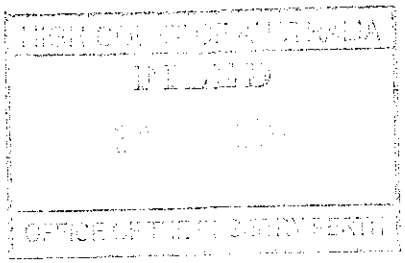
IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No. S116 of 2011**

BETWEEN:

BETFAIR PTY LIMITED
(ACN 110 084 985)
Appellant



RACING NEW SOUTH WALES
(ABN 86 281 604 417)
First Respondent

HARNESS RACING NEW SOUTH WALES
(ABN 16 962 976 353)
Second Respondent

ATTORNEY GENERAL
(NEW SOUTH WALES)
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **No. S118 of 2011**

BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 612)
Appellant

STATE OF NEW SOUTH WALES
First Respondent

RACING NEW SOUTH WALES
(ABN 86 281 604 417)
Second Respondent

HARNESS RACING NEW SOUTH WALES
(ABN 16 962 976 353)
Third Respondent

ATTORNEY-GENERAL FOR SOUTH AUSTRALIA
Fourth Respondent

ATTORNEY GENERAL FOR WESTERN AUSTRALIA SUPPLEMENTARY SUBMISSIONS IN RESPONSE TO LETTER DATED 8 SEPTEMBER 2011

Date of Document: 28 September 2011
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1. These submissions respond to the questions contained in the Court's letter of 8 September 2011. Before turning to the specific questions, we address the "underlying themes" addressed by Betfair's submissions responding to those questions.

The Purpose and Function of Section 92

2. In cases arising under s. 92 of the Constitution, the task which confronts this Court is to construe the unexpressed.[1] The failure of the section to define expressly what interstate trade is to be absolutely free from must leave open room for debate as to the manner in which impermissible burdens on interstate trade are to be identified. There must obviously be more than one possible way of explaining the elliptical and expounding the unexpressed.[2]

3. The difficulties presented by that constructional task are illustrated by the history of the construction of s. 92 by this Court and the Privy Council over the first 87 years of this Court's history. The difficulties with the approaches adopted over that time included the following:

   (a) There was no stable majority view as to the correct approach to the interpretation of s. 92 of the Constitution, which resulted in significant cost and uncertainty;[3]

   (b) Instead of placing interstate trade on an equal footing with intrastate trade, the decisions of the Court effectively placed interstate trade on a privileged or preferred footing;[4] and

   (c) In determining what regulation was compatible with the "absolute freedom" provided for by s. 92, resort was made to "a somewhat ill-defined notion of what is legitimate regulation in an ordered society"[5] in a manner which sometimes invoked a particular political or economic theory.

4. The outcome arrived at by the Court in *Cole v Whitfield*[6] was to identify the thing that interstate trade was to be absolutely free from as protectionist measures; ie measures which burden interstate trade and which also have the effect of conferring protection on intrastate trade of the same kind. While discrimination against interstate trade is an indicator of protectionism, it is not itself the subject of the limitation on government power contained in s. 92 of the Constitution.[7] The outcome in *Cole v Whitfield* addresses the criticisms legitimately levelled at the preceding jurisprudence in relation to s. 92. It provides a test accepted by all members of the Court and has produced a uniformity of approach by members of the Court in following cases.[8] The outcome

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1 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

2 See the lament of Rich J in *James v Cowan* (1930) 43 CLR 386 at 422, quoted in *Cole v Whitfield* (1988) 165 CLR 360 at 392.

3 *Cole v Whitfield* (1988) 165 CLR 360 at 384-5, 400, and see the comprehensive analysis of the pre-*Cole* cases in M Coper *Freedom of Interstate Trade* (Butterworths, 1983).

4 *Cole v Whitfield* (1988) 165 CLR 360 at 402-3.

5 *Cole v Whitfield* (1988) 165 CLR 360 at 403-4.

6 (1988) 165 CLR 360 at 394.

