

NOTICE OF FILING

Details of Filing

Document Lodged:	Notice of a Constitutional Matter under s78B Judiciary Act 1903 - Form 18 - Rule 8.11(2)
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File Number:	VID552/2026
File Title:	THE COMMONWEALTH OF AUSTRALIA v 3M COMPANY (DELAWARE COMPANY NUMBER 262413) & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Notice of a Constitutional matter under section 78B of the Judiciary Act 1903

No. VID552 of 2026

Federal Court of Australia
District Registry: Victoria
Division: General

THE COMMONWEALTH OF AUSTRALIA

Applicant

3M COMPANY (DELAWARE COMPANY NUMBER 262413) and another named in the Schedule

Respondents

The Respondents give notice that the proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*.

Nature of constitutional matter

1. The matters arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act* are whether, at all times since July 2021¹ and continuing:
 - (a) section 39(1) of the *Environment Protection Act 2017* (Vic) (**EP Act (Vic)**) would be invalid in its application to the Commonwealth in its capacity as a person in management or control of the Bandiana, Cerberus, East Sale and Williams defence bases (**Victorian Bases**), because it infringes the principle, implied from the text and structure of the Constitution, that a State government may not curtail the Commonwealth's capacity to function as a government;²
 - (b) pursuant to section 109 of the Constitution, section 39(1) in its application to the Commonwealth would be inconsistent, to any extent, with any one or more of the following laws of the Commonwealth:

¹ Being the date from which the Commonwealth alleges it has been under a duty pursuant to section 39 of the EP Act (Vic): SOC [186].

² That structural implication was referred to by the majority in *Spence v Queensland* (2019) 268 CLR 355 as the reciprocal operation of the *Melbourne Corporation* doctrine.

Filed on behalf of (name & role of party)	The Respondents - 3M Company (Delaware Company Number 262413) and 3M Australia Pty Ltd (ACN 000 100 096)		
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(i) sections 3, 6, 7 and 14(1) of the *National Environment Protection Council Act 1994* (Cth), section 9(1) of the *National Environment Protection Measures (Implementation) Act 1998* (Cth) and the *National Environment Protection (Assessment of Site Contamination) Measure*; and/or

(ii) section 8(1)(d) of the *Air Services Act 1995* (Cth);

and would therefore be invalid to the extent of the inconsistency; and

(c) section 4(2) of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (**Application of Laws Act**) has prevented section 4(1) of that statute from picking up section 39 of the EP Act (Vic) by reason of the matters identified in subparagraphs (a) and/or (b) above, such that section 39 of the EP Act (Vic) is accordingly inoperative and of no effect within the Commonwealth places of the Victorian Bases, by reason of section 52(i) of the Constitution.

Facts showing that section 78B of the *Judiciary Act 1903* (Cth) applies

1. On 28 May 2026, the Commonwealth commenced proceedings against the Respondents in the Federal Court of Australia in the Victorian Registry.
2. At paragraphs [12] and [186] of the Commonwealth's Statement of Claim (**SOC**), the Commonwealth alleges that at all material times it had ownership, control and/or use of each of the Victorian Bases.
3. At paragraph [2(e)] of the SOC, the Commonwealth alleges that from around 1962 to 2003, the First Respondent (**3M**) developed, manufactured, marketed and distributed for sale, including in Australia, various fire-fighting foam products comprising an aqueous film foaming foam sold under the brand name '3M Light Water' in 6 per cent and 3 per cent concentrations (**3M AFFF**).
4. At paragraph [3(c)] of the SOC, the Commonwealth alleges that from around 1966 to 2003, the Second Respondent (**3M Australia**) was the importer from 3M of 3M AFFF for sale in Australia.
5. In paragraphs [79] to [104] of the SOC, the Commonwealth alleges that in the period from around 1972 to 2003, it purchased 3M AFFF from 3M Australia.
6. At paragraphs [110], [184] and in Section F.1 in each of Schedules 19, 20, 21 and 22 of the SOC, the Commonwealth alleges that from the early 1970s until around 2003, the Commonwealth used 3M AFFF in the course of training and operation activities at the Victorian Bases and this resulted in those bases and their surrounding areas being contaminated with the meaning of section 35 of the EPA (Vic) (**Victorian Base Contamination**).
7. In Section A in each of Schedules 21 and 22 of the SOC, the Commonwealth alleges that:

- (a) at all material times, East Sale Base was used for the purpose of Air Force training and operational activities; and
 - (b) since at least 1921, Williams Base (which comprised the RAAF Base Williams, Point Cook and the RAAF Base Williams, Laverton) was used for the purpose of Air Force training and operational activities.
- 8. In Section D.1 in each of Schedules 21 and 22 of the SOC, the Commonwealth alleges that:
 - (a) its use of 3M AFFF at the East Sale Base included use at runways and in response to air crashes; and
 - (b) its use of 3M AFFF at the RAAF Base Williams, Laverton included hosing down defence aircraft and responding to plane crashes.
- 9. At paragraph [186] of the SOC, the Commonwealth alleges that:
 - (a) by reason of its ownership, control and/or use of the Victorian Bases; and
 - (b) the Victoria Base Contamination,

