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

ON APPEAL FROM FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

BETFAIR PTY LIMITED
ACN 110 084 985
Appellant

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AND

RACING NEW SOUTH WALES
ABN 86 281 604 417
First Respondent

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

ATTORNEY GENERAL (NEW SOUTH WALES)
Third Respondent

APPELLANT'S SUBMISSIONS

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PART I

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

PART II

2. The issue in this case is whether the fee conditions imposed by the first and second respondents (the **respondents**) on approvals granted pursuant to s 33 of the *Racing Administration Act* 1998 (NSW) (**RA Act**) to the appellant (**Betfair**) to publish New South Wales (NSW) race fields infringe the freedom guaranteed by s 92 of the Constitution.

3. Specifically, whether:

   a. it is sufficient for Betfair to prove that the impugned fee conditions imposed and were intended to impose significantly greater business costs on Betfair, per revenue dollar, than they imposed on TAB Limited (**the TAB**); and

   b. the Full Court erred in holding it was necessary for Betfair to prove that the practical effect or likely practical effect of the impugned fee conditions was to cause Betfair to suffer a significant loss of market share or profitability because the impugned fee conditions were facially neutral.

PART III

4. Section 78B notices have been issued to the Attorneys General of the Commonwealth, the States and the Territories. Betfair does not consider that any further s 78B notice is required.

PART IV

5. The primary judge's decision ([2010] FCA 603) is reported at (2010) 268 ALR 723. The Full Court's decision ([2010] FCAFC 133) is reported at (2010) 189 FCR 356.

PART V FACTUAL BACKGROUND

Summary

6. Betfair is engaged in interstate trade. It operates the only betting exchange in Australia, under a licence from the Tasmanian Gaming Commission.[1] It conducts its exchange over the internet[2] and accepts wagers over the internet and by telephone from punters around Australia. It cannot lawfully operate from NSW.[3] Betfair has increased its share of the national market for wagering on racing and sporting events[4] since it was licensed in 2006.

7. The TAB is the NSW monopoly licence holder for off-course totalizator wagering and is the dominant wagering operator in respect of wagering on NSW thoroughbred and harness races.[5]

8. The RA Act prohibits publication of NSW race fields (anywhere) without an approval from the relevant racing control bodies (the respondents and Greyhound Racing NSW). The scheme permits the racing control bodies to impose a fee condition on race field approvals up to a maximum of 1.5% of "wagering turnover," a term defined in the Racing Administration Regulation 2005 (NSW) (**RA Regulation**) as the total amount of wagers made on the back side of a wager (also referred to as "back bet turnover"). The "back" side of the wager means that side of the wager that bets an event will occur.[6] The other side of the wager is known as the "lay" side, which bets that an event will not occur. Both

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[1] (2010) 189 FCR 356 (**Full Court**) at [22].
[2] (2010) 268 ALR 723 (**Perram J**) at [28].
[3] Full Court at [22].
[4] See for example: Tabcorp Holdings Limited's (the TAB's parent company) submission to the Minister for Gaming & Racing September 2007 at 1.3 (in relation to Northern Territory corporate bookmakers and Betfair) (**Tabcorp 2007 letter to Minister**); CEO 18 June 2008 Report to the RNSW Board (**18 June 2008 Board report**) at p 27.
[5] Full Court at [36]-[37].
[6] Full Court at [11]; but see Perram J at [9]-[13].

respondents have imposed the maximum fee of 1.5% of back bet turnover on all wagering operators issued with approvals.

9. The whole of the revenue derived by the TAB and intrastate bookmakers comprises revenue from back bets. This is not the case for Betfair, which matches back and lay bets.

10. The effect of the fee conditions imposed by the respondents on Betfair is that the fees paid by Betfair amount to approximately 54-61% of its gross revenue from NSW thoroughbred or harness racing.[7]

11. The fee conditions imposed by the respondents on the TAB represent fees amounting to 9.375% of its gross revenue from NSW thoroughbred or harness racing.[8]

The relevant market

12. There is a national market for wagering on racing and sporting events including NSW horse racing.[9] This national market includes wagering in person, by telephone or on the internet.[10]

13. The national market participants based in Australia, on the supply side, offer different wagering types:[11]

    a. totalizator betting, offered by each State-based monopoly off course totalizator (and racing clubs authorised to conduct on-course totalizators);

    b. traditional fixed odds back betting, offered by State-based licensed bookmakers, including "corporate bookmakers" based in the Northern Territory who operate seven days a week and solely by telephone and on the internet; and

    c. fixed odds back and lay betting on an exchange, as offered by Betfair.

14. Consumers on the demand side of this national market may bet on an Australian horse race in person with a wagering operator in the State or Territory they are in or on the telephone or electronically with any wagering operator in any State or Territory licensed or authorised to accept bets via telephone or the internet.[12]

15. The evidence before the trial judge, and the Full Court, and implicitly accepted by both, is that on average across all races, Betfair offers a better return to customers than the TAB.[13]

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[7] Perram J at [119], [133], [136], [148] and [153]. Implicitly accepted by the Full Court at [31], [80] and [107] – although the Full Court did not identify the figures. See also the Report by A Cameron to NSW Minister for Gaming and Racing (**Cameron Report**) at p 109.

[8] Perram J at [119].

[9] There is no finding to this effect in either judgment below (although see *Sportsbet v State of New South Wales* (2010) 186 FCR 226 at 235 [21] (Perram J) and *Racing NSW v Sportsbet* (2010) FCAFC 132 at [21]]), but it is a proposition not in dispute by the parties: see for example the 18 June 2008 Board Report which assumes such a market (see especially the reference to the elasticity of demand at p 44); as does the Report of the Betting Exchange Task Force dated 10.7.03 (the **Betting Exchange Taskforce Report**) (see especially Chapter 5.2: "Effects on Licensed Australian Wagering Operators and on Racing Industry and Government Revenue Streams"); Productivity Commission 2010, *Gambling*, Report No. 50 Canberra (**Productivity Commission Report**), Chapters 2.5 and 16 (available at http://www.pc.gov.au/projects/inquiry/gambling-2009/report). The draft of this report was available at the time of the trial in this matter and Betfair tendered the draft report. The trial judge did not rely on the draft report on the basis that it supported a case Betfair had not pleaded: at [334]. Betfair submits the report contains information the Court will find of assistance in determining the constitutional issue before it: see *Breen v Sneedon* (1961) 106 CLR 406 at 411-416 (Dixon CJ); *Clark King v Australian Wheat Board* (1977) 140 CLR 120 at 174-175 (Stephen J); *North Eastern Dairy Co. Limited v Dairy Industry Authority (NSW)* (1975) 134 CLR 559 (***NEDCO***) at 622 (Jacobs J); and *Thomas v Mowbray* (2006) 233 CLR 307 (***Mowbray***) at 512-522 [613]-[639] (Heydon J).

[10] See *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418 (***Betfair***) at 480 [114]; *Racing NSW v Sportsbet* [2010] FCAFC 132 at [21] (***Sportsbet* Full Court**).

[11] Perram J at [281]. See also Full Court at [10] limited to New South Wales.

[12] Perram J at [281].

[13] The evidence included: Twaits T133.36-36 (19.11.09); Twaits 25 September 2009 and Ex AJT-2 pp 1-47; Betting Exchange Taskforce Report at pp 94-98; Access Economics Report for Australian Racing Board, "Financial Implications of Betting Exchanges" dated 25.2.05 (**Access Economics Report**) at (iii); Racing NSW Strategic Plan

The suppliers licensed in New South Wales

The TAB

16. As noted above, the TAB is the monopoly off course totalizator in NSW[14] and the dominant wagering operator in that State. Its off course totalizator accounted for 78.96% of all money wagered on NSW thoroughbred races in the 2007 and 2008 racing season.[15] A significant proportion of the wagering revenue earned by the TAB is paid to the racing control bodies under the Racing Distribution Agreement[16] and to the State of NSW as betting taxes.[17]

17. Totalizator betting is a system of wagering in which wagers by customers on a particular event are pooled by the operator. Only 'back bets' are accepted so the total pool for an event will represent the total amount of wagers made on the back side, that is, back bet turnover. When the outcome of an event is known, the operator deducts a commission (in the TAB's case, on average, 16%[18]) and the remainder of the pool is divided among the successful customers. The return to the customer cannot be known before the outcome of the event.[19]

18. The TAB's revenue for each event on which it offers wagers is, on average, 16% of its back bet turnover.[20] The higher the TAB's commission, the lower the return to customers betting with the TAB.

