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

AND

RACING NEW SOUTH WALES
ABN 86 281 604 417
First Respondent

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

ATTORNEY GENERAL
(NEW SOUTH WALES)
Third Respondent

APPELLANT'S REPLY SUBMISSIONS (INCLUDING ON THE DRAFT NOTICE OF CONTENTION) AND REPLY TO THE INTERVENERS' SUBMISSIONS

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PART I

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

PART II

The impugned fee

2. Contrary to the labels employed by the respondents and the AG(NSW), the impugned fee is neither "*a fee of equal application*" (RS [72]) nor a "*flat fee*" (AG(NSW) at [20], [37]-[44]).[1] The fee (a condition of a necessary input to compete in the national wagering market) costs Betfair approximately 60% of its revenue received from the use of NSW race fields. It represents approximately 10% of TAB's revenue from such use. This is not mere arithmetic. It is a demonstration of the discriminatory burden imposed by the impugned fee.

3. The fee is protectionist because it operates, as the respondents intended, to protect the TAB's revenues from competition from Betfair, or, because that is the likely effect or natural consequence of the fee.

4. The respondents make four primary arguments (some adopted by the AG(NSW) and the interveners, some not). First, that there is no discriminatory burden because the proper comparison is the effect on back bet turnover, not gross revenue, thus the fee is equally imposed at 1.5% of back bet turnover: RS [6], [53]-[57]. Secondly, that Betfair must prove a tendency to preclude or inhibit competition which is not obvious when the fee is imposed equally on back bet turnover: RS [63]. Thirdly, that the respondents did not have a protectionist purpose but rather sought to impose a fee that was indifferent to "revenue leakage" from local traders: RS [41]. Finally, that the fee calculated by reference to turnover was reasonably appropriate and adapted to a legitimate object because the choice of turnover is appropriate and has been applied at the same rate (1.5%): RS [77]. All of these rest on the incorrect propositions that the fee is 'neutral' or 'imposed equally,' and that back bet turnover is a relevant money flow which measures use of NSW race fields.

Discriminatory burden

5. The respondents contend that back bet turnover is the appropriate comparison for assessing whether there is a discriminatory burden. That argument involves two fundamental and related errors.

6. The first is to attempt to resolve their constitutional dilemma by reiterating the essence of the dilemma itself. The respondents insist that Betfair is mistakenly analysing its fate through gross revenue rather than 'wagering' (i.e. back bet) turnover. This is especially stark at RS [6] where the respondents submit that Betfair has erred in not assessing the discriminatory impact of the fee in "*its treatment of the money flow by reference to which it is calculated – that is, wagering [i.e. back bet] turnover*" (see also [63]). But it is no answer to Betfair's argument to say that the effect of the fee must be considered in terms of the metric selected by the respondents for imposing the fee. That merely begs the question.

7. The second error is to grant back bet turnover a priority it does not deserve in the analysis of the impact of the impugned fee; again made stark at RS [6] which assumes there is a relevant 'money flow' for Betfair from back bet turnover . Back bet turnover is not a 'money flow' for Betfair. It represents the amount staked on one side of all bets (back and lay) made on a particular market through Betfair's exchange. Betfair's money flow from the use of NSW race fields is its gross revenue earned on NSW horse racing. Contrary to RS [6], Betfair's revenue cannot be calculated by reference to back bet turnover.[2]

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[1] Nor is the impugned fee "uniform": AG(WA) [8(c)], AG(Vic) [35]; nor "even-handed": AG(WA) [12]; nor does it treat "all who enter the market on the supply side equally": AG(SA) [16].

[2] See *Betfair v Racing NSW* (2010) 268 ALR 723 (**Perram J**) at [147]; see also [16] below.

Gross revenue

8. Gross revenue is the only way in which the impact of the fee can properly be compared (*contra* RS [53]-[54]). Gross revenue has the same meaning for both Betfair and the TAB (and for any and all businesses). It is the "*money flow which fulfils a similar role in each business model*".[3] It is not an "artificial" concept (RS [23], [55]), nor is Betfair privileging or elevating gross revenue (RS [6], [55]), taking a "particular slice" of its total business (RS [17]), making an "isolated comparison" (RS [30]) nor engaging in "a matter of arithmetic" (RS [54]).

9. Gross revenue is the revenue obtained by Betfair and the TAB from wagering on NSW thoroughbred and harness racing, that is, obtained from the use of race fields for such races, before payment of any costs or taxes. As such, it is the money flow which fulfils the same role in each business model; and importantly, is the money flow from which the race fields fee is paid. That is why the appropriate comparison is the effect of the fee in terms of how much it costs each wagering operator in the market, as a proportion of how much that participant earns in the market, and why the matters raised at RS [56] are irrelevant.

