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

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

PART IV CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The applicable legislative provisions are those contained in the Attachment to the Plaintiffs' Submissions (**PS**), as supplemented by Annexure to the Defendant's Submissions.

PART V ARGUMENT

A. INTRODUCTION

4. The Commonwealth submits that reg 26(3) of the *Environment Protection (Industrial Waste Resource) Regulations 2009* (Vic) does not impose on interstate trade and commerce[1] a discriminatory burden of a protectionist kind. In summary, that is for the following reasons:

   4.1. On its face, the purpose of reg 26(3) is not protectionist. Standing alone, it reflects a principle that waste should be disposed of locally, in the polity in which it was created, unless it is environmentally preferable to dispose of the waste interstate. When read in the context of the *Environment Protection Act 1970* (Vic) (the **Act**), it is a provision forming part of an integrated scheme that seeks to minimise waste production and disposal and internalise the costs of the harm caused by those processes. It is an instance of a State taking responsibility for waste produced within its borders. Any suggestion that that is not a matter of local concern would be startling.

   4.2. The plaintiffs' suggestion that the regulation restricts the interstate movement of "goods" obscures the fact that the regulation is relevantly concerned with the destruction and deposit of hazardous waste, the very production of which is discouraged by the legislation.

   4.3. If it is possible to conclude that an effect of reg 26(3) is to confer a competitive advantage on Victorian waste disposal facilities, that effect is not sufficient to

[1] For the sake of brevity, these submissions sometimes use the word "trade" to refer to "trade and commerce".

warrant characterising the burden on interstate trade as being of a protectionist kind. There is no foundation for a conclusion that the means adopted in reg 26(3) are not reasonably necessary to the achievement of its non-protectionist object or objects.

4.4. Adopting the words of the Court in *Cole v Whitfield*,[2] reg 26.3 "has as its real object" the regulation of waste and is not "grounded in protectionism".

B. APPLICABLE PRINCIPLES

5. The object of s 92 of the Constitution is to eliminate the protection of local industry against interstate competition.

6. Adopting a recent statement of the questions presented in a s 92 challenge,[3] it is necessary for the plaintiffs to show that:

6.1. reg 26(3) in its terms or practical operation discriminates against interstate trade as compared to intrastate trade of the same kind;

6.2. that discrimination burdens interstate trade to its competitive disadvantage; and

6.3. any such burden is not reasonably necessary for the achievement of a legitimate non-protectionist purpose.

7. The kind of inquiry set out at paragraph 6 has been described as a way of ascertaining whether the true purpose of the law is protectionist.[4] The Court in *Cole v Whitfield* spoke of the need to accommodate laws "genuinely regulating intrastate trade and interstate trade",[5] and the majority in *Castlemaine Tooheys* said of laws that are apt on their face to secure a legitimate object:[6]

> The fact that a law imposes a burden on interstate trade 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.

8. The approach envisaged is illustrated by the way in which Mason J framed the issue in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*:[7]

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2 (1988) 165 CLR 360 at 408.5.

3 See *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

4 *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 at 471-473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

5 *Cole v Whitfield* (1988) 165 CLR 360 at 403.5 (emphasis added).

6 *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 at 472.2 (emphasis added).

7 (1975) 134 CLR 559 at 602.4 (emphasis added).

> Shorn of its superficial details the issue raised by this case ... is whether the *Dairy Industry Authority Act 1970* (NSW) and reg 79(10)(c) made under the *Pure Food Act 1908* (NSW) ... regulate the trade in pasteurised milk in that State by protecting consumers from deleterious products ... or whether the legislation merely protects New South Wales producers of pasteurized milk from the competition in that State of Victorian pasteurized milk, as the plaintiff claims that it does.

9. It is not the case, as the plaintiffs suggest, that the State must demonstrate one true non-protectionist objective.[8] To the contrary, it is only if the law's true purpose can be characterised as protectionist that it is invalid under s 92.

C. NO PROTECTIONIST PURPOSE ON THE FACE OF THE LAW

10. The plain fact of the matter is that the object of reg 26(3) is not to favour Victorian trade at the expense of interstate trade.[9] Put another way, no "impermissible purpose" appears on the face of the legislation,[10] for the following reasons.

11. First, while Victoria in its submissions has focused on reg 26(3) in its broader context, including the factual circumstances that brought it about and explain it, reg 26(3) reveals no protectionist purpose even when the focus is on its terms, in the context of the legislation scheme.

