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

INTERVENER'S SUBMISSIONS
ATTORNEY GENERAL FOR WESTERN AUSTRALIA

Date of Document: 13 May 2011
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PART I: PUBLICATION OF SUBMISSIONS

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act 1903* (Cth) in support of the respondents to both proceedings.

PART III: WHY LEAVE SHOULD BE GRANTED

3. Not applicable.

PART IV: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

10 4. The Attorney General accepts that the appendix to Betfair's submissions contains the constitutional provisions, statutes and regulations relevant to the Betfair Appeal. The Attorney General further accepts that the annexure to Sportsbet's submissions, together with Part V of the State of New South Wales' submissions, contain the constitutional provisions, statutes and regulations relevant to the Sportsbet Appeal.

PART V: INTERVENER'S ARGUMENT

Western Australia's Submissions

5. Western Australia adopts the written submissions of the Attorney General for New South Wales in the Betfair Appeal, and of the States of New South Wales and South Australia in the Sportsbet Appeal, and makes the following supplementary submissions.

20 6. Both Betfair and Sportsbet challenge the validity of conditions of approvals to use race fields information granted pursuant to s. 33A(2)(a) of the *Racing Administration Act 1998* (NSW) and regulation 16 of the *Racing Administration Regulation 2005* (NSW) by the racing control bodies, which require holders of the approvals to pay a fee of 1.5% of wagering, or back bet, turnover to the relevant racing control body (the **impugned fee conditions**).[1]

7. Sportsbet also challenges the validity of the legislative provisions which empowered the racing control bodies to impose the impugned fee conditions (s. 33A of the *Racing Administration Act 1998* (NSW) and Part 3 of the *Racing Administration Regulation 2005* (NSW)) and which restricted the use of NSW race field information (s. 33 of the
30 *Racing Administration Act 1998* (NSW)) (together the **NSW race fields legislation**).[2]

8. Western Australia submits that:

   (a) The setting of the fee as a percentage of the back bet turnover of all wagering operators above a certain threshold has not been shown to involve discrimination

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[1] See Betfair's Notice of Appeal dated 24 March 2011 (**Betfair's Notice of Appeal**), grounds 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and the orders sought therein, and Sportsbet's Notice of Appeal dated 24 March 2011 (**Sportsbet's Notice of Appeal**), grounds 4, 5 and 6, and the orders sought numbered 2(c), (d), and (e).

[2] Sportsbet's Notice of Appeal, grounds 1, 2 and 3.

against interstate trade in a protectionist sense where it has not been established that the uniform fee precludes competition by conferring on local traders any competitive or market advantage;[3]

(b) It is open to a State Parliament, or administrative decision maker, to relieve local traders from a burden which discriminates against local traders while simultaneously imposing a uniform non-protectionist burden equally upon interstate and local traders;[4]

(c) The subjective intention of an administrative decision maker would be relevant in the present cases only in determining whether, when making an impugned administrative decision, the decision maker was acting within its statutory power;[5] and

(d) The question of whether the NSW race fields legislation and impugned fee conditions are reasonably necessary to achieve a non-protectionist purpose does not arise in the present cases, as it has not been established that the legislation or conditions impose a discriminatory burden on interstate trade so as to confer a competitive or market advantage on local trade.[6]

Discrimination in a protectionist sense

9. The setting of the fee as a percentage of back bet turnover does not discriminate against interstate trade in any protectionist sense. The fee is imposed without differentiation on the back bet turnover of all wagering operators trading above thresholds which are applied uniformly to all wagering operators. As such, the impugned fee conditions do not impose on interstate traders, including Betfair, a burden which, either in form or in substance, NSW wagering operators do not bear.

Need to show competitive or market advantage/disadvantage

10. In those circumstances, in order to show that, in their practical effect, the impugned fee conditions discriminate against interstate trade in a protectionist sense, Betfair must establish that the conditions subject Betfair to some competitive or market disadvantage, so as to confer a corresponding advantage on NSW wagering operators. That onus is not discharged by merely showing that the fee, calculated by reference to one element of Betfair's revenue (back bet turnover), represents a greater proportion of another element of Betfair's revenue (base commission) than may be the case for other wagering operators said by Betfair to be in an analogous position.

11. In *Betfair v Western Australia*, the plurality identified "*the elimination of protectionism*" as the object of s. 92.[7] The Court has consistently identified the protectionist character of a discriminatory burden as a necessary element in finding that the burden infringes

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3 See paragraphs 9 – 51 below.
4 See paragraphs 52 – 54 below.
5 See paragraphs 56 – 62 below.
6 See paragraphs 63 – 67 below.
7 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 452 [15] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan, and Kiefel JJ) (***Betfair v Western Australia***).

s. 92.[8] The plurality in *Castlemaine Tooheys* considered that *Cole v Whitfield* established that a law which imposes a burden on interstate trade but does not give the domestic product or intrastate trade in that product a competitive or market advantage does not discriminate against interstate trade on protectionist grounds.[9]

12. Unless it is established that the impugned fee conditions were not an even-handed regulation of interstate and local trade, which take effect without regard to considerations of whether the trade affected is interstate or local, then the impugned fee conditions have not been shown to be discriminatory in any protectionist sense.[10]

Relevant Market Features

13. In considering the effect of the NSW race field legislation and impugned fee conditions on competition it is important to note three features of the market in which the fees apply.

Competitors Adopt Different Business Models

14. The first feature is that the participants in the supply side of the market adopt different business models to compete with each other in the market. Those business models involve different revenue structures:

(a) A bookmaker engages in fixed price betting with punters. A bookmaker receives back bets, but does not receive lay bets or commission other than funds retained from back bets and not paid out as winnings. A bookmaker's outgoings comprise payments of winnings and other operating costs. The difference between the bets received and winnings paid is not controlled by the bookmaker, except to the extent that the bookmaker may vary the odds to attempt to achieve a particular overround.[11]

(b) A totalisator, in effect, receives back bets, but does not receive lay bets or commission other than funds retained from bets and not paid out as winnings. Its outgoings comprise payments of winnings and other operating costs. The totalisator's pooling arrangements mean that the difference between the bets received and winnings paid is controlled by the operator.[12]

(c) Betfair receives back bets and lay bets from punters. Betfair's outgoings comprise payments of winnings and other operating costs. It withholds commission from the net winnings of individual punters in each race. Betfair may also derive revenue from other sources, such as its "premium charge commission".[13] Betfair's "bet-matching" model means that receipts of bets will always equal payment of

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8 See *Cole v Whitfield* (1988) 165 CLR 360, 407-408; *Bath v Alston Holdings Proprietary Limited* (1988) 165 CLR 411, 425-426 (Mason CJ, Brennan, Deane, and Gaudron JJ) (***Bath v Alston***); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 467, 471 (Mason CJ, Brennan, Deane, Dawson, and Toohey JJ) (***Castlemaine Tooheys***).

