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 FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Crown Solicitor for the State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Tel: 08 8207 1760
Fax: 08 8207 2013
Email: fiona.mcdonald3@sa.gov.au
Ref: Fiona McDonald; 161558

Part I: Certification

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

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia accepts the statement by the first defendant of the applicable legislative provisions.

Part V: Submissions

5. South Australia confines its submissions to principles relevant to the issue of "justification".[1] The issue of justification arises only in the event that an impugned law is found to impose a discriminatory burden which has the effect of conferring a significant competitive advantage on intrastate trade and commerce, or disadvantage on interstate trade and commerce.[2]

6. In summary South Australia submits:

   i. In assessing whether a law is properly characterised as protectionist or whether it is relevantly "justified", care must be taken not to elide the distinct concepts of a law's objects, the means or measures employed to pursue those objects, and the law's practical effects.

   ii. A law's objects fall to be identified at the level of identifying the mischief or mischiefs to which the law is directed. This is ascertained objectively and by means of ordinary methods of statutory construction.

   iii. An object so-ascertained will not cease to be the object pursued by a law simply because a review of its practical effects reveals some deficiencies in the law's furthering of that object.

---

1 As to the issue of "justification" as between the parties, see Defence to Further Amended Statement of Claim at [19A]-[19B]; Demurrer Book (**DB**) 33-40; Plaintiffs' Demurrer at [2]-[3]; DB 45-48; Plaintiffs' Reply at [3]-[4]; DB 50-54; Plaintiffs' Summary of Argument (**PS**) at [40]-[67]; First Defendant's Submissions (**DS**) at [56]-[83].

2 That is, its practical operation has some protectionist effect. See *Cole v Whitfield* (1988) 165 CLR 360 at 409 (the Court); *Betfair Pty Limited v Racing New South Wales* (2012) 249 CLR 217 (***Betfair (No 2)***) at [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

iv. The threshold requirement of "legitimacy" is directed to compatibility with s 92 and is applicable to the legislative object. Assessment of the compatibility with s 92 of the means adopted in pursuit of that object is reserved to the familiar proportionality-style analysis applied in s 92 jurisprudence.

v. In undertaking that aspect of the analysis, the tools of proportionality analysis which will usefully assist in assessing a law's justification will depend on the circumstances of the case.

vi. Where consideration is given to alternative means in order to assist with considering whether a law is relevantly justified, due regard must be given to the multifarious objects pursued by the impugned law, and any alternative means with which comparison is to be drawn must be relevantly comparable as regards the objects determined to be pursued and prioritised by the State in question.

Introduction

7. The plaintiffs contend for the invalidity of reg 26(3) of the *Environment Protection (Industrial Waste Resource) Regulations 2009* (Vic) on the ground that the provision contravenes s 92 of the Constitution. The purpose of s 92 is to create an area of free trade within the Commonwealth.[3] "Free trade" in the context of s 92 refers to the absence of protectionism or the equality of trade.[4] So far as trade and commerce among the States is concerned s 92 is directed to the elimination of protection.[5] It is those discriminatory burdens on interstate trade or commerce which are of a protectionist kind, which may offend the guarantee contained in s 92.[6]

8. "[I]f a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which *warrants characterisation of the law as protectionist*, a court will be justified in concluding that it nonetheless offends s 92" (emphasis added).[7] If a relevant discriminatory burden on interstate trade or commerce is shown to be effected by the impugned law, the focus of the inquiry will shift to whether the law is to be properly

---

3 *Cole v Whitfield* (1988) 165 CLR 360 at 391 (the Court); *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at [72] (Emmett J).

4 *Cole v Whitfield* (1988) 165 CLR 360 at 391, 392-393 (the Court).

5 *Cole v Whitfield* (1988) 165 CLR 360 at 394, 408 (the Court); *Betfair Pty Limited v State of Western Australia* (2008) 234 CLR 418 (***Betfair (No 1)***) at [15] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair (No 2)* (2012) 249 CLR 217 at [36] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

6 *Cole v Whitfield* (1988) 165 CLR 360 at 394, 408 (the Court); *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at [72] (Emmett J).

