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' SUMMARY OF ARGUMENT

PART I: CERTIFICATION

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

PART II: ISSUES

2. Regulation 26(3) of the *Environment Protection (Industrial Waste Resource) Regulations 2009* (Vic) (the **Regulations**) prohibits the interstate transport of non-liquid prescribed industrial waste for destruction or deposit unless the interstate facility has better environmental performance standards than a facility at a premises licensed under the Environment Protection Act 1970 (Vic) (the **Act**) or exempted from the requirement to hold such a licence. The ultimate issue is whether reg 26(3) is contrary to the freedom of interstate trade and commerce guaranteed by s 92 of the Constitution.

3. The principal sub-issues raised by this case are:

   3.1 whether the protectionist effect of reg 26(3) can be inferred from the discriminatory burden it imposes on interstate trade;

   3.2 whether, when ascertaining if the object(s) of reg 26(3) are non-protectionist and consistent with s 92 of the Constitution, those objects must be the actual motivating objects of the regulation (as the Plaintiffs contend), rather than ex post facto justifications for the operation of reg 26(3) (as the Defendants contend); and

   3.3 whether it is inconsistent 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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PART III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. The Plaintiffs have given notice under s 78B of the *Judiciary Act 1903* (Cth) and consider that no further notice is required.

PART IV FACTS

Effect of a demurrer

5. The purpose of the hearing before this Court is to determine the Plaintiffs' demurrer to the Defence.[1] The facts that are taken to be admitted "are those which are, expressly or impliedly, averred in the [Defence] itself."[2]

   5.1 "Impliedly" averred means that which is "included in and part of that which is expressed", as distinct from "an inference [which is] additional to what is stated".[3]

   5.2 Statements that are "no more than evidentiary" and all statements "involving some legal conclusion" are discarded.[4]

6. In addition, the usual principles for determining constitutional facts continue to apply. Under those principles, the material that can be relied on to determine constitutional validity is not confined to material that is admissible under the ordinary rules of evidence.[5]

   6.1 The Court may have regard to "rational considerations",[6] which include "official facts" (particularly when government documents are not self-serving documents prepared with an eye to defending constitutional validity).[7]

   6.2 The Court can also take into account "its knowledge of society".[8]

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1 Demurrer Book (**DB**) 58, [9].

2 *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 (***Kathleen Investments***) at 135 (Gibbs J). *Wurridjal v The Commonwealth* (2009) 237 CLR 309 (***Wurridjal***) at [120] (Gummow and Hayne JJ).

3 *Wurridjal* (2009) 237 CLR 309 at [120] (Gummow and Hayne JJ).

4 *Kathleen Investments* (1977) 139 CLR 117 at 135, citing *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142 (Dixon CJ).

5 *Thomas v Mowbray* (2007) 233 CLR 307 at [629] (Heydon J); *Gerhardy v Brown* (1985) 159 CLR at 142 (Brennan J). For example, *New South Wales v The Commonwealth (The Wheat Case)* (1915) 20 CLR 454.

6 *Thomas v Mowbray* (2007) 233 CLR 307 at [630] (Heydon J), citing *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 227 (McTiernan J).

7 *Thomas v Mowbray* (2007) 233 CLR 307 at [526] (Callinan J), [639] (Heydon J). This includes annual reports of government bodies: ibid at [645] (Heydon J).

8 *Thomas v Mowbray* (2007) 233 CLR 307 at [633] (Heydon J), citing *North Eastern Dairy Co v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 at 622 (Jacobs J).

7. The Plaintiffs have included in the Demurrer Book key documents referred to in the further amended statement of claim. Those documents are intended to provide relevant context for the assistance of the Court.

Outline of relevant facts

8. On 18 November 2015, the First Plaintiff (**Material Solutions**) applied to the Second Defendant (the **EPA**) for approval to transport contaminated soil from Rose Grange Estate in Tarneit, Victoria to a waste treatment facility in McLaren Vale, South Australia.[9]

   8.1 The contaminated soil is "prescribed waste" for the purposes of the Act, and "non-liquid prescribed industrial waste" as defined in the Regulations.[10]

   8.2 In particular, the contaminated soil is "Category A waste" for the purposes of the Regulations.[11]

9. The McLaren Vale waste treatment facility is operated by the Second Plaintiff (**Southern Waste**).[12]

   9.1 Southern Waste had a licence under South Australian law to receive, treat and dispose of the contaminated waste at its facility.[13]

   9.2 The South Australian Environment Protection Authority approved the treatment of that waste at Southern Waste's facility on 14 October 2015.[14]

10. On 16 December 2015, the EPA refused the application by Material Solutions. The basis of refusal was that the EPA was not satisfied that the environmental standards at Southern Waste's facility were better than a facility that was licensed under the Act to receive that waste.[15]

11. Facilities outside Victoria, including Southern Waste's facility at McLaren Vale, are neither licensed nor eligible for exemption from the requirement to hold a licence

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9 Further amended statement of claim (**FASOC**), paragraph 15: DB 20; admitted in Defence, paragraph 15: **DB 28**.

10 FASOC, paragraph 5: DB 18; Defence, paragraph 5(a): **DB 25**.

11 Defence, paragraph 5(b): **DB 25-26**.

12 Defence, paragraph 6(a): **DB 26**.

13 Defence, paragraph 6(b): **DB 26**. The licence was initially granted from 1 May 2015 to 31 December 2015: **DB 60**. The Defendants have not admitted that the licence was extended to 31 March 2016: Defence, paragraph 6(b)-(c): **DB 26-27**; cf FASOC, paragraph 6.2: **DB 18;** and **DB 107** (copy of licence from 1 Jan 2016 to 31 March 2016).

14 FASOC, paragraph 16: **DB 20**; admitted in Defence, paragraph 16: **DB 28**. The decision is at **DB 172-173**.

15 FASOC, paragraph 17: **DB 20-21**; admitted in Defence, paragraph 17: **DB 28**; although the State says further that the EPA had requested further information. The refusal decision is at **DB 359**.

for the reception, treatment and storage of prescribed industrial waste under the Act or the Regulations.[16]

PART V ARGUMENT

A. Victorian scheme for regulating prescribed industrial waste

12. The purpose of the Act is to "create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection": s 1A(1), emphasis added. One of those principles is the principle of waste hierarchy in s 1I, under which waste should be managed in according with an order of preference starting with avoidance and ending with disposal: s 1I(a) and (g).