9 *Castlemaine Tooheys*, 467 (Mason CJ, Brennan, Deane, Dawson & Toohey JJ).

10 See *Castlemaine Tooheys* 471-472 (Mason CJ, Brennan, Deane, Dawson, and Toohey JJ).

11 See *Betfair Pty Ltd v Racing New South Wales* [2010] FCA 603; (2010) 268 ALR 723, [17]-[26] (Perram J) (the ***Betfair Trial Decision***). See, also, *Betfair v Western Australia*, [51]-[52].

12 See *Betfair Trial Decision*, [30]-[34], [46] (Perram J); *Betfair v Western Australia*, [50].

13 See *Betfair Trial Decision*, [275].

winnings. Like a totalisator operator, Betfair has no interest in, and does not take the risk of, the outcome of the event.[14]

15. The concept of "margin" sought to be employed by Betfair means different things for different business models. For totalisator operators and bookmakers it means the difference between bets received and winnings paid, which is a difference that does not exist under Betfair's business model. Betfair contends that for a betting exchange it means the commission charged on net winnings, a revenue component which totalisator operators and bookmakers do not have.

16. Bookmakers and totalisators operate both in NSW and in other Australian States and territories.[15] Betfair's business model is currently unique within Australia.

17. Where different business models are adopted by competitors in a market there is a potential for a uniform tax or charge to have different effects on the businesses of those competitors. So a uniform payroll tax will have a greater impact on a business which operates through employees as compared to a business which engages independent contractors, in the sense that the business engaging more employees will pay a greater amount of the tax and the amount paid will reflect a greater proportion of the revenue, profit or "margin" of the business. Any tax or charge calculated by reference to revenue will represent a greater proportion of the profit or "margin" of a low profit or low margin operator than is the case for a high profit or high margin operator. A high profit or high margin operator may have a greater capacity to absorb the cost of new fiscal or regulatory burdens, rather than pass the cost on to their customers, than a low profit or low margin operator. Taxes and charges of this uniform character do not contravene s. 92 of the Constitution simply because there is one interstate operator which is a low margin operator with many employees. Discriminatory protectionism is not established merely by pointing to that different effect.

18. Where there are high and low "margin" operators in the single market place then any uniform tax which is imposed other than on margin will reflect a higher proportion of the low margin operator's margin than the high margin operator's margin. That is simply a reflection of the different margins. The same may be said of profits, and there is no reason why the focus should be on "margin" to the exclusion of profits.

Interdependence of wagering and racing industries

19. The second important feature of the wagering market is that the market depends on conduct by the racing industry of the racing events on which wagers are placed. This is an example of what some economists refer to as a "two-sided" market.[16] The number and standard of races affects the amount of wagering which occurs on the wagering market. Equally, the quality of the racing or sporting event may be affected by the level and kind of wagering activity which occurs on that racing or sporting event.

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[14] See *Betfair Trial Decision*, [39]-[40], [44]-[46] (Perram J); *Betfair v Western Australia*, [57].

[15] See, e.g., *Betfair Trial Decision*, [27]-[28], [35], [285]-[286], [310]-[311]; *Betfair v Western Australia*, [53]-[56], [75].

[16] For a discussion of two-sided markets in economics see DS Evans *The Anti-trust Economics of Two-sided Markets* Related Publication No. 02-13, AEI-Brookings Joint Centre for Regulatory Studies, Washington DC (2002); and J Wright *One-sided Logic in Two Sided Markets* Review of Network Economics, Vol 3 March 2004, pp 44-64.

20. Interdependent, or two-sided, markets may have an imbalance between the costs incurred and revenue generated by each side of the market. Relevantly to the present cases, the racing industry generates the larger costs of providing the spectacle, involving provision of race tracks, prize money and other payments to participants. The obvious sources of revenue generated from these non-wagering activities will consist of entry fees, sales at the racing track, advertising and media access fees. However, the bulk of the revenue is generated by wagering operators. Transfer of revenue from the wagering industry to the racing industry improves the quality of the racing events, which in turn promotes wagering on those events. That revenue transfer operates for the benefit of both interdependent industries.

21. Particular problems arise where, as in the present cases, the two kinds of services are provided by different groups of enterprises, so that a co-ordinating mechanism is required to regulate the interdependencies between the two sides of the market.[17] So, consistently with s. 92, it is open to a Parliament to seek to secure the more efficient operation of the markets by providing for the transfer of revenue from the wagering industry, so as to promote the quality of the racing events which in turn promotes wagering on those events. This has been achieved by the imposition of taxes and charges on participants in the wagering market, the revenue from which is distributed to the racing industry.

Past preferential treatment of interstate traders

22. The third feature of the wagering market is that, by virtue of the "Gentlemen's Agreement", interstate traders were given preferential treatment by the laws of each State, which did not require interstate traders accepting bets on races conducted in the State to make any payment to or for the benefit of local racing organisers.[18]

23. Section 92 does not prevent a State from adjusting its local laws to remove an advantage conferred on interstate traders over local traders by the law of the enacting State. Such an adjustment, which merely places all participants in the market in an equal position, is not protectionist. Nor does the removal of discrimination in favour of an interstate trader which is conferred by the local law of the enacting State amount to discrimination against the interstate trader if what is left is a burden imposed equally on all participants in the market. Section 92 does not entrench a preference or advantage which may be conferred on an interstate trader by State law.[19]

24. For example, prior to *Cole v Whitfield*, legislation imposing a licence fee, other than a limited road use charge, on transport vehicles could have exempted interstate traders to avoid the perceived operation of s. 92 of the Constitution.[20] That would have given the interstate trader a competitive advantage.[21] A law enacted after 1988 which imposed a

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[17] Credit cards provide an example of a two-sided market in which cards such as American Express and Diners co-ordinate both sides within a single organisation, whereas cards such as Visa and Mastercard co-ordinate the two sides across multiple organisations: see the discussion in DS Evans and R Schmalensee, *Paying with Plastic, the Digital Revolution in Buying and Borrowing*, The MIT Press, 1999, chapter 7: "Chickens, Eggs, and Other Economic Conundrums".