Bookmakers

19. Licensed bookmakers in NSW are licensed by the respondents and Greyhound Racing NSW, authorised by the relevant race clubs where they have a physical presence[21] and authorised pursuant to Part 3A of the RA Act.[22]

20. Bookmakers offer fixed odds betting. Like totalizators, they only accept back bets. They earn revenue by offering odds on the outcome of races which includes an 'overround', with the intention of ensuring the bookmaker earns a gross profit on each race. The amount by which the sum of the percentage value of the odds for each runner in the race exceeds 100% is the overround. It is necessary for a bookmaker to re-adjust his or her odds as bets are taken to ensure the 'book' on a particular race includes the desired overround.[23] The lower the overround, the higher the odds offered to customers (and the better the return to customers).[24]

21. The revenue a bookmaker makes on a race is the total amount wagered with him or her, minus the money paid in winnings. It will depend not only on back bet turnover but also on the overround the bookmaker has created on a particular race from the bets accepted, and the distribution of bets on particular runners.[25]

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for the NSW Thoroughbred Racing Industry, 2004 (**RNSW Strategic Plan**) at p 13; Tabcorp letter to the Premier of NSW dated 12.11.07 (**Tabcorp 2007 letter to Premier**) at p 1; and 18 June 2008 Board report at p 44. See also Productivity Commission Report at 37 and 16.7.

[14] Section 14 *Totalizator Act 1997* (NSW); Perram J at [60], [282].

[15] Perram J at [36].

[16] Perram J at [60]-[61], [66], [68], [291].

[17] Perram J at [62].

[18] This was admitted by the respondents (Defence to the Further Amended Statement of Claim at [48]) and found by Perram J at [123].

[19] Perram J at [30]; Full Court [36]-[37].

[20] As the respondents admitted (Defence to the Further Amended Statement of Claim at [66.3]) and the trial judge found, there is a direct, or linear, relationship between the TAB's revenue/commission and its back bet turnover (Perram J at [137] and [150]).

[21] Perram J at [307]-[308].

[22] Perram J at [302].

[23] Perram J at [24]-[26].

[24] Perram J at [24]-[25].

[25] Perram J at [24]-[25]. See also Perram J in *Sportsbet v NSW & Ors* (2010) 186 FCR 226 (***Sportsbet* Perram J**) at [149].

The interstate supplier: Betfair

22. As noted above, Betfair is the only betting exchange licensed in Australia. It offers wagering on sporting and other events, including thoroughbred racing and harness racing conducted in NSW.[26]

23. Customers wagering on an exchange may make a back bet or a lay bet on an event[27] and in effect are betting against each other. A customer making a back bet puts up a 'stake' which they are liable to lose if their wager is unsuccessful. This wager needs to be matched by a customer prepared to make a lay bet, who does not put up a stake but who must have in his or her Betfair account sufficient funds to pay the backer's potential return if the backer is successful.[28] Although Betfair is the formal counterparty to each side of the wagering transaction, it matches each side of the wager, such that a bet is not accepted unless it can be matched. All of this wagering activity occurs over the internet.[29]

24. Betfair earns revenue by charging a commission of between 2% and 5%. It is a requirement of Betfair's licence that commission not exceed 5%.[30] This commission is charged on the net winnings of a customer in a particular "market". For example, for a given horse race, Betfair may offer a market on which horse will win the race and a separate market for horses to place first, second or third.[31] A customer's return will depend on the net outcome of all their bets in one market and also the commission they are charged.

25. The commission earned by Betfair has no fixed or direct relationship to 'back bet turnover'. Where wagering transactions by a customer in a market do not result in net winnings, while there will be 'back bet turnover' involved, Betfair will not receive any commission.[32] As Perram J found: "*What is plain is that on any particular event there is no way that the amount of Betfair's commission can be directly calculated from knowing only the total of all back bets*".[33]

Race fields approval scheme

Summary

26. The race field scheme introduced by NSW and implemented by the respondents had the following features (which are developed in more detail below):

    a. the scheme was introduced in order to gain financial contribution from "*free riders*" who were interstate wagering operators[34] (as all intrastate wagering operators contributed to the industry through fees and taxes pursuant to the Gentleman's Agreement);

    b. the respondents, who participated in the creation of the legislative and regulatory scheme, were concerned to prevent or reduce revenue leakage from the TAB to interstate wagering operators, including Betfair, and saw the scheme as a method of stemming that leakage;[35] and

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[26] Perram J at [48]; Full Court at [22].
[27] Perram J at [48].
[28] Perram J at [55].
[29] Bets accepted by telephone are also placed on the exchange. As described in the Betting Exchange Taskforce Report, quoted by the High Court in *Betfair* at 450 [8]: "The Internet is an ideal vehicle for betting exchange operations. It allows current exchange information to be displayed to a global audience in real time and facilitates automated wagering transactions against pre-established accounts and the efficient transfer of funds to and from accounts".
[30] Full Court at [23]. The range of commission reflects the commission rate for a particular market and a customer's use of the exchange: see Twaits 16 September 2009 [46]-[48].
[31] Perram J at [47].
[32] Perram J at [141].
[33] Perram J at [141].
[34] See Perram J in *Sportsbet* at [46].
[35] Perram J at [235] and [239]; see also Perram J in *Sportsbet* at [44]-[45].

c. the respondents devised a proposal to levy fees on a basis that did not address the known fundamental differences amongst wagering operators and that had a significantly disproportionate effect on Betfair.[36]

Introduction of the legislative scheme

27. Prior to the introduction of the statutory scheme in issue in these and the related proceedings of *Sportsbet*, no wagering operator paid interstate racing authorities for the use of race fields information in those States.[37] Under this "Gentleman's Agreement", each wagering operator only paid fees and taxes in the State in which they were licensed, even when offering wagers on races in other States.[38] That arrangement was described by Perram J in *Sportsbet* as "*neither between gentlemen nor an agreement ... Rather, it is a political arrangement*": [27].

28. Under NSW funding arrangements, the TAB had and has a commercial relationship with the three codes of NSW racing (the respondents and Greyhound Racing NSW)[39] (described by the trial judge as "*very close in an economic sense to a joint venture*").[40] Pursuant to this commercial relationship, the TAB must provide the racing codes 21.9965% of net wagering revenue from all its NSW licences[41] (amongst other payments identified by Perram J at [60]).

29. The Gentleman's Agreement survived in an era where face-to-face betting either on track (with bookmakers) or off track (with the TAB) was the dominant form of wagering.[42] The advent of wagering by telephone and the internet allowed wagering operators to operate 24 hours a day, 7 days a week, "*offering cheap and innovative products*".[43] The wagering operators who did so, based predominantly outside NSW, attracted customers away from established wagering operators such as the TAB in NSW, affecting the revenue base from which NSW racing was funded.[44] Further, consistent with the Gentleman's Agreement, those operators were only paying fees in the State or Territory in which they were licensed. This emergence of the "*new economy*"[45] brought with it a need to introduce an alternative model of fee collection.[46]

30. In June 2005, Mr V'Landys, CEO of Racing NSW, wrote to the Minister for Racing & Gaming suggesting that the State government introduce legislation similar to that in Victoria, requiring wagering operators to obtain approval from racing control bodies in order to publish race fields.[47] In Racing NSW's 2005 Annual Report such legislation is identified as a possible method "*to protect racing industry revenue*".[48] Similarly, Harness Racing

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[36] See Perram J in *Sportsbet* at [149] (and Perram J at [119], [133], [136], [153], [249]-[251]).

[37] Although a race fields scheme was set up in Victoria (see *Betfair* at 478-9 [107]) that scheme granted a full credit to wagering operators for payments made in their home State and so remained consistent with the Gentleman's Agreement.

[38] Perram J at [316]. As to the "Gentleman's Agreement" see also *Betfair* at 470 [69].

[39] Perram J at [291].

[40] Perram J at [68].

[41] Perram J at [301]; Racing Distribution Agreement (as amended) (the **RDA**) at clauses 1.1 and 9.1. Note that the Full Court at [19] refers to the TAB being required, pursuant to the RDA, to pay the respondents between 4.5% and 5% of its wagering revenue. This is incorrect and may be a reference to Perram J's analysis of the division of the TAB's 16% commission at [69]; or to Racing NSW's analysis: 18 June 2008 Board Report at p 28. Note TAB's payments under the RDA are calculated by reference to its **revenue** from wagering activities, not back bet turnover.

[42] Productivity Commission Report at 16.20.

[43] Productivity Commission Report at 16.5.

[44] See Tabcorp 2007 letter to Minister at pp 3-4; Tabcorp 2007 letter to Premier at p 2; 18 June 2008 Board Report at p 27.

[45] See Posner, *Antitrust in the New Economy* (2001) 68 Antitrust Law Journal 925; referred to by the plurality in *Betfair* at 452 [14].

[46] See Perram J in *Sportsbet* at [30]. See also 16 July 2007 CEO Report to RNSW Board at p 43-44.

[47] Letter from Mr V'landys to Minister for Racing and Gaming dated 24.6.05.

[48] Annual Report of RNSW 2004-2005 at p 6.

NSW's CEO said of the race fields legislation that it would provide "*a welcome level of protection to the industry*" although "*in itself it does not prohibit the operation of betting exchanges*".[49]

31. The race fields amendments to the RA Act were introduced to Parliament in October 2006 and passed on 21 November 2006.[50] The second reading speech referred to "*free riders*"[51] and the need to "*encourage the ongoing viability and future economic development of the racing industry*"[52] (although there was no mention of 'parasites': *contra* the Full Court in *Sportsbet* at [28]).