12. The immediate object of reg 26(3), disclosed by its terms, is to ensure that non-liquid prescribed industrial waste is disposed of locally, unless it will be destroyed or deposited at premises with better environmental standards than (Victorian) licensed premises. That is consistent with the principle of product stewardship and is an orthodox approach to the management of hazardous waste.

12.1. The principal of product stewardship, set out in s 1H of the Act is that:[11]

> Producers and users of goods and services have a shared responsibility with Government to manage the environmental impacts throughout the life cycle of the goods and services, including the ultimate disposal of any wastes.

12.2. By way of comparison, in international law, it is accepted that "hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated".[12] Consistently with that principle, in the context of whether

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8 Plaintiff's submissions at [42.2].

9 Adopting the words of Wilson, Dawson and Toohey JJ in *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 432.5.

10 *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 at 466.8.

11 Emphasis added.

12 *Preamble to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57 (entered into force 5 May 1992), 8th paragraph.

hazardous waste should be permitted to be exported, the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) attaches significance to the "desirability of using facilities in Australia for the disposal of hazardous waste".[13]

13. Therefore, the terms of reg 26(3) are not themselves suggestive of protectionism, especially when it is remembered that the regulation is relevantly concerned with hazardous waste, which is not to be reused or recycled. (If the Authority is satisfied that the proposed transport of prescribed industrial waste is for the purposes of reuse or recycling in accordance with the principle of wastes hierarchy, then there is no impediment to the Authority approving the transport.) Contrary to the suggestions in the plaintiffs' submissions,[14] this category of waste is not a "good", and the regulation cannot be seen as directed to limiting the interstate movement of – or the trade in – "goods".[15]

14. There are the following further obstacles to discerning a protectionist purpose on the face of the law:

    14.1. The requirement for better performance standards applies only in respect of the transport of non-liquid prescribed industrial waste <u>for the purposes of destruction or deposit</u> and not where the proposed transport of prescribed industrial waste is for the purposes of reuse or recycling. Therefore, any attempt to characterise the impugned measure as protectionist must overcome the oddity that the legislature has excluded from its protective efforts Victorian providers of recycling and re-use services.

    14.2. The fact that an objective of the Act is to impose the landfill levy[16] on Victorian providers of hazardous waste disposal services sits uneasily with the proposition that the objective of the regulation is to protect those providers.

15. The Victorian Government's avowed goal[17] in 2008 to minimise – and ideally remove altogether – the need for disposal of higher hazard waste is an important part of the relevant context for the law,[18] and is consistent with the principle of

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13 *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth), s 17(5)(b).

14 Plaintiffs' submissions at [3.3], [30], [64].

15 See, See *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 453-454 and 467-468; Commissioner *of Taxation v Totalisator Administration Board (Q)* (1990) 170 CLR 508 at 511. See also *C & A Carbone Inc v Clarkstown, New York* (1994) 511 US 383 at 391.

16 Act, s 51S and *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* (Vic), reg 13.

17 Defence, paragraph 19A(i) (Demurrer Book (DB) 34). See also Defence, paragraphs 19(j)-(l) (DB34-35).

18 First Defendant's submissions at [65(b)] and [65(c)].

wastes hierarchy (s 1I(a)). Again, such a goal is at odds with characterising the regime as protecting Victorian providers of (higher hazard) waste disposal services.

16. For the reasons set out above, the Commonwealth submits that the proposition that the true purpose of the legislation is protectionist faces insurmountable difficulties in light of the terms of the regulation and the broader statutory context.

D. PARTICULAR ISSUES RAISED BY THE PLAINTIFFS' SUBMISSIONS

D.1 Plaintiffs' first question (PS [3.1]): Can the protectionist effect be inferred from the discriminatory burden?

17. A prior question is whether the legislation in its terms imposes any discriminatory burden on interstate trade. The terms of reg 26 do not make any distinction between intrastate and interstate trade. That of itself distinguishes it from cases in which contravention of s 92 has been found on the face of the legislation.[19] The distinction made in reg 26 is between premises that are licenced, or exempt from the requirement to be licensed, and those that are not licenced. Further, because hazardous waste is not obviously an article of commerce, it is not apparent from the terms of the regulation that it affects interstate trade. There may be a market for the provision of waste disposal services, in which Victorian providers compete with out of State providers, but that is not the subject-matter of reg 26(3).