[18] See *Betfair Trial Decision*, [316]; *Betfair v Western Australia*, 470 [69]; and Betfair's Submissions, [27].

[19] See *Cole v Whitfield*, 402-403; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 201.

[20] See M Coper, *Freedom of Interstate Trade under the Australia Constitution* (1983), 157-169.

[21] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 618 (Deane J); *Cole v Whitfield*, 402-403.

non-discriminatory fee on all transport operators might take away the advantage which the interstate trader previously enjoyed under the law of the enacting State. However, such a fee would be neither discriminatory nor protectionist.[22]

Effect of impugned fee conditions on profit and "margin"

25. State race-fields legislation provides a mechanism by which revenue may be transferred from the wagering industry to the racing industry. The introduction of the obligation to pay the charge or fee on all wagering operators who accept bets on races that are conducted in the enacting State imposes a new cost on the interstate wagering operator. However, the charge is not discriminatory for that reason, as the cost is also imposed on, and in effect had previously been imposed only on, local wagering operators.

26. The NSW race fields legislation and impugned fee conditions are laws and regulations of the kind described above. They require, for the first time in NSW, that wagering operators not licensed in NSW who accept wagers on NSW races make a payment which will be distributed to participants in the local racing industry. The obligation to make that payment had previously been borne only by local wagering operators in NSW.[23]

27. The imposition of this cost, which is a new cost for interstate wagering operators, may have business consequences for an interstate operator. It will be necessary for the interstate operator to either absorb the new cost or pass it on to its customers.[24] That effect on the business of the interstate trader is simply a consequence of the loss of the privileged position which the law of the enacting State previously accorded them. The fact that the interstate trader is unable to continue to operate its business in the same manner, including in relation to the price which it offers its customers, after the enactment of the State law is not sufficient to lead to a conclusion that the State law is discriminatory in any protectionist sense.

28. In that context it is an error to compare the proportion of different wagering operators' "margin" which the new fee represents. This can be illustrated by taking a simplified hypothetical example by reference to the licence fees noted above:[25]

    (a) Suppose that a State law imposed a licence fee on local operators of $500 per 10,000 km travelled, but exempted interstate transport operators.

    (b) Suppose that a local and an interstate trader each have fuel costs of $1,000 per 10,000 km travelled, and vehicle costs of $1,000 per 10,000 km travelled.

    (c) Each operator aims to make a $300 profit per 10,000 km travelled, so that the local operator charges its customers $2,800 per 10,000 km travelled and the interstate operator charges its customers $2,300 per 10,000 km travelled. This might be described as giving the local and interstate operators a "margin" of $800 and $300 respectively (if "margin" is described as revenue less fuel and vehicle costs).

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[22] See *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331; [2005] NSWCA 273.
[23] See *Sportsbet Pty Trial Decision*, [30]-[31] (Perram J).
[24] See Betfair's Submissions, [50].
[25] See paragraph 24.

(d) Suppose that the State law imposing the licence fee is amended so that the charge of $500 per 10,000 km is levied on all operators in the State.

(e) The interstate trader might complain that the $500 fee represents 167% of its $300 "margin" as compared to 62.5% of the $800 "margin" of the local operator. The interstate trader might also complain that the imposition of the $500 fee makes it impossible for it to maintain its price of $2,300 per 10,000 km, so that it will be required to increase its prices at the cost of the competitive advantage which it previously enjoyed.

(f) Such a claim by the interstate operator would be clearly illusory. The competitive advantage which is lost is that which was a product of the law of the enacting State. The new law places an equal impediment on the ability of the local and interstate operators to charge its customers only $2,300 per 10,000 km.

29. The essence of Betfair's complaint is the same as that of the interstate trader in the example given above. The new business cost of which Betfair complains is one which, in effect, operators in NSW previously bore and continue to bear. Even if, as Betfair contends, the "margin" referred to by Betfair is to be regarded as the "price" which it charges its customers[26] then the imposition of the charge on the TAB is as much an impediment to the TAB operating at such a low price as it is an impediment to Betfair continuing to do so.

Effect of impugned fee conditions on price

30. In any event, Betfair's contention that, from the perspective of potential customers, its "price" is constituted solely by its commission should not be accepted.[27] From the customer's perspective, the "price" of a wager is the odds less commission (if any) charged on winnings.[28]

Comparing prices

31. Betfair complains that, if it were to pass on the cost by raising its "prices", then (assuming the TAB also passed on the cost) the relative price difference between the TAB and Betfair would be affected in favour of the TAB.[29] Once it is accepted that the object of s. 92 is to eliminate the preclusion of competition from interstate trade,[30] then in order to determine whether an impugned measure is discriminatory in a protectionist sense it is necessary to examine the relative competitive effect on local and interstate traders of the introduction of the measure. In the present cases, that means comparing the relative change in price offered to punters by local and interstate wagering operators if those operators were to pass on to customers the cost of the impugned fee conditions. If the measure is competitively neutral, or has less effect on interstate traders than it does on local traders, then it cannot be characterised as discriminatory in a protectionist sense. As the impugned fee condition is imposed as a percentage of wagering turnover

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[26] See Betfair's Submissions, [50(b)].
[27] See RNSW's and HRNSW's Submissions in the Betfair Appeal, [8].
[28] See *Betfair Trial Decision*, [17]-[18].
[29] Betfair's Submissions, [50(b)].
[30] *Betfair v Western Australia*, [15].

(i.e. the amount wagered by punters on back bets[31]), the relative effect on the price to Betfair's punters may be no greater than that for those investing with the TAB.[32]

32. For example, assume that prior to the introduction of the impugned fee conditions a punter wishing to bet $1 on the horse "Grumpy" to win[33] was faced with the following options:

(a) a price of $2 by a bookmaker for a bet on Grumpy to win;

(b) investing with the TAB in the expectation of obtaining a dividend comparable to the odds offered by a bookmaker, but noting that the actual dividend which might be received cannot be certain until the betting on the race is closed.[34] An informed punter would know that the TAB takes a commission of 16% from the pool of investments, so that, if successful, he or she would receive a dividend representing a proportionate share of 84% of the total invested by all punters on the event;

(c) offering any price he or she wished to Betfair, bearing in mind that Betfair will only accept the wager if it is able to match the bet. The punter's offer must therefore reflect the market's assessment, or at least the assessment of an individual willing to lay the bet at the correlative odds, or it will not be matched and Betfair will not accept it.