32. The amendments required wagering operators to obtain a "race field information approval" in order to "use" race fields (including publishing or communicating race field information): ss 32A and 33. The legislation defined race field information as identifying the name or number of horses or greyhounds taking part in a race: s 27; described by Perram J and the Full Court as "necessary" information to wager upon the outcome of a horse race.[53]

33. The amendments permitted the racing control bodies to impose a fee condition on the approval, to be imposed in accordance with the RA Regulation: s 33A(2)(a).

34. The RA Regulation had not been prepared at the time the legislation was assented to, but as said on behalf of the Minister: "*The detail of the regulations will be developed— as was this bill— in consultation between the racing industry, the regulator and the Government's legal advisers*".[54]

35. That consultation occurred at a working group level, with representatives of the respondents, Greyhound Racing NSW and the Office of Liquor, Gaming and Racing (**OLGR**) meeting[55] and corresponding[56] from late 2006 until June 2008 to prepare the regulations; and at a Ministerial level with the Chairs of the respondents and Greyhound Racing NSW meeting with the Minister in November 2007. In relation to this meeting, the Chairman of Racing NSW reported to his Board that:[57]

> "The TAB franchise was being progressively undermined by internet bookmakers and betting exchanges with inherently lower cost structures and no product fees. In this environment it was agreed that it was critical that the three codes control pricing for the use of their product under the umbrella of the Race Fields Legislation."

36. During this period, both respondents prepared a format for the fee condition based on back bet turnover which was reflected in the regulation's final form[58] and also re-iterated ongoing concern about revenue leakage from the TAB[59] and that the fee condition would be a means of stemming that leakage.[60]

37. It is clear the respondents were aware that the adoption of a back bet turnover model would result in a fee to be paid by Betfair which was a significantly higher proportion of its

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[49] Annual Report of HRNSW 2005-2006 at p 14 (see also at p 7).
[50] Perram J at [91] (*Racing Legislation Amendment Act 2006* (NSW) No 91).
[51] All of whom were interstate operators: *Sportsbet* Perram J at [46].
[52] NSW Parliamentary Debates, Legislative Assembly, 20 October 2006 (**Second Reading Speech**), 3116.
[53] Perram J at [70]; Full Court at [24].
[54] Second Reading Speech, 3116.
[55] November 2006 CEO report to the RNSW board (**November 2006 Board report**); email from OLGR to RNSW and HRNSW (amongst others) dated 24.1.07.
[56] See e.g. RNSW letter to OLGR dated 2.8.07 and HRNSW letter to OLGR dated 30.8.07.
[57] 19 November 2007 CEO report to the RNSW board at p 36.
[58] See CEO reports to the RNSW board in November and December 2006, January, March, April, June, October, November and December 2007; March, April, May and June 2008; and June 2007 CEO report to the HRNSW board (**June 2007 HRNSW Board report**).
[59] See especially 18 December 2007 CEO report to the RNSW board (referring to and attaching the Tabcorp presentation referred to by Perram J at [223]), June 2007 HRNSW Board report, and HRNSW Annual Report for 2008 (quoted by Perram J at [232]).
[60] Tabcorp "revenue leakage" presentation cited by Perram J at [223]; the 18 December 2007 CEO report to the RNSW board at pp 20-21 described this presentation as containing "important facts" and its advocacy of a fee of 1.5% of turnover as "in line with RNSW's recommendations." See also RNSW Strategic Plan at pp 6, 7, 11; Speech by A Brown, chair of RNSW dated 31.7.09 at p 13.

revenue earned on NSW horseracing, compared to intrastate wagering operators.[61] It is also clear that the respondents were concerned the RA Regulation be drafted so as to permit a fixed rate turnover based fee to be applied to all wagering operators. A draft version of the RA Regulation included a reference to operators "*of the same class or type*". Mr Vance, an employee of Racing NSW, wrote to the OLGR seeking amendment to the draft regulations to delete this phrase because:[62]

> "Racing NSW proposed to charge a fixed rate on all turnover above a certain threshold ... That sort of fee structure needs to be, and should be, able to be accommodated but may not be permitted under the current wording."

The final version of the RA Regulation did not include any reference to "*of the same class or type*". It set a ceiling on the permitted fee that could be charged to licensed wagering operators of 1.5% of back bet turnover: cl 16 RA Regulation.

38. This State-based regulation of a national market commenced on 1 July 2008; it was "*a departure*" from the Gentleman's Agreement[63] or, more accurately, signalled the end of that agreement.[64]

The race field approvals granted by the respondents

Racing NSW

39. On 18 June 2008, prior to the RA Regulation being publicly finalised or promulgated, the Racing NSW Board resolved to impose a fee condition upon wagering operators of 1.5% of back bet turnover in excess of $5 million.[65] In doing so it noted a detailed report prepared for the Board regarding the likely effects of the fee condition, described by Perram J as "*a complex document of considerable sophistication*".[66]

40. The report indicated the fee condition would have no net impact on the TAB because of commercial obligations[67] and that there would be few NSW bookmakers affected as more than 95% of bookmakers licensed in NSW have an annual turnover less than the $5 million threshold.[68] In addition, it contained a detailed analysis of the effect of the fee on interstate wagering operators, specifically (as quoted by Perram J):[69]

> ***"Corporate bookmakers and betting exchanges***
>
> ...
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> It can be expected that, if the NSW race fields fees are imposed on these wagering operators, they will take action to mitigate what would otherwise be a 25% reduction in their margins.[70] Such action may include, for example:
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> ...
>
> - an increase in revenue margin – ie an increase in player losses per dollar bet – can be expected to reduce turnover as the "cost" of the wagering is increased. Assuming price elasticity of –1, if the corporate bookmakers were to seek to increase their revenue margins by the 1.5% of turnover (ie the same proportion of turnover as the NSW race fields fee), the corporate bookmaker turnover would be expected to decline by approximately 20%, and, as a result of that decline in turnover the

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[61] See especially 18 June 2008 Board report at pp 28-29 and 43-46. See also the documents referred to at fn 78 below.
[62] Email from RNSW to OLGR dated 12.6.08.
[63] Perram J at [316]; although note his Honour's comments in *Sportsbet* at [30].
[64] Productivity Commission Report at 16.20. This had been identified by the CEO of RNSW to the Minister for Racing on 8 June 2005 at p 26 and later in his reports to the RNSW Board in May and July 2007.
[65] Perram J at [93].
[66] Perram J at [218].
[67] 18 June 2008 Board Report at p 23.
[68] 18 June 2008 Board Report at p 23 (see Perram J at [312]).
[69] 18 June 2008 Board Report at p 43-44 (see Perram J at [218]).
[70] Mr V'Landys is using the example of corporate bookmakers (with 6% 'margin' – meaning revenue as a percentage of 'back bet turnover', not profit margin) but the same analysis applies to Betfair's betting exchange (with the assumed 3-4% 'margin') (18 June 2008 Board Report at p 44).

corporate bookmakers' aggregate margin on NSW racing will still be approximately $9.7 m (20%) lower than they were prior to the introduction of NSW race fields fees – costs which will need to be absorbed by the wagering operators."

The Full Court did not refer to this document in its judgment.

41. In August 2008 Betfair applied for, and on 15 August 2008 was granted, a race field approval subject to the standard conditions, including the fee condition calculated as 1.5% of back bet turnover in excess of $5 million. A further approval was granted on 22 June 2009.[71]

Harness Racing NSW

42. On 11 June 2008, prior to the commencement of the RA Regulation, Harness Racing NSW resolved to impose a fee of 1.5% of back bet turnover on wagering operators. This was confirmed in later resolutions on 9 July 2008[72] and 23 September 2008.[73]

43. Harness Racing NSW granted Betfair a two-year race fields approval from 1 September 2008, subject to the fee condition of 1.5% of back bet turnover in excess of $2.5 million.[74]

Purpose of the respondents in imposing fee condition

44. The trial judge concluded in relation to both Racing NSW and Harness Racing NSW that their actual purpose in imposing the fee condition was to protect the revenues of the TAB from competition from interstate operators: [239]. His Honour also concluded that the fee was "*plainly not adapted to the purpose of ensuring that those who derive commercial benefit from the use of race fields information make a contribution commensurate with that use*": [251]; and would have held that it was not reasonably and appropriately adapted to achieve a legitimate object: [252].

The effect or likely effect of a turnover based fee on Betfair when compared to TAB

45. As anticipated by Racing NSW, the introduction of the race field fees "*directly impose[ed] additional costs on corporate bookmakers and betting exchanges*".[75] The additional cost is for a necessary input in order to offer wagering on NSW horse racing in the national wagering market.