13. The Act has limited extraterritorial operation to territorial seas adjacent to Victoria, and to discharges of waste into the River Murray from any premises situated in Victoria: s 3(1) and (1A).

Classes of industrial waste

14. Under reg 5(2) of the Regulations, "prescribed industrial waste" is defined as:

    14.1 "category A waste" (defined in Sch 2, cl 1), which is the highest hazard waste;

    14.2 "category B waste" (defined in Sch 2, cl 2);

    14.3 "category C waste" (defined in Sch 2, cl 3); and

    14.4 "Schedule 1 industrial waste" (defined in Sch 1).

Licensing scheduled premises and landfill levy

15. The occupier of a scheduled premises must not undertake at those premises (relevantly) the reprocessing, treatment, storage, containment, disposal or handling of waste unless licensed to do so under the Act: the Act, s 20(1)(b).

16. "Scheduled premises" include storage, treatment, reprocessing, containment or disposal facilities handling any prescribed industrial waste not generated at the premises; and landfills used for the discharge or deposit of solid wastes (including solid industrial wastes) onto land.[17]

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16 FASOC, paragraph 14; **DB 20**; admitted in Defence, paragraph 14: **DB 27**. In other words, the limited power of the EPA to grant exemptions under s 53 of the Act and reg 29 of the Regulations is not relevant to this case.

17 See the Act, s 4(1) (definition of "scheduled premises"); and the *Environment Protection (Scheduled Premises and Exemptions) Regulations 2007* (Vic) (the **Scheduled Premises Regulations**), and Sch 1, items A01 (PIW management) and A05 (landfills).

17. Landfill levy is payable by the owner of a licence in respect of a scheduled premises that is prescribed as a scheduled premises required to pay landfill levy: the Act, s 50S(1).[18]

Requirement for permit to transport prescribed industrial waste interstate

18. A person must not conduct any business, the operation of which includes the transport of prescribed waste on a highway, unless there is in force a permit to transport prescribed waste: the Act, s 53A(1). A breach of s 53A is an indictable offence: s 53A(3).

19. Permits for the transport of waste are issued by the EPA under Part 3 of the Regulations, which is headed "Transport and Management of Waste".

20. The interstate transport of prescribed industrial waste is governed by reg 26.

20.1 Regulation 26(1) prohibits the transport of PIW from one premises to another premises unless:

(a) the receiving premises is licensed under the Act to receive that category of prescribed industrial waste; or

(b) the receiving premises is exempt under the Act or has been exempted by the authority from requiring a licence to … handle that prescribed industrial waste at the premises; or

(c) the transport has been approved by the authority under [reg 26](6).

20.2 Regulation 26(3) provides that the EPA "must not approve the transport of prescribed industrial waste for the purposes of [reg 26](1)(c) unless":

(a) the Authority is satisfied that the proposed transport of the prescribed industrial waste to the premises is for the purposes of reuse or recycling in accordance with the principle of wastes hierarchy; or

(b) in the case of a proposal to transport non-liquid prescribed industrial waste for destruction or deposit, the Authority is satisfied that the waste will be destroyed or deposited at a premises at which there is a facility with better environmental performance standards than a facility at a premises described in [reg 26](1)(a) or (1)(b). (emphasis added)

21. The EPA has issued Guidelines entitled "Movement of Prescribed Industrial Waste from Victoria" (the **Guidelines**): **DB 155-162**.

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[18] The scheduled premises required to pay landfill levy are set out in reg 13 of the Scheduled Premises Regulations.

21.1 The Guidelines state that, under the Regulations, any person wanting to transport non-liquid prescribed industrial waste from Victoria to another State or Territory must obtain prior approval from the EPA: **DB 155**.

21.2 The Guidelines state that the EPA will only issue an approval if the EPA is satisfied that the prescribed industrial waste (whether Category A, B or C) will be (if not reused, recycled or used for the recovery of energy) "destroyed or deposited at a facility with better environmental performance standards than are available in Victoria": **DB 156**.

21.3 The Guidelines note that no facility in Victoria is currently licensed to receive category A waste for disposal. That means that the EPA "will not approve applications for the interstate disposal of Category A [waste]", and the EPA "considers that only the transport of Category A [waste] for destruction will achieve the 'better environmental performance standards' requirement": **DB 156**.

B. Regulation 26(3) discriminates with protectionist effect

22. Regulation 26(3) will be contrary to s 92 of the Constitution if:

22.1 reg 26(3) imposes a discriminatory burden on interstate trade and commerce of a protectionist kind;[19] and

22.2 reg 26(3) is not reasonably necessary for giving effect to a legitimate, non-protectionist object.[20]

23. Paragraphs 24-39 below establish that reg 26(3) imposes a discriminatory burden on interstate trade and commerce of a protectionist kind. Paragraphs 40-67 below establish that there is no permissible justification for that discriminatory burden.

Regulation 26(3) discriminates against interstate trade and commerce on its face

24. In this case, the discriminatory burden imposed by reg 26(3) on interstate trade and commerce is apparent on the face of the regulation.

25. Regulation 26(3) provides that the EPA "must not approve" the interstate transport of non-liquid prescribed industrial waste for destruction or deposit unless the EPA is satisfied that the waste will be destroyed or deposited at a premises at which there is a facility with better environmental standards than a facility at a premises described in reg 26(1)(a) or (b).

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19 *Cole v Whitfield* (1988) 165 CLR 360 at 394 (the Court). See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (***Betfair (No 1)***) at [118], [121] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

20 On the test of "reasonable necessity", see *Betfair (No 1)* (2008) 234 CLR 418 at [101]-[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

25.1 The only premises that are described in reg 26(1)(a) or (b) (licensed or exempt premises) are premises in Victoria: see paragraph 11 above.