it has, since 1 July 2021, been under a duty pursuant to section 39 of the EP Act (Vic) to take steps to minimise the risks of harm to human health and/or the environment arising from the Victorian Base Contamination.
- 10. At paragraph [187] of the SOC, the Commonwealth alleges that it has taken steps to comply with its alleged duty under section 39 of the EP Act (Vic) and is likely to be required by that alleged duty to take further steps, and alleges at paragraph [188] of the SOC that it has incurred costs or is likely to incur costs accordingly.
- 11. At paragraph [187] and in Section H of each of Schedules 19, 20, 21 and 22, the Commonwealth alleges that the steps taken to comply with the alleged duty under section 39 of the EPA (Vic) include remediation and mitigation activities and that the Commonwealth is likely to be required to undertake further investigations, monitoring and remediation and mitigation activities in order to monitor the extent of, ameliorate the effects of, and to manage or otherwise minimise the risks arising to human health and the environment from the Victorian Base Contamination.
- 12. In Section H of Schedule 21, the Commonwealth alleges that the remediation activities undertaken in compliance with its alleged duty under section 39 of the EP Act (Vic) included the removal of over 24,000 tonnes of soil from the East Sale Base.
- 13. At paragraph [191] of the SOC, the Commonwealth alleges that pursuant to section 39(3) of the EP Act (Vic) the Commonwealth is entitled to recover from the Respondents, as a debt due to it, the sum equal to the costs pleaded in paragraph [188] of the SOC, which total some \$56,182,934.96.
- 14. The Commonwealth also seeks a declaration, pursuant to s 39(3) of the EP Act (Vic), that the Commonwealth is entitled to recover from the Respondents its reasonable future costs

incurred in complying with the alleged duty under section 39(1) in relation to the Victorian Bases, which are anticipated to total some \$66,977,830.94.

15. The Victorian Bases are each places acquired by the Commonwealth for public purposes within the meaning of section 52 of the Constitution.
16. Section 52(i) of the Constitution relevantly provides that the Parliament shall, subject to the Constitution, have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect “to all places acquired by the Commonwealth for public purposes”.
17. As a result of section 52(i) of the Constitution, the EP Act (Vic) cannot apply to Commonwealth places, including the Victorian Bases, of its own force.
18. Section 3 of the Application of Laws Act defines the term “**Commonwealth place**” to mean a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth.
19. Section 4(1) of the Application of Laws Act applies, or deems to apply, the provisions of the law of a State as in force at a time, in accordance with their tenor, in relation to each place in that State that is or was Commonwealth place at that time.
20. However, section 4(2)(a) of the Application of Laws Act provides that section 4 does not extend to the provisions of a law of a State to the extent that, if that law applied, or had applied, in or in relation to a Commonwealth place, it would be, or have been, invalid or inoperative in its application in or in relation to that Commonwealth place otherwise than by reason of the operation of section 52 of the Constitution in relation to Commonwealth places.
21. The Respondents contend that the Commonwealth did not owe any duty under section 39(1), in relation to the Victorian Bases, on three grounds.
22. **First**, section 39(1) of the EP Act (Vic) would be invalid in its application to the Commonwealth because it infringes the principle, implied from the text and structure of the Constitution, that a State government may not curtail the Commonwealth’s capacity to function as a government.
23. **Second**, section 39(1) of the EP Act (Vic) would be inconsistent with Commonwealth law and would therefore be invalid to the extent of the inconsistency in accordance with section 109 of the Constitution.

- (a) Section 39(1) is inconsistent with sections 3, 6, 7 and 14(1) of the *National Environment Protection Council Act 1994* (Cth), section 9(1) of the *National Environment Protection Measures (Implementation) Act 1998* (Cth) and the *National Environment Protection (Assessment of Site Contamination) Measure* because the legislative scheme created by those Commonwealth laws would be undermined if the State of Victoria unilaterally imposed obligations on the Commonwealth in respect of the management of contaminated sites owned by the Commonwealth.
 - (b) Section 39(1) is inconsistent with section 8(1)(d) of the *Air Services Act 1995* (Cth), which provides that it is a function of Air Services Australia to carry out activities to protect the environment from the effects associated with the operation of Commonwealth jurisdiction aircraft, because it would be inconsistent for a State law to impose an identical or substantially overlapping duty on the Commonwealth by reason of its ownership, control and/or use of (relevantly) East Sale Base and Williams Base.
24. **Third**, the EP Act (Vic) is inoperative within the geographical areas of the Commonwealth defence bases, by reason of s 52(i) of the Constitution because:
- (a) in the absence of section 52 of the Constitution, section 39 of the EP Act (Vic) would not have applied to the Victorian Bases by reason of the matters set out in paragraphs 22 and/or 23 above; and
 - (b) therefore, section 39 of the EPA (Vic) is not “picked up” by section 4(1) of the Application of Laws Act and applied to the Commonwealth in respect of the Victorian Bases.
25. In the premises, the Commonwealth’s claim of debt under section 39(3) of the EP Act (Vic) is not maintainable in the proceedings.

Date: 2 October 2026



Signed by Aoife Mary Xuereb
Lawyer for the Respondents

SCHEDULE

No. VID552/2026

Federal Court of Australia

District Registry: Victoria

Division: General

Second Respondent

3M AUSTRALIA PTY LTD (ACN 000 100 096)