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

8 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Barley Marketing Board v Norman* (1990) 171 CLR 182; *Betfair v Western Australia* (2008) 234 CLR 418. While *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 was decided by a 4:3 majority, the difference between the majority judgments in that

allows for the regulation of trade in a manner which does not give rise to any preference to interstate trade, while enabling the Court to respond to laws that would distort a national market by preferring interstate trade over trade within a State.[9]

5. Having reached that outcome the Court should not countenance the Appellants' invitation to depart from the settled understanding that protectionist measures are the subject of the limitation on government power contained in s. 92 of the Constitution. To depart from that settled understanding would invite a return to the uncertainty and difficulty which attended the pre-*Cole* jurisprudence.

6. In *Betfair v Western Australia*[10] this Court recognised, in relation to the task of construing s.92, the continued force of the sentiment expressed by O'Connor J that:[11]

> "[I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve."

7. Consistently with that approach, s. 92 should not be read as containing an implied requirement that competition in national markets cannot be impeded except by measures reasonably necessary for some permissible purpose. In Australia's current circumstances, governments in all jurisdictions have recognised the social and economic benefits which flow from free competition in Australian markets. Reflecting that policy decision, Australian governments have enacted laws prohibiting restrictive trade practices and have agreed upon the National Competition Policy. However, a commitment to market forces will not necessarily serve the interests of the Australian community in all the circumstances which it may face during its history. For example, the exigencies of the Second World War saw a need for economic regulation which must have had a negative impact on the state of competition in a variety of markets. That regulation was principally effected in the exercise of the defence power, which operates subject to s. 92.[12] Further, the economic circumstances facing a particular market at a particular time may make the regulation of transactions in that market of benefit to Australian consumers and producers, for example by marketing schemes which certainly have an impact on competition in the markets in which they operate.[13] The Australian community may also benefit from the conferral of a monopoly on a company undertaking capital intensive infrastructure projects which create both economic and social benefits. Examples of that approach may be found in the manner in which telecommunications markets were established[14]. Section 92 must accommodate not only internet commerce but the variety of challenges which the

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case flowed more from disagreement about the perspective from which the particular legislative provisions should be viewed than from any disagreement about principle: see *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 468 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

9 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Betfair v Western Australia* (2008) 234 CLR 418.

10 (2008) 234 CLR 418 at 453 [19].

11 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Assn* (1908) 6 CLR 309 at 367–368. See also, respecting s 92 itself, the remarks of Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 615.

12 *Gratwick v Johnson* (1945) 70 CLR 1; *Cole v Whitfield* (1988) 165 CLR 360 at 407.

13 As to the treatment of marketing schemes under s. 92 see *Barley Marketing Board v Norman* (1990) 171 CLR 182 at 198-201.

14 See the history of the provision of telecommunications services averted to in *Telstra Corp v The Commonwealth* (2008) 234 CLR 210 at 220-223, [9]-[19].

Australian community may face through the life of the Constitution, not all of which will be best answered by a resort to the forces of a free market. As this Court accepted in *Betfair v Western Australia*:[15]

> "... s 92 was not designed to create 'a *laissez-faire* economy in Australia'; rather, it had a more limited operation, to prevent the use of State boundaries as trade borders or barriers for the protection of intrastate players in a market from competition from interstate players in that market."

8. Section 92 must also accommodate the Commonwealth Parliament's legislative power to make laws with respect to interstate trade under s. 51(i) of the Constitution. A law made under s. 51(i) may single out interstate trade as the subject of its regulation, and in that operation be characterised as a law with respect to interstate trade.[16] If the effect of such a law is to increase business costs or restrict the kind of trade that can be undertaken, the law may subject interstate trade to a competitive or market disadvantage as compared to intrastate trade which is not subject to that regulation. However, such laws of the Commonwealth will rarely be protectionist in character. If the question raised by s. 92 is not whether the law is protectionist, but is rather whether the law discriminates against interstate trade in a manner not reasonably necessary for some permissible purpose, then the legislative power conferred by s. 51(i) of the Constitution will be of limited scope. Such an approach to s. 92 would not take sufficient account of s. 51(i) of the Constitution.

9. Cases in this Court since *Cole v Whitfield* have consistently adopted the approach of considering whether the law is protectionist, rather than simply asking whether the law impedes competition in a market. In particular, in *Barley Marketing Board v Norman*[17] the impugned marketing scheme, by vesting all barley grown in NSW in a marketing Board, had a negative effect on competition in the barley market. Nevertheless, it survived challenge because it did not impose a discriminatory burden of a protectionist kind. In *Betfair v Western Australia*[18] a conclusion critical to the invalidity of the impugned laws was that they imposed a discriminatory burden of a protectionist kind on interstate trade. The Court should not now depart from the approach which recognises protectionism as the subject of the limitation on governmental power contained in s. 92 of the Constitution.