7 *Cole v Whitfield* (1988) 165 CLR 360 at 408 (the Court).

characterised as protectionist or not.[8]

Objects, practical effects and a law's "true character"

9. It is in undertaking the task of characterisation that consideration is given to whether the law pursues a legitimate non-protectionist object in a proportionate[9] manner having regard to the discriminatory burden it imposes on interstate trade and commerce. Where it does, the law is not one appropriately characterised as "protectionist" and it will not offend s 92.[10] Put another way, before discerning that a law warrants classification as "protectionist", it must be concluded that the law is not relevantly justified.[11]

10. To the extent that some judgments might appear to identify a two-stage test, whereby the question of justification is approached only after a legislative measure has been found to impose a discriminatory burden "of a protectionist kind",[12] the substance of the analysis remains unaltered. References to the protectionist nature of a law in this context – that is, antecedent to any justification analysis – reflect merely the identification of a law which, in its practical operation, is likely to have a protectionist *effect*.[13] Characterisation of the law as "protectionist" in the sense identified in *Cole v Whitfield* as offensive to s 92, is only possible once the question of justification has been considered.

11. The determination of whether the law is "properly characterised" or "warrants" characterisation as protectionist (in the sense prohibited by s 92) has been variously expressed, including as a discernment of the law's "true purpose".[14] If framing the task of characterisation in this way – suggesting that one is searching for what is "in truth" the "purpose" of the law – care must be taken not to elide the distinction between a law's objects and its practical effects,[15] nor to obscure the nature of the characterisation task as one which must engage with the issue of justification.

---

8 *Castlemaine Tooheys Limited v State of South Australia* (1990) 169 CLR 436 (***Castlemaine Tooheys***) at 471 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ). See also *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [168] (Gummow J). See also DS at [59].

9 Variously described as "appropriate and adapted" (*Castlemaine Tooheys* (1990) 169 CLR 436 at 474 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ)) and "reasonably necessary" (*Betfair (No 1)* (2008) 234 CLR 418 at [102]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ,) *Betfair (No 2)* (2012) 249 CLR 217 at [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ)). See also *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at [229]-[233] (Kenny and Middleton JJ).

10 *Cole v Whitfield* (1988) 165 CLR 360 at 408-410 (the Court); *Castlemaine Tooheys* (1990) 169 CLR 436 at 471-474 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ). See also *Betfair (No 2)* (2012) 249 CLR 217 at [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

11 *Castlemaine Tooheys* (1990) 169 CLR 436 at 471 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ).

12 See *Betfair (No 2)* (2012) 249 CLR 217 at [59] (Heydon J), [136], [141] (Kiefel J).

13 See *Betfair (No 2)* (2012) 249 CLR 217 at [135] (Kiefel J). See PS at [40], DS at [19(b)-(c)], [56].

14 *Castlemaine Tooheys* (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); see also PS at [42.2]; DS at [60].

15 See *McCloy v New South Wales* (2015) 89 ALJR 857 (***McCloy***) at [40] (French CJ, Kiefel, Bell and Keane JJ).

12. Because the characterisation task looks to the law's non-protectionist objects (if any) as well as any practical effect it has of conferring a relevant[16] competitive advantage or disadvantage on intrastate or interstate trade and commerce respectively, the "true character" analysis necessarily proceeds from a premise that a law's objects and its practical effects are distinct concepts.[17] It also follows that the task of characterising the law as "protectionist" or not, is not exclusively concerned with, or determined by, either of those concepts. Faithful maintenance of the distinction throughout any analysis is necessary to guard against self-fulfilling characterisations and circularity of reasoning.