25.2 Accordingly, reg 26(3) discriminates against the transport of non-liquid prescribed industrial waste to an interstate facility for destruction or deposit compared to the transport of that waste to a facility within Victoria, because the interstate facility's environmental performance standards must be better than those of a Victorian facility.

26. In that key respect, reg 26(3) of the Regulations is different from the State laws considered in most cases arising under s 92 of the Constitution, where it was necessary to infer discriminatory operation from the law's practical operation. Here, the discrimination is express and overt.

The protectionist effect follows from the discriminatory burden

27. The protectionist effect of reg 26(3) of the Regulations follows inevitably from the legal and practical operation of reg 26(3).

28. "Protection" in the context of s 92 of the Constitution means protection of domestic industry against foreign competition.[21] In this case, the discriminatory burden imposed on interstate trade and commerce identified in paragraph 25 above creates a competitive advantage for Victorian industry.

28.1 Regulation 26(3) confers a competitive advantage on Victorian premises at which prescribed industrial waste is destroyed or deposited, because those Victorian premises 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 a Victorian premises.

28.2 The facts of this case alone demonstrate that the burden placed on interstate trade and commerce is real. Material Solutions has been prevented by reg 26(3) from transporting prescribed industrial waste to Southern Waste's facility in South Australia.

29. It is no objection to the Plaintiffs' argument that the burden is imposed on the transport of non-liquid prescribed industrial waste, and the competitive advantage is conferred on the destruction or deposit of non-liquid prescribed industrial waste. It is clear from *Barley Marketing Board (NSW) v Norman*[22] that a protectionist burden of that type can amount to a breach of s 92.

29.1 Adapting *Norman* to the present case, the differential treatment of interstate transport of prescribed industrial waste is the means by which

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21 *Cole v Whitfield* (1988) 165 CLR 360 at 392 (the Court). See also *Betfair (No 1)* (2008) 234 CLR 418 at [15] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

22 (1990) 171 CLR 182 (***Norman***) at 204-205 (the Court).

the discrimination between interstate and intra-state destruction and deposit of non-liquid prescribed industrial waste is created.

29.2 That conclusion in *Norman* followed from first principle. The *Cole v Whitfield* test is concerned with matters of substance, not form.[23] Moreover, *Betfair (No 1)* establishes that the "protection" prohibited by s 92 includes any attempt by a State to protect an intra-state product against competition from an interstate product that is substitutable for the intra-state product.[24]

30. In *Norman*,[25] this Court observed that a burden placed on the export of goods from a State can breach s 92 of the Constitution:

> [I]t could scarcely be denied that a prohibition or restriction upon the export of a commodity from a State with a view to conferring an advantage or benefit on producers within the State over out-of-State producers would amount to discrimination in a protectionist sense.

31. That passage from *Norman* describes the effect of reg 26(3).

Response to the Defence, paragraph 19

32. It is necessary to respond to several matters raised in paragraph 19 of the Defence.

33. **First**, the fact that s 92 of the Constitution is concerned with interstate trade, not traders,[26] does not detract from the Plaintiffs' arguments: cf Defence, paragraph 19(a): **DB 28**.

33.1 Section 92 can be breached if a law burdens interstate trade and commerce in a particular good or service to the competitive advantage of intra-state traders, even if competition remains between interstate and intra-state trade and commerce in related goods and services.

33.2 For example, the laws held invalid in *Betfair (No 1)* affected one type of betting (betting through a betting exchange), and did not prevent competition between interstate and intrastate trade in other types of betting. However, the anti-competitive effect of the WA law on that one type of betting was contrary to s 92 of the Constitution.

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23 *Cole v Whitfield* (1988) 165 CLR 360 at 384, 407-408; see also 399 ("discrimination" includes factual as well as legal discrimination).

24 In *Betfair (No 1)*, a prohibition on conducting betting through a betting exchange (carried on by a business based in Tasmania) protected local betting carried on through a totalizator.

25 (1990) 171 CLR 182 at 204.

26 See for example *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217 (***Betfair (No 2)***) at [50] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298 at [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

The proposition in paragraph 19(b) of the Defence (**DB 29**) appears directed at the same point.

34. **Second**, for that reason, it is irrelevant that there is a large national market for the management (including the collection, transport, treatment, containment, re-use, recycling and disposal) of hazardous waste: cf Defence, paragraph 19(c), (e)-(g), (i): **DB 29, 31, 32**.

35. In the present case, reg 26(3) burdens the interstate transport of prescribed industrial waste for destruction or deposit (including category A waste), and has a protectionist effect for the reasons set out in paragraphs 27-31 above. It is no answer that there is a thriving national market in the management of other forms of hazardous waste.

36. It is true that, in *Betfair (No 1)*,[27] the plurality stated that "protection" is "concerned with the preclusion of competition, an activity which occurs in a market for goods or services". However, the operation of the impugned law, and the point at which it imposes a burden, determines the relevant aspect of the market.[28]

    36.1 Here, reg 26(3) burdens the interstate transport of non-liquid prescribed industrial waste for destruction or deposit. Any broader conception of the market is not relevant to validity.

    36.2 In any event, the principal relevance of market evidence in *Betfair (No 1)* was to determine whether a facially neutral State law discriminated against interstate trade and commerce in its factual operation.[29] Those issues do not arise here.

37. In the current case, by contrast, the discrimination against interstate trade and commerce is apparent on the face of reg 26(3). In that respect, the current case is like *Bath v Alston Holdings Pty Ltd*,[30] where the differential treatment of interstate trade and commerce was apparent on the face of the law.

    37.1 In *Bath*, this Court held, by majority, that an additional levy imposed by Victorian law on retailers for the sale of tobacco grown interstate was

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27 (2008) 234 CLR 418 at [15] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

28 See *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 428 (Mason CJ, Brennan, Deane and Gaudron JJ): "If the tax is imposed on transactions in a particular market – in this case, the Victorian retail tobacco market – it is the effect of the tax on transactions in that market which is material".