Interfering with trade and commerce among the States

10. The Appellants' submissions propose a new test for invalidity under s. 92 which asks more questions than it answers. The Appellants identify the purpose of s. 92 as being to "ensure that national markets are created and fostered with commerce flowing through the Commonwealth, without competitive restriction or interference of the relevant kind." This formulation is inconsistent with the text of s. 92, which refers to trade "among the States" rather then "through the Commonwealth". It is not a formulation which finds reflection in the history of the development of s. 92 discussed in *Cole v*

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[15] (2008) 234 CLR 418 at 460 [36].
[16] See *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 413, [35]-[36].
[17] (1990) 171 CLR 182 esp at 201-5.
[18] (2008) 234 CLR 418 at 481-2, [118] and [121]-[122].

Whitfield and *Betfair v Western Australia*. It also does not itself advance the analysis, since it begs the question of "what is a competitive interference of the relevant kind?"

11. The Appellants offer two ways, said not to be mutually exclusive, in which the identification of a "competitive interference of the relevant kind" may be approached.

12. The first asks whether an impugned measure restricts competition in a market "in pursuit of a narrow economic interest". The test offers little guidance as to what economic interests are to be classified as narrow, and what economic interests are legitimate for legislation to pursue.

13. The Appellants' second approach asks whether the measure can be justified as reasonably necessary for the achievement of a legitimate legislative object. That proposed test departs from the proportionality approach taken in previous decisions of this Court in several respects.

14. The proportionality approach adopted by this Court to date applies only once it has been shown that a law, which on its face is not protectionist, has the incidental effect of discriminating against interstate trade in a manner which confers a competitive or market advantage on intrastate trade. The incidental effect combined with the disproportionate nature of the law may show that the true purpose of the law is not to attain the non-protectionist object but to impose the impermissible burden on interstate trade.[19] The legitimate object is simply one which is non-protectionist. The approach requires the Court to ascertain the true purpose or object of the law, and does not involve the Court sitting in judgment as to the merits of a law which does not have a protectionist character.

15. The Appellants' proposed test treats proportionality as a criterion of validity and not as a mechanism for determining whether a law is protectionist. It requires the Court, in all cases where a law has some effect on competition in a market, to consider whether a legislative object is "legitimate" and to assess the means by which Parliament has chosen to achieve that object. That test, in effect, harks back to the approach taken under the individual rights theory of s. 92, where burdens on interstate trade could be justified if amounting to reasonable regulation.[20] It places this Court in the position of determining questions of policy which are not apt for resolution by curial means in which, subject to any exception for "constitutional facts", matters going to the legitimacy of the object and the suitability of the law to achieve that object must be established by admissible evidence. Further, the Appellants' approach moves the court from the judicial task of determining the character of law to the essentially legislative task of determining the merits of the legislative object pursued by an impugned law and the method chosen to achieve that objective.

Geographical Descriptions

16. The advent of the "new economy" of the internet age has not altered the terms of s. 92 of the Constitution, which refer to trade and commerce among the States, whether by

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[19] See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-2.; *Betfair v Western Australia* (2008) 234 CLR 418 at 477 [102].

[20] See *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 281-4 per Barwick CJ, 300 per Gibbs and Wilson JJ, 303-4 , 307 per Stephen and Mason JJ and 324 per Aickin J.

means of internal carriage or ocean navigation. For the sake of brevity, in these submissions "interstate trade" has been used as shorthand for that longer expression. Section 92 of the Constitution distinguishes between interstate trade and other kinds of trade, protecting only the former kind.

17. Section 92 of the Constitution can only operate in relation to a market, or potential market, the boundaries of which extend beyond one State. Where a market operates wholly within the borders of one State there is no interstate trade. Within a market whose geographic boundaries extend beyond one State there may be some transactions which are classified as interstate trade and some which are not.