13. Certainly, at one level, the object of any law is to achieve the practical effect it creates.[18] However, the object of a law with which the "justification" analysis is concerned is not the object identified at that level of abstraction. Nor are those intermediate "objects" which in fact constitute the means or method adopted in pursuit of a broader legislative object the object with which the analysis is concerned. Rather, "[t]he level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed or when speaking of 'the objects of the legislation'."[19]

14. Were the analysis concerned simply with identifying the purpose of pursuing the practical effects the law creates, the question would devolve into identification of those effects and whether they confer a competitive advantage on intrastate trade and commerce, or a competitive disadvantage on interstate trade and commerce.[20] If a practical effect of the law was that it conferred such an advantage or disadvantage then, despite the presence at a higher level of abstraction of some legitimate non-protectionist object, the justification analysis would be foreclosed by identification of the law's object as one pursuing those protectionist effects. Such an approach would be self-fulfilling and contrary to authority.[21]

15. Equally, the legislative object which, if proportionately pursued, might relevantly justify a discriminatory burden, cannot be the intermediate "object" which in truth amounts simply to the means adopted for pursuing a broader end. It is that means which falls to be adjudged proportionate or otherwise, by reference to the broader end it seeks to pursue.

16. The level of abstraction at which the object of a law is to be identified for the purposes of the question of justification (and so, in turn, the task of characterisation) is at the level of

---

16 That is, by means of a discriminatory burden on interstate trade and commerce.
17 Indeed they are: see *McCloy* (2015) 89 ALJR 857 at [40] (French CJ, Kiefel, Bell and Keane JJ).
18 *APLA* (2005) 224 CLR 322 at [178] (Gummow J), [424]-[425] (Hayne J).
19 *APLA* (2005) 224 CLR 322 at [178] (Gummow J).
20 See *Cole v Whitfield* (1988) 165 CLR 360 at 409 (the Court).
21 See *Betfair (No 2)* (2012) 249 CLR 217 at [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Cole v Whitfield* (1988) 165 CLR 360 at 409 (the Court).

identifying the "mischief" to which the law is directed.[22] It is the means adopted in the pursuit of that legislative object which must be proportionate where a practical effect of the law is the conferral of a competitive advantage on intrastate trade and commerce, or a competitive disadvantage on interstate trade and commerce, by means of a discriminatory burden on such trade and commerce.[23]

17. This legislative object is discerned objectively[24] by ordinary methods of statutory construction.[25] It is not discerned by reasoning backwards from an examination of the law's practical effects, nor is an object which a construction of the statute discloses to be denied because the law's practical operation suggests it is deficient or ineffective in achieving that object.

18. This is not to deny that there exists any relevant connection between a law's purpose and its practical operation. Where a legislative measure is so ill-suited to its purpose, so deficient in achieving its object, that there in fact exists *no rational connection* between the law's object and its practical operation, then the law's connection to its purpose may be severed.[26]

19. However, this necessity for some rational connection imposes no threshold greater than that demanded by logic.[27] It does not invite a value judgment of the impugned law or its efficacy.[28] It is only where it is "not possible to discern how [the] provisions could further the [purpose identified]"[29] – where the measure "cannot contribute to the realisation of the statute's legitimate purpose"[30] – that the connection necessary to sustain acceptance of the purpose identified as a purpose pursued by that legislative measure will be severed. Importantly, the identification of shortcomings in the ability of the legislative measure to

---

22 The same approach is adopted in relation to the identification of legislative objects where a law is said to burden political communication: see, for example, *McCloy* (2015) 89 ALJR 857 at [132] (Gageler J, citing *APLA* (2005) 224 CLR 322 at [178] (Gummow J)); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 301 (Mason CJ). As to the origin of the concept of "mischief" see *Heydon's Case* (1584) 3 Co Rep 7a at 7b.

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

24 *Betfair (No 2)* (2012) 249 CLR 217 at [141] (Kiefel J).

25 *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (2015) 89 ALJR 857 at [67] (French CJ, Kiefel, Bell and Keane JJ); *APLA* (2005) 224 CLR 322 at [178] (Gummow J). See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

26 *McCloy* (2015) 89 ALJR 857 at [56], [80] (French CJ, Kiefel, Bell and Keane JJ); see also *Tajjour v New South Wales* (2014) 254 CLR 508 at [78] (Hayne J); *Unions NSW v New South Wales* (2013) 252 CLR 530 at [50]-[55], [64] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [140], [168] (Keane J).

27 *McCloy* (2015) 89 ALJR 857 at [80] (French CJ, Kiefel, Bell and Keane JJ).

28 *McCloy* (2015) 89 ALJR 857 at [80] (French CJ, Kiefel, Bell and Keane JJ).