18. However, even if reg 26(3) does on its face impose a discriminatory burden on interstate trade, the answer to the plaintiff's first question is "no": a protectionist effect of reg 26(3) cannot be inferred from the discriminatory burden, for two reasons.

    18.1. first, consideration of the practical operation of reg 26(3) is necessary to determine whether it in fact operates to protect local industry against interstate competition; and

    18.2. secondly, if it does operate to the competitive disadvantage of interstate trade, it will not infringe s 92 if it is reasonably necessary for, or a reasonably appropriate and adapted means of achieving, a non-protectionist object.[20] If that is the case, the discriminatory burden imposed by reg 26(3) will not be of a protectionist kind.

19. As to the first matter:

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19 See *Fox v Robbins* (1909) 8 CLR 115 and *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411.

20 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-474; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [102]-[103], [110].

19.1. The scope of the relevant market and the nature of any effect of the law on that market are questions of fact, which are disputed.[21] On the demurrer, the plaintiffs' allegations of "real burden" and "competitive advantage" are not to be taken as established.

19.2. Examples of why the protectionist effect may not be inferred from any discriminatory burden appearing on the terms of the legislation include the following:

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19.2.1. It is not apparent from the terms of reg 26(3) whether any effect on competition in the relevant market is "serious" or "meaningful".[22]

19.2.2. In *Betfair Pty Ltd v Western Australia*,[23] Heydon J said that, subject to the question of justification, a law would be contrary to s 92 if it burdened interstate trade "to a significantly greater extent than it burdens intra-State trade".[24] In a context where the Victorian legislation imposes a landfill levy on Victorian licence holders, some further enquiry is required to understand the practical effect of the different burdens (levy, on the one hand; requirement for better standards on the other).

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20. As Wilson, Dawson and Toohey JJ said in *Bath v Alston Holdings Pty Ltd*,[25] "it is the practical operation of the legislation which will largely determine whether there is discrimination on protectionist grounds".[26] Though Wilson, Dawson and Toohey JJ were in the minority in *Bath*, the difference in approach between the minority and the majority did not reflect any disagreement about principle.[27] Thus, a provision that appears on its face to discriminate against interstate trade may, when read in light of its statutory context and having regard to its practical operation, be shown not to so discriminate. In the Commonwealth's submission, the statutory context, considered above at paragraphs 10 to 16, shows that reg 26(3) is not protectionist. And the plaintiffs do not rely on the law's practical operation, proper consideration of which is impossible on the demurrer.

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21 Defence, paragraph 19 (DB 28).

22 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 478 [105] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Williams V Metropolitan and Export Abattoirs Board* (1953) 89 CLR 66 at 74 (Kitto J). *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 271 [59] (Heydon J)

23 (2008) 234 CLR 418.

24 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 483 [131].

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25 (1988) 165 CLR 411.

26 (1988) 165 CLR 411 at 432.1. See also *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at 319 [22].

27 See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 468.

21. The plaintiffs rely on the majority decision in *Bath*.[28] The following account of that decision, given in the joint judgment in *Castlemaine Tooheys*, is sufficient to highlight the differences between the legislation in this proceeding and the legislation in *Bath*, which:

> ... demonstrated that the imposition of an equalization tax by a State upon retailers in respect of products from another State so that the interstate goods lose a competitive advantage that they would otherwise enjoy because the other State levies a tax upon the goods at a lower rate that does the legislating State upon the domestic product is a contravention of s 92.

10 Reg 26(3) is far removed from an equalization tax imposed in respect of products from another State.

22. If the Court were to conclude that reg 26(3) operates to the serious competitive disadvantage of interstate trade as compared to intrastate trade, then it would be necessary to consider whether reg 26(3) is reasonably necessary for the achievement of a legitimate non-protectionist purpose.

20 **D.2 Plaintiff's second question (PS [3.2]): ex post facto justifications**

23. On the Commonwealth's understanding of the pleadings and submissions, the second issue identified by the Plaintiffs does not arise, as the Defendants do not contend that the Court ought have regard to *ex post facto* justifications for the law.

24. However, the Commonwealth makes the following submissions relating to the Plaintiffs' arguments about statutory objects.