46. As noted above, Betfair and the TAB derive revenue differently. The TAB's revenue from its totalizator is 16% of all money wagered with it. Betfair obtains revenue from a customer's net winning position (if any) on each market it offers.

47. The trial judge found,[76] and the Full Court implicitly accepted,[77] that the result of the imposition of a fee based on 1.5% of back bet turnover, is that Betfair pays the respondents 54-61 cents of each $1 of its commission from a NSW horse race. In contrast, the TAB pays about 9 cents of each $1 of its commission. The additional cost imposed on Betfair is 5 or 6 times greater than the additional cost imposed on the TAB. This necessarily operates to the competitive advantage of the TAB.

48. The respondents were well aware of the different impact of the fee condition on the different wagering operators.[78] Mr V'Landys' 18 June 2008 Board Report stated: "*A fee of*

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[71] Perram J at [98].

[72] Minutes 9 July 2008 HRNSW Board Meeting item 7.

[73] Minutes 23 September 2008 HRNSW Board Meeting item 8.

[74] Perram J at [99]-[100], Full Court at [30].

[75] 18 June 2008 Board Report at p 28. As noted in that report, the TAB's fee would be offset by payments made under the RDA: p 23; and 95% of NSW bookmakers have turnover of less than $5 million and as a result would not pay the fee: p 23.

[76] Perram J at [133], [136], [148] and [153].

[77] See Full Court at [31], [80] and [107] – although the Full Court never identified the figures. See also the Cameron Report at p 109.

[78] See e.g. letter from Betfair to RNSW dated 28.11.06; letter from Betfair to RNSW dated 16.4.07; the applications for race field approvals from Betfair to Racing NSW (5.8.08) and Harness Racing NSW (21.8.08); letter from Betfair to Minister for Gaming and Racing dated 5.6.08 copied to respondents; Briefing notes for discussion with Ken Callender (Daily Telegraph journalist) (1.6.08) (**Briefing notes for Callender**) at p 2; Boston Consulting Group

1.5% of turnover would represent a significant proportion of the revenue margin (ie wagering revenue as a percentage of turnover) currently being realised by these operators [corporate bookmakers and Betfair]".[79]

49. In addition, the evidence before Perram J and the Full Court as to the actual effect of the fee on Betfair's gross profit (gross revenue less all taxes and product fees, but before any other costs) was straightforward. It established that on thoroughbred racing in the 3 months prior to the introduction of the race fields fee Betfair's gross profit was 56% of its gross revenue, and in the 9 months after the introduction of the race fields fee Betfair's gross profit was only 1.6% of its gross revenue. Similarly, on harness racing in the 3 months prior to the introduction of the race fields fee Betfair's gross profit was 56% of its gross revenue, and in the 9 months after the introduction of the race fields fee Betfair's gross profit was only 0.7% of its gross revenue.[80] That is, by choosing to absorb the race fields fee, virtually all of Betfair's gross profit on thoroughbred racing and harness racing had disappeared, prior to the payment of any other costs in relation to these activities.

50. Clearly, Betfair has two choices in relation to the additional cost imposed by the fee:

    a. It can absorb the cost of 60c in each dollar of revenue on NSW horse racing (as it has done pending the outcome of this litigation), which leaves it 40c to pay remaining fees, taxes and costs before it has any profit. This affects its profitability and ability to compete with the TAB, which must only absorb a cost of 9c in each dollar of revenue (assuming the TAB pays the additional cost). That leaves the TAB 91c to pay its other fees, taxes and costs before it has profit. Mr V'Landys recognised that such a course in relation to the corporate bookmakers, may lead to their possibly "ceasing their operations" because of the "financial pressure" arising from the fee;[81] or

    b. It can pass on the cost by raising its prices by 60% whereas the TAB (if it pays the additional fee) need only increase its fee by 9% (assuming, in each case, no relative difference in the reduction in demand), subject to the constraint that Betfair's commission may not exceed 5% pursuant to its licence.[82] The consequence of passing on the cost is that the relative price differences between the TAB and Betfair will be affected, in favour of the TAB.[83] As Mr V'Landys expressed it in his 18 June 2008 Board Report: "*Given the interrelationship between turnover and margins, attempts to fully offset the impact of race fields fees by increasing margins will set the wagering operator into a 'downward spiral'.*"[84]

PART VI ARGUMENT

Section 92: applicable legal principles

51. *Betfair* confirmed that the source of current s 92 doctrine is *Cole v Whitfield*[85] as further developed and applied in *Bath v Alston*,[86] *Castlemaine Tooheys Ltd v South Australia*,[87] *Barley*

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report for RNSW dated 31.7.08 (**BCG report**) at pp 16-17; 18 June 2008 Board Report at p 46; Twaits 16 September 2009 at [123].

[79] 18 June 2008 Board Report at p 43.

[80] See Annexure A to Betfair's reply submissions before Perram J and the references there to Ex AJT-4.

[81] 18 June 2008 Board Report at p 29 and p 45; see also Briefing notes for Callender at p 2.

[82] Full Court at [23].

[83] The price relativity between Betfair and the TAB before the fee (using the concept of revenue margin, that is revenue as a proportion of back bet turnover) is 15.63% ($2.50/$16.00). That is, Betfair's average price is 15.63% of the TAB's price. Once the 1.5% back bet turnover fee is included (and assuming it can be passed on in this way) the price relativity is $4.00/$17.50 = 22.86%. If the same calculation is done with a fee based on 10% of revenue, the relativity is $2.50 (plus $0.25)/$16.00 (plus $1.60) = 15.63%. That is, there is no change to the price relativities between Betfair and the TAB if the additional cost is imposed by reference to revenue rather than 'back bet turnover', while there is a change in price relativities in the TAB's favour if the fee is calculated by reference to 'back bet turnover'.

[84] 18 June 2008 Board Report at p 44 fn 38.

[85] (1988) 165 CLR 360 (*Cole*).

[86] (1988) 165 CLR 411 (*Bath*).

[87] (1990) 169 CLR 436 (*Castlemaine*).

Marketing Board (NSW) v Norman[88] and *Betfair* itself. Thus, if legislation or an executive measure imposes "discriminatory burdens of a protectionist kind", s 92 is engaged, and the legislation or measure will be invalid unless it is reasonably and appropriately adapted to a legitimate non-protectionist object.

52. As a result of *Betfair*, there is a more nuanced analysis of those matters, which uses language more apposite to a modern national economy. As identified by the plurality, the reason for this shift included the "*significant developments in the last 20 years in the Australian legal and economic milieu in which s 92 operates*": 452 [12]. Those developments are first, the interpretation of the place of ss 90 and 92 in the Constitution consistently with the requirement that the "*creation and fostering of national markets would further the plan of the Constitution for the creation of a new federal nation and would be expressive of national unity*": [12]. Second, the appearance of internet-dependent businesses (such as Betfair's) which strains State attempts to retain their own "economic centre": 452 [14]-[15]. Third, the emergence of the National Competition Policy: 452 [16].

53. However, that refinement of s 92 analysis does not signify a departure from the propositions identified in [51] above, or the imposition of additional requirements applicable to private law proceedings for remedies for anti-competitive conduct, such as evaluation of the damage to competition caused by such conduct. Rather, s 92 remains concerned with ensuring that interstate trade is not subjected to discriminatory burdens, in the absence of an acceptable explanation for the differential treatment. The continued focus on that central concept appropriately reflects the fact that one is dealing with questions of the validity of legislative or executive action (which must either be valid or invalid when enacted or undertaken, regardless of what comes to pass in the market) and that s 92 is directed to the preservation of national unity rather than the preservation of a particular state of the market: *Betfair* at 452 [12], 459-60 [32]-[36].

54. The imposition of a tax or fee which imposes a competitive disadvantage on interstate traders to the advantage of their intrastate competitors is such a discriminatory burden.

55. If that burden cannot be justified as being reasonably and appropriately adapted to a legitimate non-protectionist object,[89] the constitutional guarantee will be infringed.

56. Applied in this case:

    a. Betfair represents part of interstate trade and commerce, and hence competition in the national market for wagering on sporting and racing events, including NSW thoroughbred and harness racing;

    b. the imposition of the fee on 'back bet' turnover imposes a much greater business cost on Betfair, per revenue dollar, than it imposes on the TAB;

    c. the natural consequence of that vastly higher business cost (5-6 times greater) is to competitively disadvantage Betfair, and thereby favour the TAB, in a manner which cannot be justified by reference to a legitimate non-protectionist object; and

    d. further, and in any event, the discriminatory burden could be characterised as protectionist because of the finding of actual protectionist purpose or intention on the part of the respondents.

Discriminatory burden of a protectionist kind

57. Betfair submits the effect of the fee condition is to impose a 'competitive disadvantage'[90] upon interstate trade or "*restrict what otherwise is the operation of competition*" in the national market identified in [12] above.[91]

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[88] (1990) 171 CLR 182 (***Barley Marketing Board***).