Effect on Bookmaker's Price

33. Assume that the bookmaker has set his or her price so as to have the square book described at paragraph [22] of the *Betfair Trial Decision*. (Usually, rather than have a square book, the bookmaker will have factored in an overround.[35]) If the bookmaker then became subject to the impugned fee conditions, then, in order to maintain a square book the bookmaker would have to pass on the cost of the impugned fee conditions by changing the odds (i.e. the price) offered to potential customers. Since the impugned fee condition is imposed as a percentage of back bet turnover, then, in order to balance his or her book, the bookmaker will need to include an overround to account for the fee. This can be done by reducing the price on each eventuality (including the price for Grumpy to win) by 1.5%.

34. So, taking the example given by Perram J, if the bookmaker wishes to achieve an overround to neutralise the impugned fee condition, then the odds will need to total 101.5228% (100%/(100%-1.5%) = 100%/98.5%). So as to minimise the effect of rounding errors in the calculation,[36] it is necessary to express the prices in the example given by Perram J to more significant figures. Showing 4 decimal places for price, and 2 for wagers accepted, Perram J's example is:

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31 See *Betfair Trial Decision*, [87]-[88].
32 See, also, RNSW's and HRNSW's Submissions in the Betfair Appeal, [8].
33 See *Betfair Trial Decision*, [22].
34 See *Betfair Trial Decision*, [30].
35 See *Betfair Trial Decision*, [23]-[26].
36 See *Betfair Trial Decision*, [23].

Horse	*Implied probability*	*Price*	*Wagers accepted*	*Potential payout*
Grumpy	50%	$2.0000	$50.00	$100
Dopey	35%	$2.8571	$35.00	$100
Doc	15%	$6.6667	$15.00	$100
Total	*100%*		*$100*	
Maximum payout				*$100*

35. If the price offered for each horse is decreased by 1.5% (i.e. it is 98.5% of the price previously offered), this will achieve an overround of 1.5228% as illustrated by the following table:

Horse	*Implied probability*	*Price*	*Wagers accepted*	*Potential payout*
Grumpy	50.7614%	$1.9700	$50.76	$100
Dopey	35.5341%	$2.8142	$35.53	$100
Doc	15.2283%	$6.5667	$15.23	$100
Total	*101.5238%*		*$101.52*	
Maximum payout				*$100*

36. Therefore, if the bookmaker accepts $101.52 in back bets, then he or she is bound to be left with $1.52 after paying winnings. In that case, the bookmaker's back bet turnover is $101.52 and so he or she will be liable to pay $1.52 ($101.52 x 1.5%) pursuant to the impugned fee conditions. The bookmaker is square. This exercise demonstrates that, allowing for rounding errors, reducing the price offered for each horse by 1.5% will generate an overround which neutralises the effect of the impugned fee condition.

10 37. The same holds if the book already included an overround. Decreasing the price by 1.5% increases the overround by 1.5228%, thus immunising the bookmaker from the fee. So, taking the balanced book given as an example by Perram J at [24] of the *Betfair Trial Decision*, decreasing each of the prices by 1.5% gives:

Horse	*Implied probability*	*Price*	*Wagers accepted*	*Potential payout*
Grumpy	50.7614%	$1.9700	$50.76	$100
Dopey	35.5341%	$2.8142	$35.53	$100
Doc	19.2890%	$5.1843[37]	$19.29	$100
Total	*105.5845%*		*$105.58*	
Maximum payout				*$100*

38. So if the bookmaker accepts $105.58 in back bets, then he or she is bound to be left with $5.58 after paying winnings. The bookmaker's liability for the impugned fee conditions is $1.58 ($105.58 x 1.5%). The bookmaker therefore makes a "profit" of $4 ($5.58-$1.58), which allowing for rounding errors, is equivalent to the $3.97 profit made before the impugned fee condition was imposed.[38]

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[37] The price for Doc in Perram J's example with an implied probability of 19% would be 1/0.19 = $5.2632 when expressed to 4 decimal places.

[38] Noting that Perram J's calculation at [24] has more significant rounding errors than the calculation above.

39. Of course, it would be open to a bookmaker not to pass on the cost of the impugned fee condition, or to pass it on by altering the price offered on only one horse, or several (but not all) horses.

Effect on TAB's price

40. If the TAB passed on the whole of the cost of the impugned fee conditions to its customers then it would need to increase its "commission" by 1.5% above the commission it would otherwise take from the pool. So, for example, the TAB might increase its commission from 16% to 17.5% of the pool. This would reduce the pool available to winning punters from 84% of the total invested with the TAB to 82.5% of the total invested with the TAB, a difference of 1.78% (100%-82.5%/84%). Thus the return on investment to successful punters, and hence the "price" or odds perceived by a potential punter, would be reduced by 1.78%. If the TAB wished to maintain a commission of 5% and pass on the cost of the fee, it would increase its commission to 6.5%. This would reduce the pool available to winning punters from 95% of the total invested with the TAB to 93.5% of the total invested with the TAB, a difference of 1.58% (100%-93.5%/95%).

Effect on Betfair's price

41. Because there is no linear relationship between Betfair's back bet turnover and its commission,[39] if Betfair wished to pass on the cost of the impugned fee condition, the simplest way would be to impose a fee of 1.5% on all back bets, regardless of whether the punter was a net winner on the particular race or event (and hence liable to pay Betfair's commission). Adopting this approach would have the greatest effect on Betfair's price to any particular customer, and so can be analysed to determine the maximum effect which passing on the fee might have for a particular customer. If this approach were adopted, it would be unnecessary for Betfair to impose a fee on lay bets to recover the cost of the impugned fee conditions.[40] Betfair is therefore relatively advantaged by the impugned fee condition, compared to bookmakers and a totalisator operator, as the price of only half of the bets placed with Betfair need be reduced.

42. If a 1.5% fee were imposed as an extra charge (so as not to form part of the punter's bet), then the effect would be to reduce the return to the punter by 1.47%. For example:

    (a) Without the fee, a punter must make a $1 back bet on Grumpy at a price of $2 with Betfair to receive a return of $1.90 (assuming a 5% commission) if Grumpy wins.

    (b) With the fee a punter must make a $1 back bet on Grumpy at a price of $2 with Betfair and pay a 1.5c fee to receive a return of $1.90 (assuming a 5% commission) if Grumpy wins. That is, the punter must outlay $1.015 to secure $1.90 if Grumpy wins. Expressed as a return per dollar invested that is a return of $1.8719 ($1/$1.015 x $1.90) per dollar invested.