29 See *Betfair (No 1)* (2008) 234 CLR 418 at [114]-[115] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). In *Betfair (No 2)* (2012) 249 CLR 217, the Court rejected an argument that a facially neutral law in fact imposed a greater burden on an interstate competitor by reason of that competitor's business model. See further *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 (***Victoria v Sportsbet***).

30 (1988) 165 CLR 411 (***Bath***). The *Business Franchise (Tobacco) Act 1974* (Vic) imposed an additional fee on retailers for the sale of tobacco that was grown interstate. A different provision in that Act imposed a fee at the same rate on wholesalers for the sale of tobacco grown in Victoria.

contrary to s 92 of the Constitution. That conclusion did not depend on any market analysis. Any competitive advantage for intra-state trade and commerce necessarily followed once the Victorian Act was found to impose an additional levy on interstate goods.[31]

37.2 The issue on which this Court divided in *Bath* was whether the apparently differential fee imposed on retailers for interstate tobacco was discriminatory in substance, given that wholesalers in Victoria paid an equivalent fee for Victorian tobacco.[32]

38. In *Sportsbet Pty Ltd v New South Wales*,[33] the plurality noted that the majority in *Bath* may have "favoured the legal operation of the [retailers'] tax at the expense of the practical operation of the statute as a whole". Notably, even that criticism of the majority reasoning in *Bath* looks at the practical operation of the statute, and does not invoke any general market analysis. The position here is even clearer than in *Bath*, because there is no other provision in the Regulations that could be said to "equalise" the burden imposed on interstate trade and commerce by reg 26(3).

39. **Finally**, it is irrelevant whether the generation of many types of solid prescribed industrial waste, or the quantities of prescribed industrial waste deposited to landfill in Victoria, have declined significantly since 2007: cf Defence, paragraph 19(iA) and (iB): **DB 32**. Those facts (assuming them for the purposes of the Demurrer) do not establish whether the objects of reg 26(3) are non-protectionist objects, nor whether the means used by reg 26(3) to achieve its objects are non-protectionist means.

C. No permissible justification

40. For the following reasons, the protectionist burden placed by reg 26(3) on interstate trade and commerce is not a reasonably necessary means of achieving a non-protectionist object.

Identifying the objects of reg 26(3)

41. There is a preliminary issue about identifying the objects of reg 26(3). Those objects are a question of law,[34] and are thus not foreclosed by the terms of the Defence: see paragraph 5.2 above.

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31 See *Bath* (1988) 165 CLR 411 at 429 (Mason CJ, Brennan, Deane and Gaudron JJ).

32 See *Bath* (1988) 165 CLR 411 at 425-427 (Mason CJ, Brennan, Deane and Gaudron); cf 431-432 (Wilson, Dawson and Toohey JJ, dissenting).

33 (2012) 249 CLR 298 at [22] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), emphasis added.

34 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [423] (Hayne J).

42. The Plaintiffs contend that relevant "objects" of a law for the purposes of s 92 of the Constitution are the actual motivating objects of the law, determined according to the usual rules of statutory construction. Those objects do not include any ex post facto justification for the operation of a law.

    42.1 The "objects" of a law are different from a description of the law's practical effect.[35] Those objects must be capable of being identified when the law is made, and do not change over time unless the law is amended.

    42.2 Moreover, *Betfair (No 1)* makes plain that it is not sufficient that a law has a legitimate, non-protectionist object.[36] Implicit in that conclusion is that it is necessary to determine the "true purpose"[37] of a law.

43. It is permissible to have regard to the *Regulatory Impact Statement for the draft Environment Protection (Industrial Waste Resource) Regulations* (Publication 1275, March 2009) (the **RIS**)[38] to determine the true object(s) of reg 26(3) of the Regulations. A regulatory impact statement must contain (among other things) a statement of the objectives of a regulation, a statement of other practicable means of achieving those objectives, and an explanation of why those other means are not appropriate.[39]

44. The RIS reveals three important points for present purposes.

45. **First**, the measure contained in reg 26(3) adopted what had been an interim, 12-month variation to the former *Industrial Waste Management Policy (Movement of Controlled Waste Between States and Territories)* (Vic) (the **2001 Policy**),[40] which was to expire on 23 July 2009.[41]

    45.1 That variation to the 2001 Policy required pre-approval from the EPA, in terms similar to the current reg 26(3). The variation also added a new policy objective to the 2001 Policy, being to "prevent the unnecessary

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35 *APLA* (2005) 224 CLR 322 at [178] (Gummow J); see also [38] (Gleeson CJ and Heydon J); cf [425] (Hayne J). See further *Monis v The Queen* (2012) 249 CLR 92 at [317] (Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 254 CLR 508 at [163] (Gageler J) (considering the objects of a law in the context of the implied freedom of political communication).

36 *Betfair (No 1)* (2008) 234 CLR 418 at [48] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

37 See the references to the "true purpose" and 'true object" of a law in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (***Castlemaine Tooheys***) at 472, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

38 See http://www.epa.vic.gov.au/our-work/publications/publication/2009/march/1275.

39 *Subordinate Legislation Act 1994* (Vic), s 10(1)(a), (c) and (e).

40 See Victoria Government Gazette S222, 6 December 2001.

41 RIS, p 17. The variation was made under s 18B of the Act, which permits the Minister to certify that there are special reasons why a waste management policy should be varied "without delay". Such a variation is only in force for 12 months: s 18B(2).

movement of prescribed industrial waste in a non-liquid form produced in Victoria to another State or Territory".[42]

45.2 The RIS does not give any reasons for adopting the 2008 variations to the 2001 Policy. However, the 2008 Variation stated:[43]

> Victoria has in place a framework to avoid and promote re-use and re-cycling of hazardous wastes [sic]. It is not Government's intention to allow the transport of wastes to other states and territories for disposal except where it is environmentally preferable to do so.

46. **Second**, the RIS states that, in the 2007-08 financial year (that is, before the 2008 Variation took effect), there were 19,504 tonnes of prescribed industrial waste produced in Victoria and granted approval to be transported interstate. That represented less than 2% of the total prescribed industrial waste produced in Victoria.[44] (That is an "official fact", to which the Court may have regard: see paragraph 6.1 above.)