[89] That is, proportionality between the differential burden and the putative object in the sense of an application of a criterion of "reasonable necessity": *Betfair* at 477 [102]-[103].

[90] *Cole* at 409, *Castlemaine* at 467-8.

[91] *Betfair* at 480 [116].

58. All members of the Court in *Betfair* approached the issue of competitive disadvantage on the basis that it required consideration of whether the practical effect of each of the impugned provisions (both s 24(1aa) which prohibited betting exchanges, and s 27D which required a race fields approval) was to impose a more onerous burden upon interstate trade as compared to in-state trade in the relevant market,[92] that is, a "discriminatory burden".

59. The terms "discriminatory" and "discrimination" in this context are to be understood in the primary sense of "discrimination between",[93] meaning that a comparison is required.[94] As was made clear in *Betfair*, the relevant comparison is between:[95]

    a. persons who from time to time are placed on the supply side or the demand side of trade or commerce and who are present in NSW at any particular time; and

    b. one or more of their out of state counterparts who are participating in the market for the same goods or services or for goods or services that are "of the same kind" in the sense of being relevantly substitutable (relevantly including Betfair, which is, as submitted above, necessarily an out of state operator).

60. As discussed above, the TAB is an in-state supply side participant present in NSW. It provides wagering services which exhibit a high cross elasticity of demand and thus close substitutability with the services provided by Betfair, an out of state supply side participant in that market (see similarly, this Court's conclusion regarding the methods of wagering in issue in *Betfair* at 480 [115]). Betfair's operation is conducted out of NSW, and necessarily so.[96] In those circumstances, the relevant inquiry is whether the impugned fee conditions impose a more onerous burden upon Betfair as compared to the TAB.[97] A broader inquiry encompassing other market participants on the supply side is unnecessary. It is well established that the discriminatory burdening of interstate trade is inconsistent with s 92 regardless of whether it is directed at or sustained by all, some or only one of the relevant interstate traders.[98] It is similarly unnecessary that all in-state traders be comparatively better off, particularly where the TAB is the dominant wagering operator in respect of money wagered on NSW thoroughbred and harness racing.[99]

61. The potential for fiscal measures in the nature of fees or taxes to impose impermissible discriminatory burdens upon interstate trade is well recognised.[100] For example, a requirement on an interstate trader to pay a fee where no such fee applies to competing in-state businesses will, in the absence of an acceptable justification consistent with s 92, impermissibly burden interstate trade (both *Bath* and *Guy v Baltimore*[101] involve examples of such a fee). So too will a legislative or executive measure that subjects both interstate and in-state trade to a fee, but sets the level of the fee in respect of the interstate trader or their products proportionately higher (see the differentially applied £2 and £50 licence fees in *Fox v Robbins*).

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[92] *Betfair* at 463 [43], [46], 481 [118] and 481 [121]-[122] and 483 [131].

[93] *Austin v Commonwealth* (2003) 215 CLR 247 (*Austin*) at 247 [118] per Gaudron, Gummow and Hayne JJ.

[94] *Bayside City Council v Telstra Corporation Limited* (2004) 216 CLR 595 at 629-30.

[95] *Betfair* at 449 [4], 453 [18], 480 [115] and 481 [121]. See also Barton J in *Duncan v Queensland* (1916) 22 CLR 556 (*Duncan*) at 602-603.

[96] See [6] above.

[97] And to a lesser extent, the in-state bookmakers, most of whom do not pay the fee condition as their annual turnover is less than the $5 million threshold: Perram J at [312].

[98] *Castlemaine* at 475 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ. Similarly, the "betting exchange criterion" in *Betfair* plainly did not encompass all of the various forms of interstate wagering services competing with in-State operators in Western Australia (interstate bookmakers and interstate TABs). Like CUB in *Castlemaine*, those operators would, if anything, have been advantaged by the legislation, in so far as they competed with Betfair to supply wagering services in Western Australia.

[99] In any event, see, as regards the position of in-state bookmakers, the material referred to in [40] above and the findings of the trial judge referred to in footnote 97 above.

[100] Discriminatory burdens of that nature clearly falling within the "five traditional examples of protection of domestic industry" are given in *Cole* – see at 393 and 408.

[101] 100 US 434 (1879) (see the discussion in *Betfair* at 462-3 [42]-[43])

62. The fee conditions in issue in these proceedings may be analysed in an equally straightforward manner. In their effect, they impose a burden analogous to that imposed by the legislation impugned in *Fox*. That can be demonstrated by examining the actual effect of the fee on the revenue received by wagering operators (that is, by selecting "*a money flow which fulfils a similar role*"[102] in both businesses). As found by Perram J, and discussed at [47] and [49] above, that examination reveals that the race field fees are simply an impost imposed on the TAB at the rate of 9.375% of its revenue and on Betfair at the rate of at least 54% of its revenue.[103]

63. Of course, the burden in *Fox* involved discrimination in the sense of the "unequal treatment of equals". However, discrimination for the purposes of s 92 is also established where there exists "*the equal treatment of those who are not equals*" producing an "*unequal outcome*".[104] That is the current case. The imposition of a tax or a fee upon 'back bet turnover' imposes a much greater business cost upon Betfair, per revenue dollar, than it imposes on the TAB. It does so because of the fundamentally different nature of a betting exchange business. Betfair earns its commission at a different rate (capped by Tasmanian legislation at 5%) and on a different money flow from that on which the TAB earns its commission or revenue. Moreover, Betfair's business structure is governed by Tasmanian legislation and it is not free to alter the basis upon which it charges commission or to raise its commission rate above 5% of net winnings.

64. The "tendency"[105] or "likely"[106] flow-on effect of an impost that is five times greater than the impost applied to the TAB is either on the price to customers, if passed on; or on resources available to Betfair to compete, if not passed on, as detailed at [50] above.

65. A discriminatory impost of this kind necessarily restricts what would otherwise be the operation of competition between Betfair and the TAB in the national market referred to above. The Productivity Commission, having examined (from a competition viewpoint) the NSW race fields fee,[107] observed that "*the economics is relatively straightforward*"[108] and concluded:[109]

> "It is evident that turnover-based fees will tend to either drive low margin operators out of business or compel them to change their business models and increase their prices to punters. In short, turnover-based fees (if universally applied) discourage price competition."

Facial and practical effects discrimination: a false dichotomy

66. The Full Court held that *Fox vRobbins* was distinguishable from the current matter because in *Fox*, the disturbance of the competitive balance, which would otherwise exist, was apparent from the terms of the law itself: [91]. The Full Court also distinguished *Betfair* and *Bath* on that basis: [91], [101], [102], [103]. While not explicitly stated, it follows that a measure of that kind will, in the absence of an acceptable explanation for the differential treatment, infringe s 92 without further inquiry. In contrast, the measures in question here are said to require a further inquiry (into effect on market share and profitability) because

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[102] *Sportsbet* Perram J at [149].
[103] Perram J at [153].
[104] *Castlemaine* at 480 per Gaudron and McHugh JJ as adopted in *Austin* at 247 [118] per Gaudron, Gummow and Hayne JJ.
[105] See Heydon J in *Betfair* at 488 [146], referring to the "tendency" of the law to affect the composition of the market. (See also the reasons of the Supreme Court in *Baldwin v GA F Seelig* 204 US 511 (1935) (***Baldwin***) at 522.) See similarly, in the context of s 90, *Capital Duplicators Pty Limited vA CT [No 2]* (1993) 178 CLR 561 at 586 per Mason CJ, Brennan, Deane and McHugh JJ.
[106] *Bath* at 426.
[107] Productivity Commission Report at 16.20-16.40.
[108] Productivity Commission Report at 16.22.
[109] Productivity Commission Report at 16.38. The Commission later recommended: "The New South Wales and Queensland Governments should work with racing authorities in those states, as soon as possible, to replace their 'across the board' turnover fees with more competitively neutral and efficient product fees" (emphasis added) (Recommendations 16.1 at p 62 and 16.46).

the discriminatory effect of the fees depends on their practical operation rather than their facial expression.