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[39] See *Betfair Trial Decision*, [138]-[147]. It would appear that, in fact, it is incorrect to conclude that there is any relationship, other than a statistical one, between Betfair's back bet turnover and its commission. Betfair's commission does not appear to be a function of its back bet turnover at all.

[40] See *Betfair Trial Decision*, [87]-[88].

(c) The difference in the return is 2.8c ($1.90 - $1.8719), a reduction of 1.47% from the original $1.90 return.

43. So too, if a punter wished to make a $1 back bet on Dopey at a price of $3:

(a) Without the fee, a punter must make a $1 back bet on Grumpy at a price of $4 with Betfair to receive a return of $3.80 (assuming a 5% commission) if Grumpy wins.

(b) With the fee a punter must make a $1 back bet on Grumpy at a price of $4 with Betfair and pay a 1.5c fee to receive a return of $3.80 (assuming a 5% commission) if Grumpy wins. That is, the punter must outlay $1.015 to secure $3.80 if Grumpy wins. Expressed as a return per dollar invested that is a return of $3.7438 ($1/$1.015 x $3.80) per dollar invested.

(c) The difference in the return is 5.6c ($3.80 - $3.7438), a reduction of 1.47% from the original $3.80 return.

44. The calculations in the preceding paragraph assumed, for the sake of argument, the worst case scenario that Betfair has a commission of 5% of winnings on the particular eventuality and the punter bet on only one horse in the event.

45. Obviously, imposing a fee only on back bets might discourage back betting and encourage lay betting, although, under Betfair's business model, one cannot occur without the other. If Betfair wished to avoid this, it could split the fee between back bets and lay bets according to any formula it wished to devise. The point, however, is that the greatest change in the effective price offered to any particular punter would be 1.47%.

Comparative effect on prices of competitors in the wagering market

46. So, if a bookmaker, the TAB, and Betfair all decided to pass on the whole of the cost of the impugned fee condition to punters, punters would face a reduction in the price offered by bookmakers of 1.5%, and by the TAB of greater than 1.5%. Punters wishing to make a back bet with Betfair would face a reduction in the price of up to 1.47%. It can therefore be seen that the change to the price offered by Betfair would be *less* than the change to the TAB's or a bookmaker's price. While the example given is hypothetical and the figures speculative, the point is that it is far from certain that the effect of the impugned fee conditions is to confer a competitive or market advantage on the local traders, or to eliminate a competitive or market advantage enjoyed by Betfair. It appears that, assuming a high cross-elasticity of demand,[41] Betfair could be relatively advantaged by the impugned fee condition as compared to the TAB and bookmakers.

Need for evidence

47. There must be a "*sound evidentiary basis*" indicating that the impugned measures do in fact deprive interstate trade and commerce of the freedom guaranteed by s. 92.[42] An unsupported hypothesis is insufficient. While Perram J concluded that the impugned fee

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[41] See *Betfair v WA*, [115], [121]-[122].
[42] *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475, 498 (Stephen J).

conditions discriminated against Betfair and in favour of a local trader because they treat two wagering operators who earned commission at different rates as if they were the same,[43] the existence of such a difference is insufficient to establish discrimination in any protectionist sense. As the Full Court held, there is no necessary link between that difference and the state of the competitive balance between Betfair and TAB.[44] Betfair's commission on back bet turnover is just one component of the revenue received, and profit made, by Betfair, and is just one of the components determining the price offered to Betfair's customers. It does not inevitably follow that, because of the "arithmetical truth" that the fee condition represents a greater portion of one component of Betfair's revenue than it does of the local traders (in particular the TAB), that it is discriminatory in a protectionist sense. A number of factors may indicate that the effect of the fee does not burden Betfair more than it does a local trader.

48. Significantly, Perram J concluded that Betfair's references to its "revenue" "meant no more and no less than the commission earned by it as the result of the operation of its Exchange".[45] That is, Betfair's references to its "revenue" are not references to its profit or its entire revenue, but rather references to one of the kinds of commission it earns on wagering transactions before account is taken of other sources of revenue, and expenses and overheads such as rent, computer system maintenance, wages, and taxes. Without taking these other sources of revenue, and expenses and overheads into account, it is impossible to properly compare the effect of the impugned fee conditions on Betfair's trade and commerce with the effect the impugned fee conditions have on local traders such as TAB. Betfair's comparison of the effect of the impugned fee conditions on this component of its revenue with the effect on TAB's revenue is a false dichotomy for the purposes of s. 92.

49. Without evidence of the actual competitive effect of the impugned fee conditions, it is impossible to determine whether they give TAB (or any other local trader) a competitive or market advantage over Betfair and it is impossible to determine whether the impugned fee conditions protect local traders in NSW from competition from interstate traders.[46] Betfair invites the Court to accept its unsupported hypothesis that imposing a fee which represents a greater proportion of one component of an interstate trader's revenue than that of an local trader, without reference to, or evidence of, the practical effect on competition between the interstate and local trader, infringes s. 92. That invitation should be rejected.

Previous Authority

50. Betfair's submission that in *Bath v Alston*, no proof was required of competitive effects in the nature of reductions in market share of profitability,[47] neglects the fact that, in *Bath v Alston*, the invalid *ad valorem* content of the retailer's licence fee was imposed, in effect, only on retailers who purchased tobacco in other States.[48] In the present cases, the impugned fee conditions are imposed on all traders, whether local or interstate. Further, the hypothetical competitive advantage of which interstate traders were

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[43] See *Betfair Trial Decision*, [148], [153].
[44] *Betfair Full Court Decision*, [94].
[45] *Betfair Trial Decision*, [127].
[46] See, also, *Betfair Full Court Decision*, [37].
[47] Betfair's Submissions, [78].
[48] *Bath v Alston*, 426-427 (Mason CJ, Brennan, Deane & Gaudron JJ).

deprived in *Bath v Alston* was an advantage conferred by the law of another State. In the present cases, any competitive advantage enjoyed by Betfair which might be eroded by the imposition of the impugned fee conditions derives from the regime in place in NSW prior to their imposition. Unlike in *Bath v Alston*, it is open to NSW to alter its own regime to impose a uniform burden without infringing s. 92.