47. **Third**, the RIS also observed that Victoria was the only jurisdiction that required approval for waste to be transported out of the state.[45]

47.1 A person in Victoria has to obtain both pre-approval from the EPA as well as a consignment authorisation from the jurisdiction of destination under the *National Environment Protection Measure (Movement of Controlled Waste between States and Territories) 1998* (Cth) (the **National Measure**).[46]

47.2 Other States and Territories left the interstate transport of waste to be dealt with under the National Measure.[47] Nothing in the National Measure suggests that the jurisdiction where waste is produced should have a veto over that waste being transported interstate.

(a) The National Measure provides for licensing of transporters of controlled waste, and mutual recognition of those licences: clause 13(a) and (b).

(b) A producer intending to move controlled waste to another jurisdiction must obtain a consignment authority from an agency of the jurisdiction of destination before moving such waste: clause 13(c).

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42 See *Variation to Industrial Waste Management Policy (Movement of Controlled Waste Between States and Territories) 2008* (Vic) (the **2008 Variation**), adding a new paragraph 11A, and paragraph 4(c), respectively: Victoria Government Gazette, S208, 23 July 2008.

43 Victorian Government Gazette, S208, 23 July 2008, p 1.

44 RIS, p 17.

45 RIS, p 121.

46 RIS, p 17. The Commonwealth Measure is made under s 14(1) of the *National Environment Protection Council Act 1994* (Cth) and corresponding State and Territory provisions.

47 RIS, p 124.

Before issuing a consignment authority, the jurisdiction of destination should consult with the jurisdiction of origin to determine the appropriateness of issuing a consignment authorisation: clause 13(d).

(c) Producers of controlled waste, and transporters, and facility operators must provide information on the production, transport, and acceptance of the controlled waste, respectively: clause 13(f).

48. In summary, it can be seen that reg 26(3) is based on a 2008 variation, made on an interim basis under s 18B of the Act (which avoided the usual requirements in s 18A for consultation and the preparation of a draft policy impact statement). That variation was adopted without explanation in 2009, even though interstate transport of prescribed industrial waste in 2007-08 was only 2% of the total prescribed industrial waste in Victoria, and all other States and Territories were content for the interstate transport of waste to be dealt with under the National Measure. It remains the case that no jurisdiction, apart from Victoria, has a requirement that the jurisdiction of origin must approve the interstate transport of waste (let alone a criterion for approval that imposes a protectionist burden on interstate transport of waste).[48]

49. Those circumstances make it difficult to contend that reg 26(3) is reasonably necessary to achieve a legitimate, non-protectionist object.

Protecting revenue and discouraging interstate transport are illegitimate means

50. The Defence raises two matters that cannot possibly, as a matter of law, provide a justification for the discriminatory burden that reg 26(3) imposes on interstate trade and commerce. The Defence states that, without the "better than" standard in reg 26(3), the approach set out in paragraph 19A(j) and (k) of the Defence will not achieve the goals in paragraph 19A(l) to (n), "because producers of waste would avoid paying the higher levies [in Victoria] by transporting prescribed industrial waste from Victoria to a place outside Victoria": paragraph 19A(p): **DB 36**.

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[48] Other laws impose licence and tracking requirements: see *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) (**NSW Regulations**), Part 4 (tracking of certain waste transported within, out of and into NSW), especially regs 43, 45 and 46, Part 5 (reporting on waste from metropolitan levy area transported out of NSW), especially reg 68; *Environmental Protection Regulation 2008* (Qld), Part 9 (Waste tracking), especially regs 81Q-81T (transportation out of Queensland); *Environment Protection Act 1993* (SA), s 36 (licence to undertake a prescribed activity of environmental significance), Sch 1 clause 3(4) and (5); *Environmental Protection (Controlled Waste) Regulations 2004* (WA), Part 3 (transportation and unloading of a controlled waste); *Environmental Management and Pollution Control (Controlled Waste Tracking) Regulations 2010* (Tas), Part 3 (tracking movement of controlled waste), Part 4 (collection and disclosure of tracking information); *Environment Protection Regulation 2005* (ACT), Division 7.2 (movement of controlled waste between states); *Waste Management and Pollution Control Act* (NT), s 30(1) (licence required for activities specified in Part 1 of Schedule 2), Schedule 2, Part 2 item 2.

51. Protecting the revenue of Victoria cannot be a legitimate, non-protectionist object of reg 26(3), nor can it be a legitimate, non-protectionist means of achieving other objects: cf Defence, paragraph 19A(n): **DB 35**. For the same reasons, discouraging the interstate transport of prescribed industrial waste, to ensure that the producers of that waste do not avoid paying Victorian levies, cannot be a legitimate, non-protectionist means of achieving an object of reg 26(3).

52. The State's arguments in this regard are contrary to *Betfair (No 1)*. In that case, Western Australia submitted that it was not a protectionist purpose for a State law to protect the turnover of in-State operators from diminution as a result of competition with Betfair, in order to prevent consequent prejudice to the returns to the racing industry and in-State revenue provided by that industry. The plurality said that the State's submission was contrary to authority, and contrary to principle, because "such a justification, if allowable, would support the re-introduction of customs duties at State borders".[49]

53. The Plaintiffs' objections to those paragraphs of the Defence are consistent with its Demurrer. Section 92 of the Constitution requires that both the means, as well as the objects, of a law be non-protectionist.[50] Any law that uses protectionist means to give effect to an otherwise permissible object cannot be "reasonably necessary", as a matter of law, to achieve that object.

Waste minimisation objects do not support reg 26(3)

54. Once those illegitimate means are disregarded, the objects of encouraging waste reduction, resource efficiency initiatives, and reuse, recycling and treatment technologies cannot justify the protectionist effect of reg 26(3) of the Regulations: contra Defence, paragraph 19A(l): **DB 35**.

55. **First**, the premise underlying reg 26(3) is that Victoria can prohibit the interstate transport of prescribed industrial waste unless it is better for the environment to approve that transport: see paragraph 45.2 above. However, Victoria does not have any general governmental interest in the environmental standards of facilities in another State.

