IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S116 OF 2011**

On appeal from the Full Court of the Federal Court of Australia

BETWEEN: **BETFAIR PTY LIMITED**
ACN 110 084 985
Appellant

AND: **RACING NEW SOUTH WALES**
ABN 86 281 604 417
First Respondent

HARNESS RACING NEW SOUTH WALES
ABN 16 962 976 373
Second Respondent

ATTORNEY-GENERAL (NSW)
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S118 OF 2011**
On appeal from the Full Court of the Federal Court of Australia

BETWEEN: **SPORTSBET PTY LTD**
ACN 088 326 612
Appellant

AND: **NEW SOUTH WALES**
First Respondent

RACING NEW SOUTH WALES
ABN 86 281 604 417
Second Respondent

HARNESS RACING NEW SOUTH WALES
ABN 16 962 976 373
Third Respondent

SOUTH AUSTRALIA
Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING) IN RESPONSE TO QUESTIONS FROM THE COURT

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

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF SUBMISSIONS

2. These submissions are the response of the Attorney-General of the Commonwealth (**Commonwealth**) to the questions contained in the letter from the Senior Registrar dated 8 September 2011.

PART III ARGUMENT

3. The Commonwealth's short answers to the three questions are as follows:

(1) There is no novelty in the application of s 92 to a national market for services. That was the position not only in *Betfair Pty Ltd v Western Australia* (in which *Cole v Whitfield* was applied[1]) but also in *Bank of New South Wales v Commonwealth* (*Bank Nationalisation Case*)[2] (which *Cole v Whitfield* overruled). The concept of "free trade" in s 92 was settled in *Cole v Whitfield* after nearly a century of uncertainty and should not be reopened. The concept as so settled does not depend on the product or geographic dimensions of any particular market.[3] The concept is that of "equality of trade":[4] the relevant equality being substantial equality between interstate trade (trade across state boundaries) and intrastate trade (trade within state boundaries). That concept of "free trade" which s 92 guarantees is the mirror image of the concept of "protectionism" which s 92 prohibits.[5] The "protectionism" prohibited by s 92 is the unequal treatment of

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1 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 481 [118], [121] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

2 (1948) 76 CLR 1.

3 Of course, the identification of the relevant market may inform the application of the concept by assisting to determine whether or not a measure disadvantages interstate trade when compared with intrastate trade.

4 *Cole v Whitfield* (1988) 165 CLR 360 at 391.8 (the Court).

5 *Cole v Whitfield* (1988) 165 CLR 360 at 392.9 (the Court).

interstate trade (trade across state boundaries) and intrastate trade (trade within state boundaries) to the serious competitive disadvantage of interstate trade without an acceptable (competitively neutral) explanation or justification.[6]

(2) There should be no departure from that now settled approach. Irrespective of the geographic dimensions of a particular market, a measure cannot offend s 92 unless the measure involves the unequal treatment of interstate trade (trade across state boundaries) and intrastate trade (trade within state boundaries) to the serious competitive disadvantage of interstate trade when compared with intrastate trade.

(3) Section 92 does not prohibit a measure that imposes a burden on interstate trade merely because the measure operates to the serious competitive disadvantage of an interstate trader in a national market. Whether or not trade is carried on in a national market, the relevant comparison is always between treatment of interstate trade (trade across state boundaries) and intrastate trade (trade within a state). Applied to the present case, leaving the existence or non-existence of an acceptable explanation or justification to one side, the question is not whether the New South Wales measure operates to the serious competitive disadvantage of Betfair Pty Limited (**Betfair**) in the national market for wagering services. The question is whether the measure operates to the serious competitive disadvantage of Betfair in providing wagering services between Tasmania and New South Wales to the advantage of TAB Limited or other wagering service providers providing wagering services within New South Wales.

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6 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 478 [105], [106] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

4. Although some cases refer to s 92 (and associated provisions) creating a "free trade area",[7] s 92 should not be analogised too closely either to the "dormant commerce clause" doctrine in the United States or to doctrines that have emerged in the application of the conglomeration of differently worded and differently focussed provisions of the Treaty on the Functioning of the European Union.[8]

5. Unlike the "dormant commerce clause" doctrine in the United States, s 92 operates not only as a limitation on state legislative and executive power but also as a limitation on national legislative and executive power. Doubtless, a circumstance informing each is that "legislators in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers".[9] But, while the dormant commerce clause doctrine is tailored to addressing that circumstance, in that it limits only State action and in that it allows for Congress to authorise State action which would otherwise be prohibited,[10] s 92 applies to the Commonwealth and the States alike.[11]

6. Unlike the various provisions of the Treaty on the Functioning of the European Union, the subject matter of the freedom in s 92 is expressly limited to trade and commerce "among the States". The same expression, borrowed from the commerce clause in the United States Constitution, is

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7 *Cole v Whitfield* (1988) 165 CLR 360 at 391 (the Court); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 276 (Brennan, Deane and Toohey JJ).