18. Even though a market, or commercial activity within that market, may not be organised along State borders, the constitutional concept of interstate trade remains relevant. The distinction between interstate and other trade is a distinction adopted by the Constitution and, as such, it must be observed however much interdependence may exist between interstate and other trade. No commingling of interstate and other trade can enlarge the subject matter of Commonwealth power under s. 51(i) of the Constitution or expand or contract the operation of s. 92 of the Constitution. This Court has recognised that it is entrusted with the preservation of this constitutional distinction, and it both fails in its task and exceeds its authority if it discards this distinction.[21]

19. The internet increases the opportunity for persons in Australia to engage in interstate trade, by entering into transactions with, or receiving services from, persons located in another State. However, the problem of applying provisions of the Constitution referring to interstate trade to commercial activity that is not organised by reference to State lines is not new. It remains possible to characterise internet transactions as constituting either interstate trade or other trade, as the decision in *Betfair v Western Australia* illustrates.

Question 1: How does the concept of free trade in s 92 apply in relation to a national market for services?

20. Section 92 applies to trade in services in the same manner in which it applies to trade in goods. Namely, an impugned measure which discriminates against interstate trade in services in a protectionist sense will infringe s 92.[22]

21. That the present case concerns trade in services, rather than trade in goods, does not necessitate a different approach to s. 92 of the Constitution. The concept of protectionism identified by the Court in *Cole v Whitfield*, and developed in subsequent cases, in particular *Betfair v Western Australia*,[23] is as applicable to trade in services as it is to trade in goods, as demonstrated by *Betfair v Western Australia* itself. That the

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[21] *Airlines of NSW Pty Ltd v NSW [No 2]* (1965) 113 CLR 54 at 77-9 per Barwick CJ, 115 per Kitto J, 127 per Taylor J, 149-50 per Windeyer J; *Attorney General of the State of Western Australia (ex rel Ansett Transport Industries (Operations) Pty Ltd) v Australian National Airlines Commission* (1976) 138 CLR 492 at 502-3 per Gibbs J, 509-10 per Stephen J (Barwick CJ concurring as to this point); *R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 628-9 per Latham CJ, 670-71, 672 per Dixon J, 677 per Evatt and McTiernan JJ; *Wragg v NSW* (1953) 88 CLR 353 at 385-6 per Dixon CJ; McTiernan, Williams, Fullagar and Kitto JJ concurring.

[22] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 452-453 [14]-[18] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan, and Kiefel JJ (***Betfair v Western Australia***).

[23] See, in particular, *Betfair v Western Australia*, 452 [14], 453 [18].

particular trade occurs within a national market does not necessitate a different approach to s 92.

22. The way in which the concept of "market" is to be used and applied in the context of s 92 differs from, and is more limited than, the manner in which the concept is used and applied in the context of Part IV of the *Competition and Consumer Act 2010* (Cth).

23. A "market" is an instrumental concept, defined for the purpose of assisting in the analysis of a legal or economic problem. The manner in which a market is defined depends on the purposes for which the concept is employed.[24] In antitrust law, markets are defined to assist in the analysis of market power and the effects of conduct on market power.

24. In the antitrust context the market is defined for the purposes of considering whether there is a substantial lessening of competition[25] or whether a corporation has a substantial degree of power in a market.[26] In undertaking the analysis for that purpose, the focus is on questions of substitutability in order to determine whether, if a firm were "to give less and charge more" would there be, to put the matter colloquially, much of a reaction.[27]

25. The concept of "market" as developed in anti-trust law is not directly applicable to s 92, as the anti-trust concept has been developed for a different purpose. Section 92 is not concerned with a substantial lessening of competition in a market per se, or avoiding the accumulation or misuse of market power. The decision in *Barley Marketing Board (NSW) v Norman*[28] shows that the creation of a statutory monopoly for the acquisition and sale of primary products produced in a State is not incompatible with s 92. Section 92 is concerned with freedom of *trade*, not freedom of markets. A market is merely the space or environment within which trade occurs.

26. In *Betfair v Western Australia* the concept of protectionism was identified as being concerned with the preclusion of competition, being an activity which occurs within a market.[29] However, while there have been significant developments in the legal and economic environment since *Cole v Whitfield*,[30] in order to infringe s 92, the supposed preclusion of competition must still be concerned with interstate trade. Section 92 is not concerned with restrictions or burdens which affect only trade within State borders.[31] The mere fact that an impugned measure may have some competitive effect on some

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[24] See the discussion in M Brunt, 'Market definition issues in Australian and New Zealand Trade Practices litigation' (1990) 18 *Australian Business Law Review* 86, 109-110.