51. Further, contrary to Betfair's submissions,[49] *Castlemaine Tooheys* is also a case where the Court's conclusion that the disadvantage imposed on interstate traders gave local traders a competitive or market advantage was an element of finding that the disadvantage was protectionist.[50]

Relief from existing burdens

52. Sportsbet's complaint of protectionist discrimination is of a different character, but can also be seen to be illusory when regard is had to the features of the market noted above.[51] Where a burden previously imposed only on local operators is to be charged to all operators there are at least three approaches which could be adopted:

    (a) The previous charge could be abolished and a new charge imposed on all operators;

    (b) The previous charge could be retained and a new charge imposed only on interstate operators;

    (c) A new charge could be imposed on all operators, the previous charge could be retained and the new charge could be rebated to those who bear the burden of both charges.

53. The second and third of these approaches appear discriminatory only when considered in isolation. However, the substantive effect of the approaches is the same: a charge previously imposed only on local operators is now imposed on all. The question of validity under s. 92 of the Constitution is to be considered not by the form but by the substantive effect of the provisions.[52] In such a context, breach of s. 92 is not established by pointing to the new charge imposed only on the interstate operator or the rebate given only to the local operator. Discrimination for the purposes of s. 92 will arise only when, in substance, the interstate operator is required to bear a burden which is not imposed on the local operator.

54. In formulating its present race field charge Western Australia adopted the approach noted in paragraph 52(a) above.[53] Sportsbet's allegation is in substance that NSW adopted a combination of the approaches noted in paragraphs 52(b) and 52(c) above:

    (a) Sportsbet alleges that bookmakers who previously made contributions to the racing industry through the turnover fees levied directly by the metropolitan racing clubs were effectively exempted from the impugned fee conditions by the

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[49] Betfair's Submissions, [74], [76].
[50] *Castlemaine Tooheys*, 467, 476
[51] See paragraphs 13-22 above.
[52] *Cole v Whitfield*, 409.
[53] See paragraphs 68 to 80 below.

thresholds below which the fee is not imposed and, in effect, given a rebate by the clubs' decisions to reduce or eliminate their levies;[54] and

(b) Sportsbet alleges that the TAB, which made contributions to the racing industry through the Racing Distribution Agreement was, in effect, given a rebate by reason of the payments due to it under the Deed of Release.

55. However, discrimination is not established by pointing to the exemption or rebate without taking account of the other contributions which bookmakers and the TAB made, and continue to make, to the racing industry. To establish discrimination for the purposes of s. 92 it would be necessary for Sportsbet to show that discrimination arises because of the greater extent to which it was required to make payments for the benefit of the NSW racing industry. For the reasons explained by NSW,[55] Sportsbet has not established discrimination in that sense.

Object, Purpose, and Intention

56. Betfair's submission that discriminatory burdens which cannot be justified by reference to a legitimate non-protectionist purpose *will* be characterised as protectionist[56] is contrary to *Cole v Whitfield* and *Castlemaine Tooheys*. In *Castlemaine Tooheys*, the plurality clearly distinguished the approach laid down in *Cole v Whitfield* from the approach of the Supreme Court of the United States in "the negative commerce clause doctrine", which might involve a rule that legislation imposing a burden on interstate commerce is invalid unless it serves a legitimate State interest.[57] The approach in *Cole v Whitfield* dictates that only legislation which imposes a discriminatory burden in a protectionist sense infringes s. 92. Inability to justify a burden by reference to a legitimate object is only indicative that the purpose of the burden *may* be protectionist.[58] However, as discussed above, Betfair failed to adduce any evidence relevant to whether the impugned fee conditions affected the competitive balance between Betfair and TAB so as to confer a competitive or market advantage on TAB.[59]

57. Significantly for the present matters, the imposition of the impugned fee conditions were administrative decisions made pursuant to a statutory power by independent regulatory bodies created by statute for public purposes.[60] Perram J characterised Betfair's case at trial as asserting that an impugned administrative decision will infringe s. 92 where the actual purpose of the decision maker was protectionist, regardless of whether the decision was, in fact, discriminatory in a protectionist sense.[61] Both Betfair and Sportsbet expressly maintain such an argument in the present proceedings.[62]

58. The determining issue is the proper interpretation of the statutory provision creating the power to make the administrative decision. In *R v Anderson; Ex parte Ipec-Air Pty Ltd*, Kitto J stated that if the proper construction of the relevant statutory provision would

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[54] See *Sportsbet Trial Decision*, [70]-[78]
[55] See NSW's Submissions in the Sportsbet Appeal, [48]-[60].
[56] Betfair's Submissions, [102].
[57] *Castlemaine Tooheys*, 471.
[58] *Castlemaine Tooheys*, 471-472.
[59] See paragraphs 47-49 above.
[60] See *Betfair Trial Decision*, [63]-[65]; *Sportsbet Trial Decision*, [10]-[11].
[61] *Betfair Trial Decision*, [208]-[210].
[62] Betfair's Submissions, [103], and Sportsbet's Submissions, [84].

authorise the exercise of the power for a protectionist purpose, then the statutory provision would likely offend s. 92 and would be invalid.[63] However, in *Wilcox Mofflin Ltd v New South Wales*, Dixon, McTiernan, and Fullagar JJ considered that merely because a statutory provision creates a wide executive or administrative power which could possibly be exercised in a manner which conflicts with s. 92, that would not necessarily invalidate the whole of the statutory provision.[64] So too, in *J Bernard & Co Pty Ltd v Langley*, Gibbs ACJ, echoing Stephen J's view in *HC Sleigh Ltd v South Australia* that a challenge under s. 92 cannot be based on hypothetical possibilities,[65] considered that the mere possibility that a statutory power might be exercised so as to impose an impermissible burden on an interstate trader did not mean that the statutory provision conferring the power was invalid.[66] In *Wilcox Mofflin*, Dixon, McTiernan, and Fullagar JJ considered that provisions conferring wide powers should be read down subject to s. 92 so as not to confer powers which could be exercised so as to infringe the freedom of interstate trade and commerce.[67] Post *Cole v Whitfield*, the mere existence of a wide discretion is insufficient to establish a discriminatory burden of a protectionist kind.[68]

59. If, on the proper construction of the statutory provision, there is no power to act or make a decision for a protectionist purpose, then any purported exercise of that power for such an improper purpose would exceed the power conveyed by the provision and could be challenged on conventional grounds of judicial review.[69] Neither Betfair nor Sportsbet appear to have advanced submissions on this basis at any stage of the proceedings. Both Betfair and Sportsbet cite *APLA Ltd v Legal Services Commissioner of NSW*[70] in support of their contentions that actual subjective purpose of an administrative decision maker is directly relevant in characterising a measure as protectionist, regardless of its effect.[71] However, the passages cited by Betfair and Sportsbet support the opposite conclusion. In particular, Gummow J expressly stated that:

> "in speaking in this context of the object or purpose of the law in question, what is posited is an objective inquiry answered by reference to the meaning of the law or to its effect." (emphasis added)[72]

Hayne J observed that:

> "To attribute 'purpose' to a law runs the risk of eliding a useful legal concept expressed in the metaphor of 'intention', and the results of some attempted

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63 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 187-188 (Kitto J). See, also, *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 607 (Brennan J).