8 See the Hon Susan Kiefel, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (17th Lucinda Lecture on 19 November 2009) at p 4.

The current European provisions are in the Treaty on the Functioning of the European Union, articles 28 and 30 (which prohibit customs duties or charges which have an equivalent effect) and articles 34 and 35 (which prohibit quantitative restrictions on goods or measures with equivalent effect). The provisions were referred to in the Hon Susan Kiefel's Lucinda Lecture as articles 23, 25, 28 and 29 of the Treaty Establishing the European Community. That treaty was renamed as the Treaty on the Functioning of the European Union, and the articles renumbered, by the Treaty of Lisbon, with effect from 1 December 2009.

9 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 459 [34] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

10 *Northeast Bancorp v Board of Governors* (1985) 472 US 159 at 174.

11 *Cole v Whitfield* (1988) 165 CLR 360 at 396-397 (the Court).

used to define the subject matter of Commonwealth legislative power in s 51(i). Broad as that expression is,[12] it requires a distinction to be drawn between trade and commerce that is conducted across State boundaries and trade and commerce that is not conducted across State boundaries (relevantly, trade and commerce that is conducted within a state).[13]

7. Those two features of s 92 – its application to the Commonwealth as well as the States and its express limitation to freedom of trade and commerce conducted across State boundaries – weighed heavily in the interpretation of s 92 that was ultimately adopted in *Cole v Whitfield*. In particular, interpreting s 92 as prohibiting only burdens that discriminate against trade and commerce conducted across State boundaries in a way that operates to the substantial competitive advantage of trade and commerce conducted within State boundaries was identified as reducing the limiting effect of s 92 on the exercise of Commonwealth legislative power "to manageable proportions".[14]

8. Accordingly, whether the impugned measure is Commonwealth or State and whether the relevant trade is in goods or services, the necessary comparison is between (i) the effect of the impugned measure on the commercial provision of goods or services into, or out of,[15] a State, and (ii) the effect of the measure on the commercial provision of goods or services "of the same kind"[16] within a State. Section 92 is engaged only if the difference amounts to

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12 The breadth of the expression as applied to trade in services and intangibles is emphasised in the *Bank Nationalisation Case* (1948) 76 CLR 1 at 380-383.

13 Although the issue does not arise in this case, the need to draw this distinction does not mean that the scope of the power "with respect to" interstate trade and commerce is confined, and excludes notions of economic connection: cf *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 88 (Barwick CJ), 115 (Kitto J); *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 499 (Barwick CJ), 502-503 (Gibbs J), 510-511 (Stephen J), cf 523 (Mason J) and 530-531 (Murphy J, dissenting on this point).

14 *Cole v Whitfield* (1988) 165 CLR 360 at 406-407 (the Court).

15 See *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 204 (the Court): a prohibition or restriction on 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.

16 *Cole v Whitfield* (1988) 165 CLR 360 at 394 (the Court). Goods or services "of the same kind" include substitutable goods or services: see *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 204 (the Court); *Betfair Pty Ltd v Western Australia*(2008) 234 CLR 418 at 481 [121] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

a substantial competitive disadvantage to (i) as compared with (ii). Neither the existence of the "new economy", nor the existence of a national market, relieves a challenger relying on s 92 of the burden of demonstrating that the impugned measure protects intrastate trade against interstate trade.

9. A Commonwealth law enacted under s 51(i) will have some chance of engaging s 92 in that the law will necessarily have some legal or practical nexus with interstate trade.[17] However, a Commonwealth law that operates at a national level without distinction between interstate and intrastate trade and commerce (taking into account its practical as well as its legal operation) ought not engage s 92 at all[18] and therefore ought not require any competitively neutral explanation or justification irrespective of its effect on competition in the national market.

10. For example, the *Interactive Gambling Act 2001* (Cth) regulates the provision of an "interactive gambling service" in Australia (see s 15). An interactive gambling service is a gambling service provided by a form of telecommunication service coming within s 51(v) of the Constitution (s 5(1)(b)).[19] It is conceivable that the regulation may produce competitive effects on different service providers who have chosen to locate in different states and to adopt different business models. However, as the regulation operates throughout Australia on interstate and intrastate communications indifferently, it does not engage s 92 at all. That is so irrespective of where in Australia the service providers might be located and irrespective of the effect of the regulation on the ability of any one or more of those service providers to compete in a national market.

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17 *Cole v Whitfield* (1988) 165 CLR 360 at 407 (the Court).

18 *Cole v Whitfield* (1988) 165 CLR 360 at 399, 407 (the Court).

19 Section 5(1)(b) provides: "For the purposes of this Act, an ***interactive gambling service*** is a gambling service, where ... (b) the service is provided to customers using any of the following: (i) an internet carriage service; (ii) any other listed carriage service; (iii) a broadcasting service; (iv) any other content service;(v) a datacasting service ...".

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