[25] *Competition and Consumer Act 2010* (Cth), ss 45-45C.

[26] *Competition and Consumer Act 2010* (Cth), s 46. So, for example, in *Queensland Wire Industries v Broken Hill Pty Co Ltd* (1986) 167 CLR 177, at 187 Mason CJ and Wilson J noted that in identifying the relevant market "the object is to discover the degree of the Defendant's market power".

[27] See the classic definition of the concept of "market" in the *Trade Practices Act 1974* (Cth) in *Re QCMA* (1976) 25 FLR 169 at 190, approved in cases including *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, 422-423, [133] per Gleeson CJ and Callinan J, 427 [155] per Gaudron, Gummow and Hayne JJ and 454-455, [248] per McHugh J.

[28] (1990) 171 CLR 182, 198-205.

[29] *Betfair v Western Australia*, 452 [17].

[30] See *Betfair v Western Australia*, 452-454 [12]-[20].

[31] See *Cole v Whitfield* (1988) 165 CLR 360, 390-391, 392-393.

trade within a market does not mean that the measure infringes s 92. The competitive effect must discriminate against interstate trade and be protectionist in character.

Question 2: In the past, protectionist measures found to offend against s 92 have discriminated against interstate trade and protected intrastate trade, that is, local trade carried on within state borders. How does the concept of protectionism apply to trade carried on in a national market without reference to state borders?

27. As submitted above, s. 92 does not establish a *laissez faire* economy in Australia and the existence of a national market does not significantly affect the operation of s 92. Section 92 is concerned only with the effect of an impugned measure on trade which crosses State borders, and only to the extent that the effect of the impugned measure is protectionist. The issue is whether the impugned law operates to impose a protectionist discriminatory burden on transactions in the national market which constitute interstate trade, so as to confer a competitive or market advantage on other trade occurring within that market.

28. For example, in *Castlemaine Tooheys*, the Bond Brewing Companies and C.U.B. were national brewing groups.[32] The marketing of some brands of beer, most notably those of the Bond Brewing Companies and C.U.B., was national,[33] indicating that there was a national market for the sale of packaged beer. C.U.B. produced beer in Victoria,[34] while the Bond Brewing Companies produced beer in Queensland, Western Australia, and New South Wales.[35] The 'local' brewing companies in South Australia included The South Australian Brewery Co Ltd (S.A.B.) and Coopers and Sons Ltd (Coopers).[36] However even their produce had become available in States other than South Australia by 1984.[37]

29. Therefore, while the markets for packaged beer had historically been State based,[38] by the time the dispute in *Castlemaine Tooheys* arose the market had become, in effect, national, at least from the perspective of the dominant participants on the supply side of the market.[39] Within the geographic limits of South Australia, there was some trade in the market for packaged beer which was 'local' or 'intrastate', being the trade between, on the supply side, S.A.B. or Coopers, and, on the demand side, residents of South Australia. There was also some trade in the market for packaged beer which was 'interstate', in the sense that it was between or among the States, which relevantly included trade between, on the supply side, C.U.B. or the Bond Brewing Companies, and, on the demand side, residents of South Australia. However, within the geographic limits of the broader national market for packaged beer, some of the trade in which C.U.B. and the Bond Brewing Companies were engaged was 'local' (or 'intrastate'), and some of the trade in which S.A.B. and Coopers were involved was 'interstate'. Each of

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[32] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 437 at point 4 of the case stated.
[33] Ibid, 437, at points 5-6 of the case stated.
[34] Ibid, 438, at point 8 of the case stated.
[35] Ibid, 437, at points 1 and 2 of the case stated. The three companies in the Bond Brewing Group were Tooheys Ltd (NSW), Castlemaine Ltd (Queensland), and the Swan Brewery Co Ltd (WA).
[36] Ibid, 437 & 438, at points 1 and 6 of the case stated.
[37] Ibid, 438, at point 6 of the case stated.
[38] Ibid, 437, at point 1 of the case stated.
[39] See ibid, 438, at point 6 of the case stated.

the Bond Brewing Companies and C.U.B. were engaged in 'local' trade within their 'home' States,[40] and each of S.A.B. and Coopers traded with residents of States other than South Australia.