67. Contrary to the reasoning of the Full Court, neither *Bath* nor *Betfair* suggests that s 92 is to be understood in that disjointed fashion. For example, the majority in *Bath* referred to the impugned law being "*undeniably protectionist both in form and in substance*" – making plain that there is no bright line separating those concepts: see *Bath* at 425; and Heydon J's reasons regarding s 27D(1) in *Betfair* at 487 [141] (referring to the terms of the exemptions to that provision in ss 27C(3) and (4) and its practical operation) are to similar effect.[110] Nor is the existence of such an approach evident in Harlan J's examination of the practical effects of the impugned law in *Minnesota v Barber*,[111] identified by the plurality in *Betfair* as a case providing assistance in construing s 92.[112]

68. Even prior to *Cole*, the inquiry into the practical operation of a law in the context of s 92 has been understood in the manner contended for by Betfair. As early as 1916, the Court recognised that the "*question is still one of the necessary operation of the Statute. Any other principles will result in authorizing the production of the forbidden effect by the device of the skillful employment of evasive words*".[113]

69. As with other constitutional limitations upon power, the Court considers both the terms and the practical operation (or substance) of the law in order to ensure that the limitation or restriction is not circumvented by "*evasive words*"[114] or "*mere drafting devices*".[115] Of course, that bears some similarities to the accepted approach to the question of whether a law should be characterized as a law with respect to a particular head of Commonwealth legislative power. It is well established in that context that one must examine the practical as well as the legal operation of the law to determine if there is a sufficient connection between the law and the head of power.[116]

70. If correct, the approach of the Full Court would promote the success of the very drafting devices warned against in *Ha*. Under that approach, a measure in the nature of a fee condition would seemingly be prima facie invalid (subject to the existence of any acceptable justification or explanation) if it had, on its face, required that the interstate trader pay a higher proportion of its gross revenue than the intrastate trader. Yet, invalidity will not necessarily result where the drafter adopts facially neutral language, even if the measure imposes an identical disability or disadvantage in its practical operation. A return to artificial formalism of that sort in the context of s 92 is to be avoided. There is but a single composite characterization test[117] which requires consideration of the legal and practical operation of the relevant law or measure. Those inquiries are merely aspects of the modern approach to characterization, between which there is no strict delineation.

71. The matter before the Court is an illustration of such "*drafting devices*". The development of the RA Regulation is revealing (see [30]-[38] above). Had the respondents determined that the fee conditions for the TAB would be 9.375% of all revenue from NSW thoroughbred and harness races and for betting exchanges it would be 60%, there would be no question that the fee conditions would contravene s 92.

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[110] Note also his Honour's observations at 483 [131]: "The plaintiffs correctly submitted that where the practical effect of a law is to burden inter-state trade to a significantly greater extent than it burdens intra-state trade, the law contravenes s 92 unless there is some other end achieved by the law which is compatible with s 92". That does not suggest that a case founded upon the practical effects of a law requires an inquiry into the effects or likely effects upon market share or profitability.

[111] 136 US 313 (1890) (***Minnesota v Barber***).

[112] *Betfair* at 463-4 [46]. See also the plurality's discussion at [11] of Barwick CJ's reasons in *Samuels v Readers Digest Association Pty Limited* (1969) 120 CLR 1 at 19.

[113] *Duncan* at 601 (Barton J, dissenting); see also *NEDCO* at 623 per Jacobs J and 607 per Mason J.

[114] *Duncan* at 601 (Barton J, dissenting).

[115] *Ha v New South Wales* (1997) 189 CLR 465 (*Ha*) at 498, referring (in footnote 124) to, *inter alia*: *Cole*, *Bath*, *Castlemaine* and *Barley Marketing Board*.

[116] See e.g. *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 at 198-9 [138] and the authorities referred to therein.

[117] See also *Castlemaine* at 471.

Likely adverse effect upon market share or profitability: an unnecessary gloss

72. Having decided the fee condition was "*facially neutral*" the Full Court held that Betfair had merely established an "*arithmetical point*"[118] and that it was necessary for Betfair to demonstrate that the fee condition was likely to have a significant adverse effect on its market share or profitability.[119] That proposition involved error for the following reasons.

73. First, there is no authority for these additional requirements. In developing its analysis the Full Court has incorrectly applied *Cole*, *Castlemaine* and *Bath*.

74. The Full Court appears to have misconstrued statements by members of this Court to the effect that it is necessary that the impugned measure confer upon intrastate trade a "*competitive or market advantage*".[120] In directing attention to that matter in *Cole*,[121] the High Court was concerned to make clear that s 92 does not encompass other shades of meaning of the words "protect" or "protectionism" - for example, the "protection" of a valuable natural resource.[122] The locus of the comparative inquiry is confined to the sphere of trade and commerce. In other words, the references to "*competitive or market advantage*" were intended to do no more than identify the type of discrimination required for the purposes of s 92. Contrary to the reasoning of the trial judge[123] and the Full Court,[124] they were not intended to impose some requirement akin to the 'substantial lessening of competition' test applied in Part IV of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act* 1974).

75. That may be seen in the discussion in *Cole* of the five "traditional" examples of protection at 393 and 408-9. The imposition of discriminatory burdens of that nature (relevantly including "*discriminatory burdens on dealings with imports*") were said to be examples of the "legion" means by which "*domestic industry or trade can be advantaged or protected*" (emphasis added). That is, the "competitive or market advantage" conferred upon intrastate trade is simply the corollary of the discriminatory burden imposed upon interstate trade. To the extent there was any doubt regarding that matter following *Cole*, further elucidation was provided by the plurality in *Betfair*. In dealing with each of the impugned provisions at [118]-[122], their Honours identified a relevant discriminatory burden in terms of the practical effect of those provisions, that burden being the matter which was said to "*operate to the competitive disadvantage of Betfair*" (at 481 [118]).

76. It is also a misreading of *Castlemaine* to suppose that it required or turned on proof that the regulations had adversely affected the Bond companies' market share.[125] The conclusion that the impugned scheme relevantly discriminated against interstate trade flowed from the fact that the Bond companies were disadvantaged by two aspects of that scheme. First, non-refillable bottles were subject to a refund amount of 15 cents whereas a refund amount of four cents applied to refillable bottles, resulting in a comparatively greater "bottle cost" to the Bond companies.[126] Secondly, retailers selling Bond beer in non-refillable bottles were not exempted from the operation of the Act and were therefore obliged to accept return of non-refillable bottles and to pay a refund amount of 15 cents per bottle. On the other hand, retailers selling beer in refillable bottles were exempted from any legal obligation to accept return of those bottles or to pay the refund of four cents per refillable bottle. The consequence was to deter the retailers from selling Bond beer. Bond could only avoid this consequence by incurring the additional costs of establishing collection depots.[127]

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[118] Full Court at [92] and [107].
[119] Full Court at [79], [80], [98], [99] and [107].
[120] See e.g. *Cole* at 409, *Castlemaine* at 467 and *Betfair* at 481 [118].
[121] See at 409.
[122] See *Cole* at 409 and *Castlemaine* at 467.
[123] Perram J at [165]-[195], [199]-[202] and [205]-[206].
[124] Full Court at [76], [79], [91]-[92], [96] and [100]-[103].
[125] Full Court at [77], [78] and [105].
[126] Significantly, the "bottle cost" analysis did not seek to comprehensively quantify all relevant costs – it did not, for example, include transport costs: see *Castlemaine* at 463.
[127] See at 462-4.

Reflecting the manner in which the plaintiffs' case was put in argument,[128] Mason CJ, Brennan, Deane, Dawson and Toohey JJ observed that the "*Bond brewing companies were disadvantaged in [those two respects] which gave the South Australian brewers a competitive or market advantage*" (at 467). They did not hold that it was necessary for the Bond brewing companies to show anything beyond those comparative disadvantages or discriminatory burdens, such as an actual diminution in market share. Nor was the case for the plaintiffs sought to be advanced on that basis.[129]

77. The same may be said of the Full Court's reliance on *Bath* solely as a case about equalization taxes.[130] The reasons of the majority in that case cannot be confined to fees of that character. They provide more general guidance (overlooked by the Full Court) as to how one is to analyse the practical operation of a fee such as that in issue in the current matter for the purposes of s 92. In particular, at 426 their Honours said:

> "If wholesalers of tobacco products in another State already pay taxes and bear other costs which are reflected in wholesale prices equal to or higher than those charged by Victorian wholesalers, the practical effects of the discrimination involved in the calculation of the retailer's licence fee would be likely to be that the out of State wholesalers would be excluded from selling into Victoria and that the products which they would otherwise sell in inter-State trade would be effectively excluded from the Victorian market. On the other hand, if out of State wholesalers pay less taxes and other costs than their Victorian counterparts, and in particular if they pay no (or a lower) wholesale licence fee, the effect of the discriminatory tax upon retailers will be to protect the Victorian wholesalers and the Victorian products from the competition of the wholesalers operating in the State with the lower cost structure. Either way, the operation and effect of the provisions of the Act imposing the retail tobacconist's licence fee are discriminatory against inter-State trade in a protectionist sense."

78. It is apparent that the majority's analysis proceeded without requiring proof of competitive effects in the nature of reductions in market share or profitability – there being no evidence of the actual competitive position of market participants, their cost structures or the relative prices of the products; or even the taxation schemes in other States. Once a differential burden had been identified, the Court did not find it necessary to consider whether interstate traders were better able to bear this burden, because for example they operated more efficiently or had the benefit of relief from their home government from the Victorian impost.

79. Secondly, if the Full Court is correct, it would permit customs duties to be re-imposed at the borders of the States, as long as the market share and profitability of interstate traders was not "significantly affected". Plainly, that cannot be the case under the established doctrine of this Court.[131] Similarly, a case such as *Fox v Robbins* would have to be decided differently because it would be necessary for the retailer selling wine produced from interstate grapes to establish that its market share and profitability was affected by the higher licence fee.