29 *McCloy* (2015) 89 ALJR 857 at [55] (French CJ, Kiefel, Bell and Keane JJ).

30 *McCloy* (2015) 89 ALJR 857 at [80] (French CJ, Kiefel, Bell and Keane JJ).

further its object(s) "does not identify a want of proportionality".[31]

"Legitimacy"

20. Having identified, by means of construction, the object pursued by the law in question, a threshold test of "legitimacy" must be passed before any proportionality analysis concerning the legislative measure need be engaged. The pursuit of a legislative object which is "illegitimate" is incapable of providing a justification for a relevant burden on interstate trade and commerce in a manner which would deny the law's character as protectionist.

21. The concept of "legitimacy" in this context directs attention to whether the object pursued is compatible with s 92.[32] Given the purpose of s 92,[33] a law which pursues a protectionist[34] object will fail this threshold test.[35] In such a circumstance, the enquiry need proceed no further; the law cannot be relevantly justified and, assuming it also imposes a relevant discriminatory burden with protectionist effect, it will fall to be characterised as protectionist and be invalid. Where the law's object is compatible with s 92 – for example, it being "non-protectionist"[36] or "competitively neutral"[37] – this threshold test is satisfied and the justification enquiry proceeds to examine the measure adopted to pursue that object. Examination of the measure, or means, adopted engages a proportionality analysis.[38]

22. Importantly, there is no additional threshold requirement that the means or measure adopted itself be "legitimate" in some sense.[39] To the extent that the plaintiffs invite the Court to impose some threshold test requiring a "legitimacy of means",[40] that invitation should be declined. Such a requirement would constitute a novel test for compliance with s 92 and would undermine and tend to foreclose the proportionality-style analysis which this Court has consistently applied in its assessment of the means implemented by a law

---

31 See *McCloy* (2015) 89 ALJR 857 at [64] (French CJ, Kiefel, Bell and Keane JJ). See, for example, *Betfair (No 1)* (2008) 234 CLR 418 at [134] and [145] (Heydon J).

32 *Betfair (No 1)* (2008) 234 CLR 418 at [131] (Heydon J).

33 See [7] above.

34 Of intrastate trade and commerce: *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at [29] (the Court).

35 In such circumstances, the protectionist burden would not be "incidental" to the pursuit of a legitimate object: *Castlemaine Tooheys* (1990) 169 CLR 436 at 473 (the Court).

36 *Betfair (No 2)* (2012) 249 CLR 217 at [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ); see also *Cole v Whitfield* (1988) 165 CLR 360 at 408 (the Court).

37 *Betfair (No 1)* (2008) 234 CLR 418 at [101] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

38 See *Castlemaine Tooheys* (1990) 169 CLR 436 at 471-474 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); *Cole v Whitfield* (1988) 165 CLR 360 at 409 (the Court); *Betfair (No 1)* (2008) 234 CLR 418 at [101]-[105], [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

39 Cf PS at [53].

40 See PS at [53]; see also at [39], [51].

impugned on s 92 grounds.

23. To resist the imposition of such threshold test is not to deny that the means or measure adopted in pursuit of the law's legitimate end must be compatible with s 92. Rather, it is to observe that the proper method for making that assessment of compatibility is to undertake the proportionality-style analysis familiar to the s 92 context. A disproportionate or unjustified measure will constitute an incompatible or "illegitimate" means in the relevant sense, and will be invalid.

24. The only basis advanced by the plaintiffs to support the imposition of such a threshold test is the requirement identified in the implied freedom jurisprudence for both the means and object of a law which burdens political communication to be compatible with the system of representative and responsible government mandated by the Constitution.[41] However, a direct transposition of equivalent threshold tests of compatibility to the s 92 context is unavailable.

25. In the context of the implied freedom, the threshold tests for compatibility – which apply to the law's object *and means* – look to compatibility with the system of representative and responsible government. They do not inquire into compatibility with the implied freedom itself. Two distinct concepts are at play. The threshold tests look to compatibility with the first,[42] whilst the proportionality analysis examines whether the law offends (or is incompatible with) the second.[43] Critically, an observation that a law (both its object and means) is compatible with the system of representative and responsible government as required by the threshold test does not guarantee that that same law will not offend the implied freedom.[44] In contrast, the express guarantee of s 92 does not involve equivalent dual concepts. The threshold test of legitimacy looks to the compatibility of the law's object with s 92. To apply such threshold test to the means adopted would be simply to ask: "are the means adopted by this law compatible with s 92?". That question, the authorities demonstrate, is one to be answered with the assistance of the tools provided by a proportionality-style analysis.