55.1 To the contrary, the Act is concerned with the protection of the environment in Victoria: see s 1A(1) and paragraphs 12-13 above. The prohibition in

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49 *Betfair (No 1)* (2008) 234 CLR 418 at [108] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). See also *Victoria v Sportsbet* (2012) 207 FCR 8 at [77] (Emmett J), [315]-[318] (Kenny and Middleton JJ).

50 By way of comparison, it is clear in the context of the implied freedom of political communication that both the means and the ends of a law must be consistent with the system of representative and responsible government provided for by the Constitution: see for example *Coleman v Power* (2004) 220 CLR 1 at [92]-[96] (McHugh J), with Gummow and Hayne JJ (at [196]) and Kirby J (at [211]) agreeing on this point.

reg 26(3) is unconnected with whether the destruction or deposit of the waste in another State could cause environmental damage in Victoria.[51]

55.2 The environmental performance standards of facilities in South Australia are a matter for South Australia, not Victoria.[52] In a federation, the predominant concern of State and Territory legislatures is with acts, matters and things in their respective law areas.[53] Consistently with that principle, the National Measure contemplates only that there will be consultation by the jurisdiction of destination (here, South Australia) with the jurisdiction of origin (Victoria) before issuing a consignment approval: see paragraph 47.2(b) above.

56. Accordingly, once the illegitimate means mentioned in paragraphs 50-53 above are disregarded, there is no sufficient connection between the waste minimisation objects referred to in paragraph 19A(l) of the Defence and the environmental performance standards of an interstate facility at which non-liquid prescribed industrial waste will be destroyed or deposited. That is not to deny the competence of Victoria to enact legislation with extra-territorial effect; rather, the Plaintiffs' argument is that Victoria's view of another State's environmental standards cannot justify a discriminatory burden on interstate trade and commerce of a protectionist kind.

57. **Second**, once the illegitimate means are disregarded, the waste minimisation objects referred to in paragraph 19A(l) of the Defence cannot reasonably be regarded as supporting the requirement in reg 26(3) that non-liquid prescribed

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51 Cf *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78.

52 In the United States, the Supreme Court struck down a City law that prohibited the transport of non-recycleable waste a destination outside the state and therefore required that waste to be deposited at a waste facility located within the City – on the ground that: "The Commerce Clause presumes a national market free from local legislation that discriminates in favour of local interests": *C & A Carbone Inc v Clarkstown, New York* 511 US 383 at 393 (1994). In answer to an argument that the City law protected the environment in the other state, the Court's judgment said that the City cannot validly "steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment [because that] would extend the town's police power beyond its jurisdictional bounds": *C & A Carbone Inc v Clarkstown, New York* 511 US 383 at 393 (1994).

Intermediate courts have also struck down State laws that purport to prohibit the import into the enacting State of solid controlled waste for disposal unless the law of the State of origin contained similar requirements for disposing of controlled industrial waste. Those State laws were contrary to the dormant component of the Commerce Clause (which prevents States from discriminating against interstate traffic), because one State "cannot force its judgment with respect to hazardous wastes on its sister states 'at the pain of an absolute ban on the interstate flow of commerce' ...": see *Hardage v Atkins* 619 F 2d 871 at 873 (1980); *National Solid Wastes Management Association v Meyer (I)* 63 F 3d 652 at 660 (1995); *National Solid Wastes Management Association v Meyer (II)* 165 F 3d 1151 at 1153 (1999).

53 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), discussing choice of law rules in intra-national torts. The law of one State cannot destroy or weaken the legislative authority of another State or its capacity to function as a government: see *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [15] (Gleeson CJ).

industrial waste can only be destroyed or deposited at an interstate facility that has better environmental standards than a comparable Victorian facility.

58. The Plaintiffs' arguments are made as a matter of construing and characterising reg 26(3) of the Regulations, and do not run counter to the Demurrer. It should also be noted that the Demurrer does not prevent this Court from drawing inferences based on its knowledge of society: see paragraph 6.2 above. The Plaintiffs' arguments in this regard are supported by aspects of this Court's reasoning in *Castlemaine Tooheys*, where the plurality rejected an argument that the differential burden on non-refillable bottles was merely incidental to implementing a legislative regime to conserve finite energy resources.

58.1 Their Honours observed that the facts on this issue in the special case were "extremely meagre".[54] The plurality observed that, as the Bond brewing companies use bottles manufactured outside the State, any increase in their market share would reduce the use of the State's natural gas in the manufacture of bottles.[55] The manufacture of bottles by the Bond brewing companies did not "as far as [their Honours] kn[e]w", involve the use of South Australian natural gas.[56]

58.2 Significantly, the case stated did not contain any information about whether Bond brewing bottles used natural gas derived from South Australia.[57] The inference that increased sales of out-of-State bottles would reduce the use of South Australian gas was not based on any specific fact in the case stated, but rather was drawn as a matter of common sense.

Other matters raised by Defence, paragraph 19A

59. There are two final responses to paragraph 19A of the Defence.

60. **First**, the policy that the producers of hazardous waste should bear a truer cost of waste disposal does not provide any justification for reg 26(3): contra Defence, paragraph 19A(m): **DB 35**. Once the illegitimate means mentioned in paragraphs 50-53 above are disregarded, the policy referred to in paragraph 19A(m) of the Defence cannot reasonably be regarded as supporting the "better than" requirement in reg 26(3).

61. **Second**, given the matters set out in paragraphs 54-60 above, it is irrelevant whether, since 2010, there has been an increase in the proportion of category B waste that is sent for treatment or immobilisation prior to deposit to landfill: cf Defence, paragraph 19A(o): **DB 35**.

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54 *Castlemaine Tooheys* (1990) 169 CLR 436 at 476 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

55 *Castlemaine Tooheys* (1990) 169 CLR 436 at 477.

56 Ibid.

57 See *Castlemaine Tooheys* (1990) 169 CLR 436 at 450-451 (case stated, paragraphs 84-85).

Response to Defence, paragraph 19B

62. The matters raised by paragraph 19B of the Defence can be dealt with shortly.

63. **First**, reg 26(3) has no sufficient connection with any policy of treating waste close to its site of production: contra Defence, paragraphs 19B, 19B(b) and (c): **DB 39, 40**.