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25. First, the object or purpose of a law is what the law is designed to achieve in fact and is akin to the identification of the "mischief" which the law is designed to address.[29] The purpose "must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth".[30]

26. Secondly, the purpose of a particular provision may need to be understood in light of its broader legislative context.[31]

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27. Thirdly, there is no authority for the proposition advanced in the plaintiffs' submissions that, in order to be consistent with s 92, the means and ends of a law

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28 Plaintiffs' submissions at [37].

29 *McCloy v New South Wales* (2015) 325 ALR 15 at [132] (Gageler J); *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322 at [178] (Gummow J); see also *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* (2011) 244 CLR 508 at [56] (the Court), citing *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

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30 *Stenhouse v Coleman* (1944) 69 CLR 457 at 471.7 (Dixon J).

31 See, eg, *Monis v R* (2013) 249 CLR 92 at 205 [317] (Crennan, Kiefel and Bell JJ) and *Tajjour v New South Wales* (2014) 254 CLR 508 at 552 [41] (French CJ) and 579 [148] (Gageler J).

must be "non-protectionist".[32] The freedom of political communication cases relied upon are not relevant.

27.1. In the freedom of political communication cases, once it is established that the freedom is burdened, the next question is whether the purpose of the law and the means adopted to achieve that purpose are legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government.[33] The first step does not involve any qualitative assessment of the nature of burden,[34] except perhaps to be satisfied that it is not insubstantial.[35]

27.2. By contrast, the first stage of an inquiry in a s 92 case involves a qualitative assessment of whether the impugned law treats interstate and intrastate trade differently and confers a competitive advantage on intrastate trade. The second stage of a s 92 enquiry asks whether, <u>despite</u> the protective or protectionist effect of the means, the latter are explained or justified by the end or ends they secure.

27.3. Whereas the freedom of political communication is concerned to ensure that electors are capable of making an informed choice at federal elections, which rules out certain legislative means regardless of the ends said to be secured, a measure reasonably appropriate and adapted or reasonably necessary to a legitimate purpose is not a discriminatory measure of a protectionist kind from which s 92 protects trade and commerce.

28. Fourthly, the question of whether a measure is reasonably necessary to achieve a legitimate end may depend on contestable facts. For example, in *Cole v Whitfield*, the agreed facts made it clear that the prohibition on the sale and possession of crayfish below a certain size had to apply to imported crayfish as well as local crayfish, because Tasmania could not "undertake inspections other than random inspections and the local crayfish were indistinguishable from those imported from South Australia".[36] In *Castlemaine Tooheys*, South Australia's concession that a lesser refund for non-refillable bottles would have been sufficient to ensure their return at the same rate as refillable bottles[37] was significant.

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32 See Plaintiffs' submissions at [53].

33 *McCloy v New South Wales* (2015) 325 ALR 15 at [2] (French CJ, Kiefel, Bell and Keane JJ).

34 *McCloy v New South Wales* (2015) 325 ALR 15 at [126] (Gageler J); *Monis v R* (2013) 249 CLR 92 at [108] (Hayne J).

35 See *Tajjour v New South Wales* (2014) 254 CLR 508 at [133] (Crennan, Kiefel and Bell JJ).

36 *Cole v Whitfield* (1988) 165 CLR 360 at 409.8.

37 *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 at 462 and 474.4.

29. Lastly, there is no foundation in this case for a conclusion that reg 26(3) is not reasonably necessary for achieving a legitimate end, or legitimate ends. That may be illustrated by contrast with the objective considerations relied upon in *Betfair* and *Castlemaine Tooheys.*

29.1. In *Betfair Pty Ltd v Western Australia*,[38] the Court rejected Western Australia's argument that the laws were reasonably appropriate and adapted to legitimate objectives on the basis that there were other, non-discriminatory, measures available, illustrated by the regulatory regimes adopted in Tasmania and Victoria, that could have achieved the same objectives.[39] The existence of alternative legislative measures in other States addressed to the same problem is different to the absence of comparable legislation in other States, the latter being a matter relied on by the plaintiffs in the present proceeding.[40] The complete absence of comparable laws in other States may simply suggest that other States have not tackled the problem.