26. Aside from being unnecessary – an assessment of whether the means is compatible with s 92 being the very inquiry to which the proportionality analysis is directed – the imposition of such an additional threshold test undermines, if not precludes, that more rigorous method of inquiry. To layer on a threshold requirement that, in addition to its

---

[41] See PS at footnote 50. As to this requirement in the implied freedom context see, for example, *Coleman v Power* (2004) 220 CLR 1 at [92]-[96] (McHugh J), *McCloy* (2015) 89 ALJR 857 at [31], [67]-[68] (French CJ, Kiefel, Bell and Keane JJ).

[42] The system of representative and responsible government.

[43] The implied freedom of political communication itself.

[44] *McCloy* (2015) 89 ALJR 857 at [68] (French CJ, Kiefel, Bell and Keane JJ).

object being compatible with s 92, the means effected by an impugned law must also be compatible with s 92, invites a conclusory evaluation of those means prior to, and absent, the requisite and more rigorous proportionality analysis. Such an approach may in fact operate to foreclose the proportionality assessment, because where a law's means is prima facie designated as "illegitimate" or "incompatible" with s 92 at the threshold stage, there would appear no occasion to proceed any further.

27. To the extent that the threshold test of "legitimacy of means" proposed by the plaintiff is sought to be applied in a manner which would render invalid any legislative measure which adopted a protectionist means, two observations fall to be made. First, such an approach is contrary to authority. In *Cole v Whitfield*, the Court considered that if the law there impugned utilised a protectionist means by banning interstate trade in crayfish of a certain size, it would nevertheless be valid because such means was justified. Second, the issue of justification only arises where the means adopted by a legislative measure is protectionist in some way.

28. The introduction of a threshold test of "legitimacy of means" should be resisted. Any means adopted by a law which is *relevantly* "illegitimate" or incompatible with s 92 will be exposed as such by the conclusion that the measure is relevantly disproportionate. Such a law will be invalid.

Proportionality

29. Having identified the object or objects of a law, and assuming such objects have been found to be "legitimate", attention turns to the relationship between the legitimate legislative object and the means employed to achieve it. A law will not warrant characterisation as "protectionist" or offend s 92 if the means it employs can be said to be reasonably necessary, or appropriate and adapted, to achieving its legitimate object(s).[45] This aspect of the justification assessment engages a proportionality-style analysis.[46]

30. Howsoever the tools of proportionality analysis may be deployed in the context of a given review of a law for compatibility with s 92, any consideration of alternative means

---

[45] *Castlemaine Tooheys* (1990) 169 CLR 436 at 474; *Betfair (No 1)* (2008) 234 CLR 418 at [102]; *Betfair (No 2)* (2012) 249 CLR at [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[46] See *Betfair (No 1)* (2008) 234 CLR 418 at [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). This being so, recourse to the types of considerations identified in the more structured approach to the second limb of the implied freedom analysis propounded by the plurality in *McCloy* may sometimes assist in the assessment. However, not all analytical tools identified in that structured approach will be apposite in all cases (see *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027 (***Murphy***) at [39] (French CJ and Bell J), [101]-[102] (Gageler J), [202] (Keane J), [296] (Gordon J)). It does not replace the orthodox analysis traditionally applied in s 92 jurisprudence: see, for example, *Cole v Whitfield* (1988) 165 CLR 360 at 408-409 (the Court); *Castlemaine Tooheys* (1990) 169 CLR 436 at 471-473 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ); *Betfair (No 1)* (2008) 234 CLR 418 at [101]-[102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

available to a legislature to achieve its objective(s) must have careful regard to the breadth and extent of the relevant legislature's pursuits. Absent such regard, the risk arises that the alternative measures identified do not constitute alternatives that are in fact capable of informing the justification enquiry. For example, to identify a legislative scheme which would fail to pursue Parliament's legitimate object to a comparable extent as the impugned scheme, or which would demand additional resources, does little to assist a determination of whether the impugned scheme is one which is reasonably necessary to achieve its objective(s).[47] It is the province of the legislature to determine which policy objectives it pursues and to what extent[48] (subject at all times, of course, to any limitations imposed by the Constitution).