64. A policy that requires restricting the movement of goods inherently raises a risk of infringing s 92 of the Constitution, and therefore the law must be closely tailored to achieving that end to avoid invalidity.[58]

64.1 Here, reg 26(3) draws a distinction between a premises in Victoria and a premises outside Victoria. That is much too crudely drawn a distinction for identifying the facility for destruction or deposit of non-liquid prescribed industrial waste that is geographically closest to the place in Victoria where that waste is produced.

64.2 The only facility that can accept category B waste for disposal is Lyndhurst,[59] in the south-eastern part of Victoria. Regulation 26(3) is not premised on the relative proximity of Lyndhurst to the source of the category B waste, compared to the intended out-of-State destination – in contrast to the "proximity principle" in reg 71 of the NSW Regulations.[60]

65. **Second**, reg 26(3) – which is directed at the environmental performance standards of an interstate facility – has no logical or rational connection with the safety of road transport: contra Defence, paragraph 19B(b): **DB 39**. Regulation 26(3) is not concerned with any of the characteristics of road transport. The

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58 By way of comparison, a law that imposes a direct burden on political speech will be more difficult to justify than a law that imposes only an incidental burden: see for example *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

59 Defence, paragraph 19A(g): **DB 34**.

60 The "proximity principle" operates as follows.

Regulation 71(1) of the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) prohibits the transport, in the course of business, by motor vehicle of waste that is generated in New South Wales (other than restricted solid waste) to a place in or outside New South Wales, unless the place can lawfully be used for the disposal of that waste and:

(a) the place is 150 kilometres or less from the premises of origin of that waste, or

(b) the place is more than 150 kilometres from the premises of origin and is the closest or second closest to those premises of the places, in or outside New South Wales, that can lawfully be used for the disposal of that waste: reg 71(1).

Regulation 71(4) of those Regulations prohibits the transport, in the course of business, by motor vehicle of restricted solid waste that is generated in New South Wales to any place unless the place can lawfully be used for the disposal of that waste and:

(a) the place is the closest place, in or outside New South Wales, to the premises of origin of that waste that can lawfully be used for the disposal of that waste; or

(b) the place is in another State or Territory and a border crossing to that State or Territory is closer to the premises of origin than any place in New South Wales that can lawfully be used for the disposal of that waste.

Guidelines make plain that approval under reg 26(3) is separate from, and additional to, the requirement to obtain a transport licence: **DB 155**; see the Regulations, regs 14-15.

66. **Third**, any countervailing benefit achieved by the "better than" standard is tenuous and lacks a sufficient connection with the burden placed on interstate trade and commerce: contra Defence, paragraph 19B(d): **DB 40**.

66.1 Victoria does not have a general governmental interest in the environmental standards of facilities in South Australia: see paragraphs 55-56 above. There is a mismatch between the location of the burden and the location of any supposed benefit.

66.2 Regulation 26(3) imposes a direct burden on the interstate transport of prescribed industrial waste from Victoria, but is not directed at the quality of that transport. The regulation does not make any provision for the EPA to make a qualitative assessment of whether the costs of permitting interstate transport are outweighed by any improvement in environmental outcomes. Accordingly, any countervailing benefit is inchoate.

67. **Finally**, a policy of reducing the risks associated with the treatment of hazardous waste outside of Victoria's regulatory supervision is not a legitimate, non-protectionist object when there is no risk that the treatment outside Victoria will cause environmental damage in Victoria: see paragraphs 55-56 above; contra Defence, paragraphs 19B(e): **DB 40**. In any event, that policy cannot be regarded as supporting the "better than" requirement in reg 26(3).

PART VI LEGISLATIVE PROVISIONS

68. See attachment.

PART VII ORDERS SOUGHT

69. The Plaintiffs seek the relief claimed in the FASOC (DB 22).

PART VIII TIME FOR ORAL ARGUMENT

70. The oral argument for the Plaintiffs will take approximately 3 hours.

17 October 2016

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Attachment – Relevant legislative provisions

Environment Protection Act 1970 (Vic) (consolidated 1 July 2015)

1A Purpose of Act

(1) The purpose of this Act is to create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection.

...

3 Extra-territorial application of Act

(1) This Act extends to and applies to and in relation to the territorial seas adjacent to the coasts of Victoria.

(1A) This Act extends to and applies to the discharge of waste to the River Murray from any premises situated in Victoria and extends to and applies in relation to any licence issued or proceedings brought in relation to such discharge.

...

20 Licensing of certain premises

(1) The occupier of a scheduled premises must not undertake at those premises—

...

(b) the reprocessing, treatment, storage, containment, disposal or handling of waste; or

...

unless licensed to do so under this Act.

...

50S Landfill levy—amount payable

(1) The holder of a licence in respect of a scheduled premises prescribed as a scheduled premises required to pay the landfill levy must pay to the Authority a landfill levy for each tonne of waste that is deposited on to land at the premises.

...

53 Exemptions

Without limiting the powers of the Authority under this Act, the Authority may exempt a person from the requirement to hold a permit under this Part if the Authority is satisfied that the person holds a valid authorisation to transport prescribed waste under the law of another State or Territory.

53A Permit required

(1) A person must not commence or conduct any business—

(a) the purpose of which is to transport prescribed waste; or

(b) the operation of which includes the transport of prescribed waste—

on a highway unless there is in force a permit to transport prescribed waste.

...

(3) Any person who or public authority which contravenes this section is guilty of an indictable offence against this Act and liable to a penalty of not more than 2400 penalty units and in the case of a continuing offence to a daily penalty of not more than 1200 penalty units for each

day the offence continues after conviction or after service by the Authority on the accused of notice of contravention of this section.