29.2. In *Castlemaine Tooheys*, South Australia's concession that a lower refund amount would have been sufficient to achieve the return of non-refillable bottles at the same rate as refillable bottles negated the claim that the law was appropriate and adapted to protecting the environment from the litter problem. As to South Australia's reliance on the object of conserving finite energy resources, the Court, noting the meagreness of the relevant facts recited in the special case, reasoned that, as Bond Brewing companies used bottles manufactured outside the State, any increase in the market share of the Bond brewing companies would reduce the use of the State's resources.[41] Further, as discussed above, the factual context of the threat to the market share of domestic brewers posed by the interstate brewers was important to the Court's analysis.[42]

D.3 Plaintiff's third question (PS [3.3])

30. The plaintiffs frame their third sub-issue in the following terms: "Whether it is consistent with s 92 of the Constitution for a State to attempt to limit interstate transport of a good (here prescribed industrial waste) for the purpose of securing levies imposed by Victorian law".

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38 (2008) 234 CLR 418.

39 (2008) 234 CLR 418 at [107]-[111].

40 Plaintiffs' submissions at [48].

41 (1990) 169 CLR 436 at 476.8-477.1.

42 See also, in this context, (1990) 169 CLR 436 at 475.5.

31. The Commonwealth submits that this misstates the issue in at least three important respects.

32. First, for the reasons advanced above at paragraphs 4.2 and 13, reg 26(3)(b) is not concerned with "goods".

33. Secondly, securing the levies imposed by Victorian law is itself a means to an end or ends, one of which is that producers of waste bear the costs of the environmental harm caused by the waste. Another is to discourage the production and disposal of waste. Those ends cannot be said to be illegitimate and are not comparable to the object put forward by Western Australia in *Betfair Pty Ltd v Western Australia*, which was the protection of State revenue *per se* (from taxation and other imposts levied in respect of the racing industry). The response in the joint judgment was that:[43]

> ... a proposition which asserts that an object of revenue protection of this kind may justify a law that discriminates against interstate trade is contrary to authority. And it is contrary to principle for such a justification, if allowable, would support the re-introduction of customs duties at State borders.

34. The objectives of ensuring that waste producers bear the environmental cost of waste and of discouraging waste production are not objects of revenue protection of the kind rejected in *Betfair*. Under the Act, the revenue raised by the landfill levy is incidental or secondary to the attainment of other, legitimate, objectives;[44] there is no objective of "revenue protection".

35. Further, reg 26(3) does not seek to secure payment of the landfill levies where there is an environmental benefit to taking the waste out of the State, because the proposed receiving premises have better environmental performance standards. The purpose of reg 26(3) needs to be understood in light of that important qualification, which confirms the overriding environmental purpose of the scheme as opposed to a revenue-raising scheme.

36. Thirdly, the plaintiff's third sub-issue does not address the more immediate object of reg 26(3), namely to ensure local disposal of local waste absent an environmental benefit to interstate disposal.

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43 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479 [108] (emphasis added).

44 See *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97 at [16] and [48] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 569-570 (Mason CJ, Deane, Toohey and Gaudron JJ).

E LOCAL INTERESTS FURTHERED BY REG 26(3)

37. The plaintiffs contend that Victoria does not have any general governmental interest in the environmental standards of facilities in another State, and that "the predominant concern of State and Territory legislatures is with acts, matters and things within their respective law areas".[45]

38. In *Betfair Pty Ltd v Western Australia*, the joint judgment commented that technological and economic developments may have rendered problematic the notions of "localised well-being" and "the people of" a particular State.[46] For that reason, it is permissible for a State to frame its legislative objectives taking into account environment impacts in other States.

39. However, even leaving aside such matters for present purposes, reg 26(3) is fundamentally concerned with acts, matters and things within Victoria, being waste generated within Victoria, to be disposed of in Victoria absent an environmental benefit to disposal elsewhere.[47] It cannot be said that the legislative objective of securing local waste disposal absent an environmental benefit to disposal elsewhere is an illegitimate object.

PART VI ESTIMATED HOURS

40. It is estimated that 45 minutes will be required for the presentation of the oral argument of the intervener.

Dated: 21 November 2016

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45 Plaintiff's submissions at [55]-[56].

46 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 453 [18] and 474 [89]-[90].

47 The United States Supreme Court case of *C & A Carbone Inc v Clarkstown, New York* 511 US 383 (1994), relied upon by the plaintiffs in paragraph 55.2 (footnote 52) addressed a different argument, namely that the environment in one state was a legitimate concern for another state.