64 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 522 (Dixon, McTiernan & Fullagar JJ).

65 (1977) 136 CLR 475, 498 (Stephen J).

66 *J Bernard & Co Pty Ltd v Langley* (1980) 153 CLR 650, 658 (Gibbs ACJ).

67 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 522 (Dixon, McTiernan & Fullagar JJ). See, also, *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613-614 (Brennan J).

68 *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331; [2005] NSWCA 273, [57].

69 See *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, 520 (Dixon, McTiernan & Fullagar JJ); *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 372-375 [34]-[41] (Brennan CJ). See, also, *Betfair Trial Decision*, [208]-[209], *Sportsbet Full Court Decision*, [141].

70 (2005) 224 CLR 322.

71 Betfair's Submissions, [105], Sportsbet's Submissions, [85].

72 (2005) 224 CLR 322, 394 [178] (Gummow J).

> exercise in psychoanalysis of those associated with the making of the law. In the familiar language of the law, there is a risk that an objective concept is turned into a subjective inquiry about the purpose of an individual or the purposes of some group of individuals. Identifying the purpose of a law is an exercise in construction."[73]

60. If the submissions of Betfair and Sportsbet that the subjective intention or purpose of an administrative decision maker in exercising a statutory power may be taken into account in characterising whether the statutory power itself is protectionist[74] were accepted, then that would subvert the Parliament's power to enact non-protectionist regulatory legislation to the vagaries of individual officers of the executive. The character of the legislation must be assessed objectively without reference to the subjective intentions of those who exercise the powers conveyed by it. Whether a statutory regime is regulatory or not is determined by reference to the regime enacted by the statute, not the intention of the regulator in exercising its powers. Subjective purpose of an administrative decision maker is relevant only in characterising whether the exercise of the regulatory power was within the jurisdiction conveyed by the statute.

61. Further, the doctrine advanced by Betfair and Sportsbet could only have any operation in circumstances where, despite the decision maker's protectionist intent, the impugned action had, in fact, no discriminatory protectionist effect or was appropriate and adapted to a legitimate non-protectionist object. Such a contention is difficult to reconcile with the Court's statements in *Betfair v Western Australia* that s. 92 is concerned with the elimination of the protectionism.[75] It would furthermore be inconsistent with the objective approach to purpose expressed by Gummow and Hayne JJ in *APLA Ltd v Legal Services Commissioner of NSW.*

62. It is also relevant to note that the Sportsbet Appeal arises under s. 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) (the **Self-Government Act**) and not s. 92 of the Constitution. Although the operation of the two provisions is the same in many respects, it must be kept in mind that s. 49 operates on State laws through s. 109 of the Constitution.[76] Section 109 of the Constitution is concerned with the inconsistency of laws, not with orders or administrative decisions made under laws.[77] Section 109 will invalidate a State law which would otherwise authorise an administrative decision which is inconsistent with s. 49 of the Self-Government Act. It will not invalidate an administrative decision directly. The subjective intention of a person purporting to act under statutory authority cannot affect the validity of the statute which confers the relevant authority.

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[73] (2005) 224 CLR 322, 462 [423] (Hayne J).

[74] Betfair's Submissions, [103], Sportsbet's Submissions, [83].

[75] *Betfair v Western Australia,* [15].

[76] *AMS v AIF* (1999) 199 CLR 160, 176 [37] (Gleeson CJ, McHugh and Gummow JJ), 232-233 [221] (Hayne J concurring).

[77] *Ex parte McLean* (1930) 43 CLR 472, 484-485 (Dixon J); *Metal Trades Assoc v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632, 642 (Gibbs CJ, Wilson and Dawson JJ), 648-649 (Mason, Brennan and Deane JJ); *Dao v Australian Postal Commission* (1987) 162 CLR 317, 337 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ); *P v P* (1994) 181 CLR 583, 601-602 (Mason CJ, Deane, Toohey and Gaudron JJ), 623 (Brennan J); *AMS v AIF* (1999) 199 CLR 160, 176 [38] (Gleeson CJ, McHugh and Gummow JJ), 232-233 [221] (Hayne J concurring).

Questions of reasonable necessity do not arise

63. The ultimate question under s. 92 of the Constitution is whether the impugned provisions constitute measures which burden interstate trade and commerce and which also have the effect of conferring protection on local trade and commerce of the same kind, the general hallmark of which is their discriminatory effect against interstate trade and commerce in that protectionist sense.[78]

64. In considering that question it is appropriate to address two subsidiary questions:

    (a) Whether the impugned law, on its face or in its economic consequences, imposes a discriminatory burden on interstate trade or commerce which is not imposed on local trade and commerce of the same kind and which gives the local product or local trade in that product a competitive or market advantage over the imported product or interstate trade in that product?[79]

    (b) If so, is the impugned law reasonably necessary to a non-protectionist object of achieving reasonable regulation of trade and commerce, with any burden imposed on interstate trade and commerce being incidental to the achievement of that object?[80]

65. If the first subsidiary question is answered in the affirmative, and the second subsidiary question is answered in the negative, the impugned law will discriminate against interstate trade in a protectionist sense so as to infringe s. 92 of the Constitution. Otherwise, the impugned law will not infringe s. 92 of the Constitution.

66. It is important that these questions be addressed in this order. It is only where the impugned law is shown to have a discriminatory, but incidental, effect of the kind described above that the Court is justified in considering the extent to which the law is appropriate to achieve the legislative object. In cases where the law does not discriminate in favour of local trade in the sense described above, the suitability of the legislative measure to achieve the desired object is a matter for the legislature to determine (so long as the law does not infringe any other limitation on legislative power).

67. In the present cases the evidence does not admit of an affirmative answer to the first subsidiary question noted above. Therefore, the second question does not arise.

The Western Australian position

68. The equivalent in Western Australia to the fee levied in New South Wales by the impugned fee conditions is not imposed as a condition of an approval to publish race field information, but rather as the racing bets levy imposed on betting operators under s. 14A of the *Betting Control Act 1954* (WA).

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[78] *Cole v Whitfield*, 394.

