CLR 115.

14 *Betfair (No 2)* 249 CLR 217 at [130] (Kiefel J).

15 *Castlemaine Tooheys* (1990) 169 CLR 436 at 473.

16 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) at 319 (Brennan J).

17. Here, the historical record reveals that the object of reg 26(3) was to prevent the "unnecessary" movement of non-liquid prescribed industrial waste, because Victoria had a framework to promote re-use and re-cycling of hazardous wastes: PS, paragraph 45. The Defence seeks to raise other matters going beyond those objects, particularly the safety of road transport and countervailing benefits: Defence, paragraphs 19B(b) and (d). Those matters should be discarded, as not forming any part of the "objects" of reg 26(3).

18. **Both the means, as well as the objects, must be non-protectionist:** The Plaintiffs maintain that, if a law imposes a discriminatory burden on interstate trade and commerce, that burden cannot be justified as a matter of law unless both the objects of the law, and the means chosen to pursue those objects, are non-protectionist and compatible with s 92.

19. That result follows from first principle – for example, it cannot be consistent with s 92 for a State law to pursue the object of reducing motor pollution by banning commercial vehicles registered in another State from using roads in the State. Equally, s 92 does not permit pursuing non-protectionist objectives by imposing a border tax. That result is also supported by analogy with the implied freedom of political communication: PS, paragraph 53; contra Qld, paragraphs 15-19. The essential similarity between s 92 and the implied freedom in this respect is that, in both cases, legislative power is qualified by a limitation (whether express or implied). Accordingly, if a law infringes on the limitation, it becomes necessary to determine whether the object of the law nevertheless falls within power.[17]

20. **A State law cannot legitimately restrict interstate movement to maintain State taxes:** The Plaintiffs maintain that it is contrary to s 92 of the Constitution for a State law to impose a discriminatory burden on the interstate movement of prescribed industrial waste, in order to maintain the efficacy of State taxes. Such a State law is contrary to the "free trade area" established by the Constitution.

21. That is not to suggest that the pricing of a regulatory measure can never be a legitimate means: contra DS, paragraph 72. Rather, the Plaintiffs' argument is that s 92 of the Constitution prevents a State from imposing a discriminatory burden on interstate trade and commerce to avoid revenue leakage.

22. **Landfill levy is a revenue measure:** The fact that the landfill levy is set at a level to discourage the production of non-liquid prescribed industrial waste does not prevent it from being a "revenue measure", within the principle identified in *Betfair (No 1)*: PS paragraph 52; contra DS, paragraphs 73-74; Cth, paragraphs 33-34. Many taxes are set at a level to discourage activities but also to raise revenue, such as taxes on cigarettes and alcohol. The landfill levy is different from taxes that are imposed only if a person does not make a payment voluntarily, where the

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[17] See *Cunliffe* (1994) 182 CLR 272 at 323-324 (Brennan J). There is no single, uniform notion of "proportionality": see *Murphy v Electoral Commissioner* (2016) 334 ALR 369 at [37] (French CJ and Bell J). The writings of Professor Barak do not assist, in the absence any explanation of their relevance to Australian constitutional law: contra Qld, paragraphs 21, 27.

raising of revenue is truly a "secondary objective".[18] Moreover, the State has pleaded that a purpose of the increase in levies was to generate revenue: Defence, paragraph 19A(n).

23. ***Cole v Whitfield*:** There is no analogy with the law considered in *Cole v Whitfield*: contra DS, paragraphs 70, 75, 77. The Tasmanian law in that case prohibited the possession or sale in Tasmania of crayfish under a certain size.[19] Thus, unlike reg 26(3), the Tasmanian law did not expressly burden interstate transport. *Cole v Whitfield* does not undermine the Plaintiffs' argument that imposing a discriminatory burden on interstate trade and commerce is an illegitimate means.

10 24. **Legislative choice constrained when law expressly discriminates:** Although s 92 of the Constitution preserves some measure of choice in how governments pursue legitimate objects (cf NSW, paragraph 44), that choice is tightly constrained when a law (such as reg 26(3)) expressly discriminates against interstate trade:[20] PS, paragraph 64.

25. A demurrer does not prevent this Court from drawing obvious conclusions about the legal and practical operation of the impugned law, in deciding whether there is a justification: PS, paragraph 58; also paragraphs 4-6 above.

25.1 Victoria is the only State that imposes an approval requirement on the transport of approved waste <u>out</u> of the State: PS, paragraph 47.

20 25.2 Victoria does not have any general governmental interests in the environmental standards of facilities in another State. Certainly, Victoria's assessment of another State's standards does not support a discriminatory burden on the interstate transport of controlled waste: PS, paragraph 55; cf DS, paragraph 83; Cth, paragraph 39.

25.3 The distinction used in reg 26(3) between facilities inside and outside Victoria is too crude a proxy for determining the closest facility for destruction or deposit of prescribed industrial waste: PS, paragraph 64.

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18 Such as the training guarantee levy: *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 569 (Mason CJ, Deane, Toohey and Gaudron JJ).

19 *Cole v Whitfield* (1988) 165 CLR 365 at 380.

20 Thus the test in *Pike v Bruce Church, Inc* 397 US 137 (1970) is not relevant, because that only applies when a law "regulates evenhandedly": at 142; cf Qld, paragraph 29.