31. Any consideration of alternative means intentioned to assist in assessing whether a particular measure is proportionate or "justified" will tend to take on increasing complexity where the impugned law or scheme simultaneously pursues multiple objects. If an impugned law simultaneously pursues two legitimate objects, and analysis reveals that either one of those objects justifies the relevant burden and effects of the law, that will deny a characterisation of the law as protectionist and the law will not offend s 92.[49] However, a failure for either one of those legitimate objects to, of itself, provide the requisite justification does not conclude the enquiry. It may be that the measure's simultaneous furtherance of *both* legitimate objects does supply justification. That is, it may be the fact of the law's composite furtherance of multiple objects that renders the measure adopted proportionate. In such circumstances, only comparisons with alternative legislative schemes which themselves also simultaneously further *both* objectives (to an extent comparable to that of the impugned law and by a means which is equally practicable) will supply a relevant comparison.[50]

32. Approaches taken in other jurisdictions to similar subject matter or issues may often appear to supply an instantly accessible illustration of an "alternative" approach. However, reference to other statutory schemes remains attended by the same limitations as any other hypothesised alternative means. They will only provide a useful source for comparison where the same composite legislative objects are pursued to a comparable

---

47 See *Murphy* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J); *Tajjour v New South Wales* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).

48 *McCloy* (2015) 89 ALJR 857 at [90] (French CJ, Kiefel, Bell and Keane JJ); *Murphy* (2016) 90 ALJR 1027 at [65] (Kiefel J); *Castlemaine Tooheys* (1990) 169 CLR 436 at 472-473 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ).

49 *Castlemaine Tooheys* (1990) 169 CLR 436 at 477 (Mason CJ, Brennan, Deane, Dawson, Toohey JJ).

50 *McCloy* (2015) 89 ALJR 857 at [328] (Gordon J).

extent.[51]

33. If such limitations are not observed, reference to alternative means moves from being an analytical tool which will, in some cases,[52] assist in assessing whether a measure proportionately pursues its objects, to in substance inviting an evaluation of competing policy objectives and resource-allocations between different polities. Such evaluations "invite the Court to depart from the borderlands of the judicial power and enter into the realm of the legislature".[53] Where one State has seen fit to pursue or prioritise certain legitimate objects at the expense of other objects, the absence of pursuit in other States of those same objects,[54] of those objects to the same extent, or of those objects in that same hierarchy is not to be mistaken for the adoption by those other States of alternative means that are relevantly comparable for the purposes of assessing the proportionality of the measures adopted by the first State.[55] If the schemes enacted in other States value, prioritise, or pursue different objects, then those schemes do not supply alternatives of the relevant kind.[56]

Part VI: Estimate of time for oral argument

34. South Australia estimates that 15 minutes will be required for the presentation of oral argument.

Dated: 21 November 2016

M G Evans QC
T: 08 8207 1565
F: 08 8212 6161
E: michael.evans@sa.gov.au

F J McDonald
T: 08 8207 1760
F: 08 8207 2013
E: fiona.mcdonald3@sa.gov.au

---

51 See *Murphy* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J).
52 Not in all; see *Murphy* (2016) 90 ALJR 1027 at [39] (French CJ and Bell J), [100]-[101] (Gageler J); *McCloy* (2015) 89 ALJR 857 at [142] (Gageler J), [328] (Gordon J).
53 *Murphy* (2016) 90 ALJR 1027 at [39] (French CJ and Bell J), see also at [245] (Nettle J).
54 See, for example, *McCloy* (2015) 89 ALJR 857 at [50] (French CJ, Kiefel, Bell and Keane JJ).
55 Cf PS at [48]-[49].
56 See *Murphy* (2016) 90 ALJR 1027 at [72]-[73] (Kiefel J).