80. Thirdly, the reasoning of the Full Court proceeds from a distinction, itself unsatisfactory, between "facial" discrimination and discrimination in the practical effects of a measure. For the reasons given at [66]-[71] above, that distinction is unsupported by authority and involves error.

81. Fourthly, the Full Court's reasoning fails to give adequate weight to the statements by the plurality in *Betfair* to the effect that s 92 is not premised upon the "*economic value of free trade*".[132] Rather, it is, as their Honours observed, directed to the implementation of a particular scheme of political economy[133] – the preservation of national unity in the face of

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[128] See at 454 of the report and pp 25-26 of the transcript of 30.5.89.
[129] Ibid.
[130] Full Court at [71].
[131] See *Cole* at 394-5; *Bath* at 429; *Betfair* at 457 [27].
[132] *Betfair* at 459 [32].
[133] *Betfair* at 454-455 [22]-[23].

the "inconvenient truth" that legislators in one component polity in a Federation may be susceptible to pressures to make decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers.[134] It follows that s 92 is not primarily concerned with preserving a particular state of the market or the market share or profitability of participants within such a market.[135]

82. Fifthly, the approach of the Full Court appears to overlook that s 92 concerns the validity of laws and executive action, which must be either valid or invalid when enacted or undertaken. It is not readily apparent how the constitutional facts upon which those matters turn could encompass the later occurring and longer term effects of an impugned measure upon an individual interstate trader's profitability and market share.

83. Sixthly, the Full Court failed to consider the pre-1900 United States commerce clause decisions this Court found of assistance in *Betfair*.[136] Those decisions further support the proposition that s 92 is concerned with the imposition of discriminatory burdens *per se* (rather than the particular market effects produced by those burdens). For example, in referring with apparent approval to the passages from *Guy v Baltimore*[137] in *Betfair* at 462-3 [42], the plurality did not suggest that some form of attenuated analysis was required in the context of s 92, so as to determine whether the "*more onerous public burden*" placed upon interstate trade was likely to have an adverse effect upon the market share or profitability of the interstate participants in the market. The same may be said of the decision in *Minnesota v Barber*. In the passage extracted in *Betfair* at 464 [46] and earlier in his reasons, Harlan J placed emphasis upon the fact that the "*necessary effect*" or "*obvious and necessary*" result of the facially neutral law was the burdening of interstate trade.[138] All members of the Court in *Betfair* similarly proceeded on the basis that the existence of such a burden will be sufficient to infringe s 92, unless the law or measure is limited to what is reasonably necessary to achieve a legitimate end.[139]

Full Court's conclusion was contrary to the evidence regarding effect on profitability and market share

84. Further or alternatively, contrary to the findings of the Full Court, there were ample bases upon which to conclude that the fee conditions had an actual or likely adverse effect upon Betfair's profitability and a likely adverse effect upon market share (to the extent, contrary to Betfair's submissions above, it is necessary to demonstrate such an effect).

85. First, the fee conditions were shown to have had an actual impact upon Betfair's gross profit (see [49] above).

86. Secondly, it was self evident that a vastly greater impost on Betfair as compared to the TAB was likely to affect the competitive balance in one of the two ways identified above ([50]).

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[134] *Betfair* at 459-460 [32]-[36]. See also *Duncan* at 605 per Barton J (dissenting) concluding that the majority's decision "will be of grievous effect upon the future of the Commonwealth for it tends to keep up the separation of its people upon state lines"; and *Street v Queensland Bar Association* (1989) 168 CLR 461 at 485 per Mason CJ observing that ss 92 and 117 were "designed to enhance national unity"; see also Brennan J at 512 and Deane J at 522. See similarly, as regards the position in the United States, the comments of Professor Tribe "... it should be noted that behind the Court's analysis stands an important doctrinal theme: the negative implications of the Commerce Clause derive principally from a political theory of union, not from an economic theory of free trade. The function of the clause is to ensure national solidarity, not necessarily economic efficiency": *American Constitutional Law*, 3rd ed, vol 1 (2000) at 1057, emphasis in original.

[135] See, for example, Sir Henry Parkes, *Convention Debates* (Sydney 1891) pp 24-25; Mr Barton, *Convention Debates* (Sydney 1891) pp 89-90; Mr Barton, *Convention Debates* (Adelaide 1897) pp 20-21; Sir John Downer, *Convention Debates* (Melbourne 1898) Vol 1 p 1018; Mr Barton, *Convention Debates* (Melbourne 1898) Vol 2 pp 2369-70. See also A Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone" (2005) 33 *Federal Law Review* 445 at 464 and J Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth*, OUP (2000) pp 52-3.

[136] See *Betfair* at 460 [35]-[36].

[137] (1879) 100 US 434 (*Guy v Baltimore*).

[138] 136 US 313 at 322-3 (1890).

[139] See *Betfair* at 463 [43], 464 [46], 481 [118] and 481-2 [121]-[122] (plurality) and 483 [131] per Heydon J.

87. Thirdly, those self evident matters may be confirmed by reference to the contemporaneous documentary evidence (prepared by the respondents, on behalf of the respondents and by others) which stated that such effects were likely to result from the imposition of the fee conditions.[140]

88. Fourthly, as Perram J observed at [212], it may be inferred from the fact that the respondents intended those consequences that they were more likely to have eventuated. His Honour did not consider that there was occasion to act upon such an inference, by reason of his understanding of Betfair's pleaded case. However, given the Full Court's conclusions regarding the sufficiency of Betfair's pleadings, at [47]-[61], such an inference is clearly available.

89. Having regard to those matters, Betfair plainly established that the fee conditions were likely to (or had a tendency to) affect the competitive balance by reducing Betfair's profitability or market share.

Business model

90. The Full Court appeared to suggest that a tax or fee will only infringe s 92 if it imposes a discriminatory burden on all interstate traders as a result of "*the common circumstances of the trade*": [104]; see also [95]. In contrast, Betfair's case was said to depend upon a burden arising from "*its particular business model*": at [80] and [95].

91. As submitted above, the test adopted in *Cole* involves a comparison. That comparison requires, *inter alia*, consideration of the burden to which the impugned government measure subjects the individuals and entities engaged in interstate trade (not the burden placed upon "interstate trade" as a more abstracted concept). As this Court said in *Betfair* at 456 [26], to perceive those matters does not involve any return to the individual rights doctrine. The Full Court acted under a misconception in suggesting otherwise.

92. The Full Court's reasoning is also inconsistent with *Castlemaine*. As was observed in argument in that case, the difficulty faced by the Bond companies might be said to have flowed from their manufacturing structure, reflecting their "business model" or particular mode of conducting trade and commerce using non-refillable bottles. The largest interstate trader, CUB, had modified is operations in South Australia by using refillable bottles.[141] On that basis, it was argued that the plaintiffs' case depended upon the "resurrection" of the individual rights theory. That submission was rejected. The Court observed:[142]

> "Discrimination in the relevant sense against interstate trade is inconsistent with s 92, regardless of whether the discrimination is directed at, or sustained by, all, some or only one of the relevant interstate traders."

93. Because it supplied beer in refillable bottles, CUB was not adversely affected by the regulations (in fact, the stated case recited that the competitive position of CUB improved with the commencement of the impugned scheme).[143] Section 92 was found to be infringed notwithstanding that those matters pointed to the conclusion that the burdens imposed by the impugned scheme flowed from the "*individual trader's particular circumstances*", rather than the common circumstances of trade affecting CUB and the plaintiffs alike (*contra*: Full Court at [104]).

94. For similar reasons, the Full Court's reasoning is inconsistent with *NEDCO*. The fact that the plaintiff in that matter conducted its milk processing plant from Victoria might equally be said to be the product of its business decisions and particular circumstances and yet the Court did not suggest that a solution to the discrimination was for the Victorian producers to build and operate a pasteurization plant in NSW.

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[140] See references in footnote 78 above; see also Access Economics Report at pp 26-27 and Allen Consulting Group report accompanying Betfair's submission to the Cameron Inquiry, at p 20.

[141] See the report of the argument of the NSW Solicitor General at p 456 of the report and the transcript of 31.5.89, pp 175-6 and 177.

[142] At 475. A similar position applies in the United States – see e.g. *New Energy Co of Indiana v Limbach* 486 US 269 (1987) at 276-7 and the authorities there referred to.

[143] See [78] of the special case at 449.

State of origin

95. Although the position is not entirely clear, it appears that the Full Court held that it must be shown that the state of origin of the interstate trader is relevant to the burden placed upon the interstate trader by the impugned measure: see particularly at [68] and [103]. If correct, that would add yet another requirement to the test to be applied for the purposes of s 92. Such a requirement does not currently form part of established doctrine and has a number of difficulties.

96. First, the addition of that novel element would "*focus upon the geographic dimension given by state boundaries*" and thus magnify rather than alleviate the practical and conceptual difficulties identified by the plurality in *Betfair* at 452 [14]-[15].