[79] *Cole v Whitfield*, 409, *Castlemaine Tooheys*, 447 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, 202-203; *Betfair v Western Australia*, [11], [117]-[122].

[80] *Castlemaine* Tooheys, 471-472, 473-474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), as modified by *Betfair v Western Australia*, [98]-[103].

69. By s. 14(2)(b) of the *Betting Control Act*, a bookmaker must pay a levy to the Gaming and Wagering Commission[81] on the whole of his or her turnover at the rate prescribed by the *Bookmakers Betting Levy Act 1954* (WA). This levy is called the "bookmakers' betting levy".

70. Until 1 September 2008, s. 2(1) of the *Bookmakers Betting Levy Act* prescribed the rates for the bookmakers' betting levy as 0.5% for a sporting event or contingency approved under s. 4B of the *Betting Control Act*, and 2% for the remainder of a bookmaker's turnover (horse and greyhound races).

71. In Western Australia, the local totalisator operator is Racing and Wagering Western Australia (**RWWA**), a body established by the *Racing and Wagering Western Australia Act 2003* (WA).[82] RWWA operates an off-course totalisator for racing wagers, and also accepts fixed odds betting on racing and sports events. RWWA also operates an off-course totalisator for sporting events. In addition to the racing bets levy, RWWA pays a special tax levied on all amounts of money received by it in respect of wagers made.[83] This tax is set at 11.91% of its gross revenue for off-course totalisator wagers on horse and greyhound races, and 5% of the amount received by RWWA for all other totalisator wagers.[84] The tax is set at 2% of all moneys paid to RWWA in respect of fixed odds wagers made on horse and greyhound races, and 0.5% of all moneys paid to RWWA in respect of fixed odds wagers on other events.[85]

72. Since 31 July 2006, RWWA has been required to disburse its funds in the way specified in s. 106 of the *Racing and Wagering Western Australia Act*. This includes paying any remaining balance to the thoroughbred, harness racing, and greyhound racing clubs registered with RWWA under the Act.[86]

73. In 2008, the legislative framework authorising the collection and disbursement of the racing bets levy was enacted by three Acts: the *Racing and Wagering Legislation Amendment Act 2009* (WA), the *Racing Bets Levy Act 2009* (WA), and the *Bookmakers Betting Levy Amendment Act 2009* (WA), each of which received the Royal assent on 23 November 2009.

74. Relevantly, the *Racing and Wagering Legislation Amendment Act* inserted new ss. 14A and 14B into the *Betting Control Act*. By s. 14A(2)(b), a betting operator (which term included anyone authorised by law to engage in or conduct the business of betting on races, and the operator of a betting exchange)[87] is required to pay a levy to the Gaming and Wagering Commission on the whole of his or her "gross revenue" or "turnover"[88] on horse or greyhound races at the rate prescribed by the *Racing Bets Levy Act*. This levy is called the "racing bets levy".

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81 Established under the *Gaming and Wagering Commission Act 1987* (WA).
82 See ss 4 & 50(1), 54-56.
83 See *Racing and Wagering Western Australia Act 2003* (WA), s 102; and *Betfair v Western Australia*, [78].
84 *Racing and Wagering Western Australia Tax Act 2003* (WA), s 4.
85 *Racing and Wagering Western Australia Tax Act 2003* (WA), s 5.
86 See *Racing and Wagering Western Australia Act 2003* (WA), s 106, and *Betfair v WA*, [79].
87 Which therefore includes a licensed totalisator operator, and a bookmaker.
88 These terms are defined in s 14A(1) of the *Betting Control Act 1954* (WA).

75. Section 4 of the *Racing Bets Levy Act* empowers the Governor to make regulations prescribing the quantum of the racing bets levy. Relevantly to Betfair's argument, the significant difference in the effect of the Western Australian scheme from the effect of the fee imposed as a condition of a licence in New South Wales is that, by regulations 4 and 5 of the *Racing Bets Levy Regulations 2009* (WA), a betting operator may choose between either of two bases for calculation of the racing bets levy:

    (a) 1.5% of the betting operator's turnover; or
    (b) either 20% of gross revenue or 0.2% of turnover for each month, whichever is the greater

10 76. The racing bets levy was imposed in respect of all bets placed with, or placed or accepted through, a betting operator on or after 1 September 2008.

77. Assuming that RWWA's commission on its totalisator as a percentage of turnover is equivalent to that of the NSW TAB, the racing bets levy imposed on RWWA would be approximately 10% of its gross revenue (comprising its commission taken out from pools). If Betfair elected to pay 20% of its gross revenue then Betfair would still pay a greater proportion of its commissions than RWWA, although the extent of the difference would be less than is alleged in NSW.

78. The racing bets levy paid to the Gaming and Wagering Commission must be paid into the "Racing Bets Levy Account".[89] After withdrawing approved sums for administrative
20 outgoings and expenses, the Commission must pay the balance of the account at prescribed intervals to RWWA or to the thoroughbred, harness racing, and greyhound racing clubs registered with RWWA.[90] RWWA must distribute any such funds it receives from the Commission to the thoroughbred, harness racing, and greyhound racing clubs registered with RWWA.[91]

79. So that bookmakers were not required to pay both the bookmakers' betting levy and the racing bets levy in respect of horse and greyhound races, the *Bookmakers Betting Levy Amendment Act 2009* (WA) amended the prescribed rate for the bookmakers' betting levy so that the levy was payable only upon sporting events or contingencies approved under ss. 4A or 4B of the *Betting Control Act 1954* (WA) (i.e. horse and greyhound
30 races were excluded). The amendment was retrospective as of 1 September 2008. No bookmakers' betting levy was thereafter payable on turnover in respect of horse races.

80. Due to the retrospective amendment of the bookmakers' betting levy rate, there was therefore a period from 1 September 2008 to 23 November 2009 where bookmakers had paid the bookmakers' betting levy on turnover in respect of horse and greyhound races, but which they were retrospectively no longer required to have paid. Section 14B of the *Betting Control Act* (inserted by the *Racing and Wagering Legislation Amendment Act*), provided that any amount paid by a bookmaker in relation to a horse or greyhound

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[89] *Gaming and Wagering Commission Act 1987* (WA), s 110B(1).
[90] *Gaming and Wagering Commission Act 1987* (WA), s 110B(5).
[91] *Racing and Wagering Western Australia Act 2003* (WA), s 107A(2).

racing bet during that period was to be credited against any amount that the bookmaker was liable to pay by way of the racing bets levy imposed by s. 14A.

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