Environment Protection (Industrial Waste Resource) Regulations 2009 (Vic) (consolidated 29 April 2015)

14 Application for a permit to transport prescribed industrial waste for the purpose of Part IXA

(1) The owner of a vehicle may apply for a permit to transport prescribed industrial waste under section 53F of the Act by submitting to the Authority—

(a) an application for a permit; and

(b) a declaration that the vehicle to which the permit will apply is fit for the purpose of transporting the prescribed industrial waste specified in the application; and

(c) the prescribed fee for the permit.

(2) The Authority must issue, or refuse to issue, a permit within 21 days after receiving—

(a) an application for the permit that complies with subregulation (1); or

(b) any other information requested by the Authority in accordance with regulation 20—

whichever is the later.

15 Conditions of permit

In addition to any conditions specified in a permit by the Authority, a permit is subject to the following conditions—

(a) no wastes other than those listed in the permit are to be transported under the permit;

(b) the permit holder must advise the Authority as soon as is practicable of any change in the information provided to the Authority in the application for the permit;

(c) the permit holder must ensure that when a vehicle to which the permit applies is used to transport prescribed industrial waste—

(i) the prescribed industrial waste does not escape, spill or leak from the vehicle at any time;

(ii) prescribed industrial wastes of different types are not transported together unless they are compatible with each other;

(iii) the containers used to contain the prescribed industrial waste are compatible with the prescribed industrial waste;

(iv) only drivers who have undertaken training approved by the Authority drive the vehicle;

(v) the vehicle meets any relevant requirements under Schedule 4;

(d) where a vehicle to which the permit applies is used to transport waste requiring placarding in accordance with Schedule 4, the permit holder must ensure that the vehicle complies with any determinations with regard to prohibited routes made under the **Dangerous Goods Act 1985**;

(e) the permit holder must ensure that any spillage, leak, escape or other loss is reported to the Authority immediately;

(f) the permit holder must ensure that where a declaration has been made by the permit holder to the Authority that the vehicle to which the permit applies is fit for the purpose of transporting the prescribed industrial waste as specified in the permit in accordance with regulation 14 or 19, the vehicle and associated insurance and approvals are

maintained in accordance with that declaration whenever the vehicle is transporting prescribed industrial waste.

...

26 Transporting prescribed industrial waste

(1) A person must not transport prescribed industrial waste or cause or permit it to be transported from any premises to another premises unless—

(a) the receiving premises is licensed under the Act to receive that category of prescribed industrial waste; or

(b) the receiving premises is exempt under the Act or has been exempted by the Authority from requiring a licence to reprocess, treat, store, contain, dispose of or handle that prescribed industrial waste at the premises; or

(c) the transport has been approved by the Authority under subregulation (6).

(2) A person may apply to the Authority to transport prescribed industrial waste to a premises other than a premises described in subregulation (1)(a) or (1)(b).

(3) The Authority must not approve the transport of prescribed industrial waste for the purposes of subregulation (1)(c) unless—

(a) the Authority is satisfied that the proposed transport of the prescribed industrial waste to the premises is for the purposes of reuse or recycling in accordance with the principle of wastes hierarchy; or

(b) in the case of a proposal to transport non-liquid prescribed industrial waste for destruction or deposit, the Authority is satisfied that the waste will be destroyed or deposited at a premises at which there is a facility with better environmental performance standards than a facility at a premises described in subregulation (1)(a) or (1)(b).

National Environment Protection (Movement of Controlled Waste between States and Territories) Measure 1998 (Cth) (consolidated 1 December 2012)

13 Features for the establishment of a system for the movement of controlled wastes

The Council provides the following guidance on possible means for achieving the desired environmental outcomes:

Licensing and mutual recognition

(a) Each participating State or Territory, where it is the jurisdiction of origin, should ensure that the movement of controlled waste from its jurisdiction to or through another participating State or Territory should be subject to a licence having sufficient control over the carriage of that waste to enable agreement to mutual recognition between participating States or Territories;

(b) Participating States and Territories should agree to recognise, for the purpose of the movement of controlled waste between states and territories only, the licence issued by the jurisdiction where the transporter is established for business purposes;

Prior Notification and Consignment Authorisations

(c) Each participating State and Territory should ensure that a producer intending to move controlled wastes to another jurisdiction obtains a consignment authorisation from an agency of the jurisdiction of destination, or from a facility delegated by that agency, prior to the movement of such wastes;

(d) The participating State or Territory of origin and destination should ensure that, prior to a consignment authorisation being issued consultation is undertaken, wherever necessary, to determine the appropriateness of issuing a consignment authorisation;

(e) In consideration of a completed application for a consignment authorisation, each participating State and Territory should take certain matters into consideration. These should include, but not be limited to:

(i) whether the facility to which the controlled wastes are directed is appropriately licensed or approved by the agency in the participating State or Territory of destination to receive the controlled waste; and

(ii) relevant environmental protection policies and legislation of participating jurisdictions which will assist in meeting the desired environmental outcomes.

Explanatory Note:

The policies and legislation may include those relating to the generation, transport, treatment or disposal of controlled waste.

Waste Tracking

(f) Each participating State or Territory must ensure that all controlled wastes transported in accordance with this Measure are accompanied by the following information:

(i) for a producer—the information specified in Part 1 of Schedule B;

(ii) for a transporter—the information specified in Part 2 of Schedule B;

(iii) for a facility operator—the information specified in Part 3 of Schedule B, completed upon acceptance of the waste.

Obligations

(g) Each participating State or Territory should ensure that the:

(i) producer provides relevant information as set out in part 1 Schedule B;

(ii) transporter carries information as described in parts 1 and 2 Schedule B when transporting controlled waste;

(iii) facility operator provides information described in part 3 Schedule B as required by participating States or Territories;

(iv) agency, or facility delegated by an agency, in the participating State or Territory of destination issues, or refuses to issue, a consignment authorisation within 5 working days following the receipt of a completed application;

(v) the agency or delegated facility should provide an explanation to the applicant of the reason for refusal of a consignment authorisation consistent with its obligations under relevant State or Territory legislation.

Maintenance of records

(h) Each participating State or Territory should ensure that records of the data generated by the tracking system in relation to requirements which are contained in Schedule B, are kept for a period of not less than 12 months.

...