97. Secondly, such a proposition seems to involve the revival of elements of the doctrine abandoned in *Cole*. In particular, it seems to require a distinction to be drawn between "essential" and "inessential" attributes of the particular trade and commerce in issue (akin to the criterion of operation formula[144]), a distinction which the High Court in *Cole* described as highly artificial, formalistic and obscure.[145]

98. Thirdly, such a requirement seems at odds with the result in both *Castlemaine* and *Betfair* – there being nothing in the criteria of use of non-refillable bottles, or the fact of conducting a betting exchange, which had an inherent connection to the geographic locations from which the plaintiffs in those matters conducted their businesses. The Full Court's suggestion that *Bath* requires consideration of whether the impugned measure negates a competitive advantage which the interstate trader enjoys in its state of origin is incorrect – as submitted above, the Court in *Bath* considered that the law was discriminatory in a protectionist sense regardless of whether the interstate trader did or did not enjoy such an advantage in their home state.

99. Fourthly, as submitted above, it is clear after *Betfair* that the comparison required for the purposes of s 92 is between persons who "*from time to time are placed on the supply side or the demand side of commerce and who are present in a given state at any particular time*"[146] and one or more of their interstate counterparts who are outside the state at that time. It matters not that a person's position on one or the other side of that equation might be said to be the result of "happenstance".[147]

Purpose or Object

100. Betfair submits there are three available approaches to the issue of 'purpose' and 'object' for s 92, and the characterisation of an identified discriminatory burden on interstate trade as protectionist. Each of those approaches applied in this case results in the conclusion that the discriminatory burden imposed by Betfair's fee condition is protectionist.

101. First, the nature of the discriminatory burden itself may be sufficient for a Court to accept that the burden has a "protectionist purpose or effect": see Heydon J in *Betfair*.[148] Betfair submits the object of the fee conditions can be inferred as protectionist given the size of discrepancy between the fee imposed on the TAB and that imposed on Betfair.

102. Secondly, in line with both judgments in *Castlemaine* and the plurality in *Betfair*, if the discriminatory burden cannot be justified by reference to a legitimate non-protectionist purpose it will be characterized as protectionist. The trial judge found that the fee condition "*is plainly not adapted to the purpose of ensuring that those who derive a commercial benefit from the use of race fields information make a contribution with that use*": [251]. Further, the

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[144] See e.g. the description in *Cole* at 400-401 of the test enunciated by Dixon J in *Hospital Provident Fund Pty Limited v Victoria* (1953) 87 CLR at 17.

[145] See *Cole* at 401.

[146] *Betfair* at 453 [18] (emphasis added).

[147] Significantly, a contrary submission was made in *Castlemaine* and should be taken to have been rejected. See the submission of the NSW Attorney recorded at 456 of the report, where it was said: "A law cannot be characterized as discriminatory simply because a party which is disadvantaged happens to be interstate".

[148] *Cole* at 404.

discrepancy between the magnitude of the fee imposed on Betfair and that imposed on the TAB cannot be justified by reference to a legitimate non-protectionist object.[149]

103. Thirdly, in the case of administrative decisions, the actual purpose or intention of a decision-maker may be sufficient to characterize a discriminatory burden as protectionist.[150] The trial judge found that the respondents' "*actual purpose was to protect the revenues of the TAB from competition from interstate operators*" but concluded that such a finding was not relevant for the purposes of s 92.[151] However, to suggest that such purpose is irrelevant misunderstands previous considerations of purpose, and invites the Court to turn a blind eye to administrative action which intentionally seeks to subvert a constitutional guarantee.

10 104. Earlier considerations of 'purpose' and its irrelevance have been in the context of legislative action and specifically, a legislative pronouncement of a putative legitimate excuse for discriminatory burdens. For example, in *Duncan*, the long title of the Act was "*An Act to Secure Supplies of Meat for the uses of His Majesty' Imperial Government during War, and for other purposes*".[152] Of this, Barton J said: "motives have not been allowed as excuses for violation of the Constitution".[153]

105. The use of purpose to determine invalidity is consistent with the US decisions in *Baldwin*[154] and *Hood & Sons v Du Mond*[155] (both cases which this Court has used in its interpretation of s 92[156]) to find a contravention of s 92 from the actual intention of an impugned law or measure. It is also in harmony with the approach this Court has taken to the intercourse
20 limb of s 92 as described in *APLA Limited v Legal Services Commissioner of New South Wales* where, had the object of the law been to impede interstate intercourse, it would have been invalid.[157] (In that case 'the object' of the law was taken to be the meaning of the law or its effect in an objective sense,[158] given the Court was dealing with a legislative scheme, not an administrative decision.)

106. Since *Cole* this Court has not had to consider whether actual purposes of administrative decision-makers are relevant to the application of s 92. In *Cole* the Court accepted the stated conservation object, and the agreed fact provided that banning the sale of the crayfish was the only way in which the object could be achieved.[159] In *Castlemaine* both judgments said that the identified object was not "*an acceptable explanation or justification for the*
30 *differential treatment,*"[160] thus, the "*true object*"[161] was found to be protectionist. In *Bath*, the majority started its analysis from the prima facie discrimination present on the face of the scheme. Their Honours said that the explanation for the exclusion from the basis of calculation of the retailer's licence fee of tobacco products purchased within Victoria (that the interstate wholesaler would not have paid a licence fee to the Victorian Government) tended "*to underline rather than remove the protectionist character of the discrimination at the retail level*".[162] In *Betfair* the plurality did not examine the possible purpose of the Western Australian legislature[163] but did conclude that one protectionist purpose would be sufficient

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[149] See *Castlemaine* at 478 per Gaudron and McHugh JJ.

[150] See M Coper, "Section 92 of the Australian Constitution since *Cole v Whitfield*" in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992) 129 at 142: "... perhaps in this area [administrative discretions] the criterion of purpose will be more important than that of effect".

[151] Perram J at [21], [239].

[152] (1916) 22 CLR 556.

[153] Ibid at 601.

[154] 294 US 511 (1934) at 519, 521, 522, 527.

[155] 336 US 525 (1948) at 530-2, 535.

[156] The former in *Betfair* at 460 [35] and both in *Castlemaine* at 470.

[157] (2005) 224 CLR 322 at 353 [38] (Gleeson CJ and Heydon J), 392-4 [173]-[179] (Gummow J) and 460-3 [416]-[427] (Hayne J). See also Brennan J in *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 at 53-61 and Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF* (1999) 199 CLR 160 at 233 [221].

[158] See e.g. (2005) 224 CLR 322 at 394 [178] (Gummow J), 462 [423] (Hayne J).

[159] (1988) 165 CLR 360 at 363 ([8] of the further agreed facts) and 409.

[160] (1989) 169 CLR 436 at 477 and 480.

[161] Ibid at 477 and 473: "The true object in such a case is critical to its validity".

[162] *Bath* at 426.

[163] *Betfair* at 480 [113].

to characterise the law as protectionist.[164] His Honour Heydon J found, in relation to one of the impugned provisions, that "*so wide is the technique adopted – so ill-suited is it to achieve the end supposedly advanced - that it must be inferred that the only purpose is protectionist*".[165] As for the administrative decision to refuse to approve Betfair's use of WA race fields, the Minister's apparent discretion to grant or withhold approval was illusory given the prohibition on betting with betting exchanges in Western Australia. Therefore there was no need to consider the actual purposes that actuated the Minister.

107. This is a relatively exceptional case where the relevance of actual purpose is squarely raised.

108. First, the respondents are administrative bodies whose intentions, purpose and object can be determined without the constraints imposed upon determining the 'purpose' or 'object' of legislation.[166]

109. Secondly, a finding as to that purpose has been made by the trial judge and was not overturned on appeal. This finding was supported by the overwhelming evidence of the material before the boards of both of the respondents, all of which can be used to infer each respondent's purpose or object in imposing the impugned fee conditions.[167]

110. Thirdly, and most importantly, the creation of a scheme where the potential non-compliance with s 92 resides at an administrative and not legislative level creates a risk that the delegation of the decision-making power will be used as an expedient or device to achieve, by indirect means, that which could not be done directly.[168]

111. Betfair submits that on any of the approaches identified above, the differential burden imposed on it by the respondents should be characterized as protectionist.

PART VII CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

112. See the attached appendix for the full text of the relevant constitutional, statutory and regulatory provisions.

PART VIII ORDERS SOUGHT

113. See the notice of appeal dated 24 March 2011 for the precise form of the orders sought.

Dated: 8 April 2011

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[164] *Betfair* at 464 [48].
[165] *Betfair* at 484 [134].
[166] *Arthur Yates & Co Pty Limited v Vegetable Seeds Committee* (1945) 72 CLR 37 at 68.
[167] *Telstra Corporation Limited v Hurstville City Council* (2002) 118 FCR 198 at 221 [50].
[168] See the passage from *Guy v Baltimore* at 443 quoted by the plurality in *Betfair* at 462 [42].