30. This examination of the agreed facts in *Castlemaine Tooheys* demonstrates the limited use of the concept of a 'market' for the purposes of s 92, as it is possible to identify at least two identified markets in that case, being the 'local' South Australian retail market and the national wholesale market. It may also be possible to identify other markets, such as the market for packaged beer brewed by S.A.B. or Coopers, the geographic limits of which appear to have been more than local but less than national.

31. However, from the perspective of the Bond Brewing Companies, *Castlemaine Tooheys* is an example of the application of the concept of protectionism to trade carried on in a national market without reference to State borders. Section 92 was infringed because the effect of the impugned measures was to protect the intrastate trade occurring in South Australia between producers in South Australia and their South Australian customers from the competition presented by the interstate trade between the Bond Brewing Companies and their South Australian customers.[41]

32. In the present cases, evidence that the impugned provisions created a differential burden on the prices offered to a purchaser on the demand side of the wagering market in favour of trade with local wagering operators might be suggestive of a protectionist effect. However, as outlined in Western Australia's primary written submissions, there is no such evidence in the *Betfair* case.[42] As those submissions indicate, if the whole of the burden of the NSW fee were to be passed onto customers then the effect on the price (being the return to the punter per dollar wagered if the wager is successful, taking into account commissions and other fees charged by the wagering operator) being offered to punters by the three types of wagering operation would be as follows:

    (a) the price offered to punters by a totalisator reduces by slightly more than 1.5%

    (b) the price offered to punters by a bookmaker reduces by exactly 1.5%; and

    (c) the greatest reduction in the price offered to punters by a betting exchange would be slightly less than 1.5%.

33. That analysis suggests that a fee imposed on turnover will have a neutral impact on the prices which may be offered to customers of the different business models[43]. It shows that Betfair's assertion that it receives a "six times greater impost" which is protectionist and discriminatory cannot be accepted at face value in the absence of proper economic analysis of the competitive effects of the impugned fee. Such an analysis was not undertaken at trial in the present cases.

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[40] Ibid, 437, at point 1 of the case stated.

[41] Ibid, 476 (Mason CJ, Brennan, Deane, Dawson & Toohey JJ).

[42] See Western Australia's written submissions, [30]-[51].

[43] Note that the criticism of Western Australia's approach made at [78] of Betfair's Reply is misplaced. Western Australia's analysis involved a mathematical calculation of the effect on the price offered to punters if the whole of the burden of the NSW fee were passed onto the customers of a totalisator, bookmaker and betting exchange. It is not a model of the effect of such a change in price on the behaviour of customers. Betfair's criticisms would be valid only in the latter case.

34. For the purposes of s 92, whether or not a burden precludes competition requires analysis of the relative competitive effect on local and interstate trade on both the demand and supply side of the relevant market.[44] Ultimately, since the benefit supposed to be derived from competition accrues to consumers (rather than producers),[45] the effect on the demand side may be more important in characterising whether a measure is protectionist.

Question 3: In the context of trade, carried on in a national market, does "absolutely free" in section 92 prohibit any measure creating a burden on interstate trade, which amounts to a competitive disadvantage (if such is demonstrated) on an interstate trader by comparison with other traders irrespective of whether those other traders can be characterised as trading intrastate or interstate?

35. It is submitted that the answer to this question is "no". As submitted above, s 92 is concerned with burdens on interstate trade which create or confer a competitive or market advantage on intrastate trade which is of a protectionist character. A State law which confers a competitive or market advantage on persons trading from another State will not ordinarily bear that character.

36. Section 92 is not concerned with identifying whether traders are engaging in intrastate or interstate trade, or whether an impugned measure favours trade with a particular trader or traders (whether characterised as interstate or intrastate). As discussed above, in a national market, it may be common for an individual trader to be described as either intrastate or interstate, depending on the perspective from which the question is asked.

37. Protectionism may be established where the identified competitive disadvantage is suffered by only a single interstate trader.[46] However, the question is not whether the burden protects local traders, but rather whether it protects local trade. Section 92 will only preclude a burden which imposes a competitive disadvantage on interstate trade, relative to local or intrastate trade, assessed from both the supply and demand side of participants in the market.

Dated: 28 September 2011

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[44] *Betfair v Western Australia*, 456 [26], 461 [39].
[45] Reflected in the balancing of benefits and costs to the community as a whole (rather than to producers) in the National Competition Policy: see *Betfair v Western Australia*, 452-453 [16].
[46] See, e.g., *Betfair v Western Australia*, 481 [121].