10. Rather than grapple with the effect of the fee on the gross revenue of the TAB and Betfair, the respondents attempt to identify various purported 'problems' with gross revenue (at [16]-[23]). Collectively, the list may be rejected on the basis stated above. Individually each 'problem' can be answered.

11. First, whether Betfair's gross revenue attributable to NSW horse racing should have additional amounts included (RS [17]) is not relevant to assessing whether gross revenue is an appropriate metric. In any event, apart from the premium charge,[4] none of the matters Betfair is said to have excluded involves any financial benefit accruing to Betfair from the use of NSW race fields information.[5] The respondents made similar submissions below but neither the primary judge nor the Full Court accepted them.[6] Further, to the extent those items are quantifiable, they represent a miniscule proportion of Betfair's total revenues.[7] Nor do the respondents identify how back bet turnover reflects any of the additional factors they raise.

12. Secondly, whether Betfair could manipulate gross revenue (RS [16] and [56(b) and (c)]) is speculation by the respondents who made no attempt to prove those contentions.

13. Thirdly, the claimed "substantial difficulties" in monitoring and enforcing a fee based on gross revenue (RS [21]) were also not established by any evidence. That submission ignores not only the basis of income tax collection in this country (as Perram J noted at [248]) but also:

    a. Mr Twaits' evidence that it was a simple matter to determine Betfair's gross revenue[8] (*contra* RS [21(a)]) and the gross revenue of a totalizator[9] (*contra* [21(b)]);

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[3] *Sportsbet v State of New South Wales* (2010) 186 FCR 226 (***Sportsbet***) at 266 [149].

[4] The premium charge, levied on all wagering with Betfair on multiple racing and sporting events, not merely NSW racing, comprised only 1.5% of Betfair's total gross revenue for the financial year ending 30 April 2009: Confidential Exhibit AJT4 (FC AB 4196). In jurisdictions where Betfair pays fees based on gross revenue, this includes the revenue earned by Betfair from the premium charge: Twaits (T11.26-.28 (20.11.09) (FC AB 4502)).

[5] See the detailed references to the evidence in fn 3 of Betfair's reply submissions in its special leave application (Application Book 214). Additionally, there was no evidence that there was any value in the intellectual property in a bet (see RS [17(e)]): Twaits (T.102 (19.11.09) (FC AB 4455). The submission at RS [17(h)] about a "layer's overround" misunderstands the percentage figures on Betfair's website, which are based on odds expressed from the backer's perspective. If odds were expressed from the layer's perspective, the percentage figures would be the inverse. In any event any "layer's overround" could not represent any financial benefit in the hands of Betfair.

[6] Perram J at [119], [131], [133], [135]; *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 (**Full Court**) at [31].

[7] API fees in the financial year ending 30 April 2009 constituted 0.45% of Betfair's total gross revenue; and transaction charges including excess data charges constituted 0.23% of Betfair's total gross revenue: Confidential Exhibit AJT4 (FC AB 4196). Client interest for the financial year to August 2009 represented 2% of Betfair's total gross revenue: Exhibit C tab 6 (Betfair Board Report) FC AB 4296. See also fn 4 above.

[8] Twaits T6.1-.3 (20.11.09) (FC AB 4499).

b. that the TAB pays fees to the respondents under the RDA on a revenue basis (Perram J [248]);

c. that Greyhound Racing NSW has no difficulty in charging race fields fees calculated by reference to 10% of gross revenue or 1.5% back bet turnover.[10] The ACT, Queensland, South Australian, Tasmanian, Victorian and Western Australian racing authorities similarly have no difficulty in charging race fields fees calculated by reference to revenue (see e.g. AG(WA) at [68]-[80]).

14. Fourthly, the respondents' professed concern that their position as "regulators" would be constrained with a fee imposed on gross revenue is at odds with the respondents' close commercial reliance on the TAB: Perram J [247]; and with the stated object of creating the race fields legislative scheme, which was for the racing industry to receive contributions from all those who "profit" from the use of the racing industry's product.

15. The Court should reject the respondents' argument (at [22]) that TAB's gross revenue is less than 16% of its back bet turnover. The respondents admitted that the TAB's take out rate was approximately 16%: Defence [48]; and that a fee of 1.5% of back bet turnover represented 9.375% of its gross revenue: [67].[11] Even if, contrary to these admissions and the findings of the trial judge, the fee were 10.7% of TAB's gross revenue (assuming a commission of 14%), the order of magnitude in impact of the fee (10.7% of TAB's revenue to approximately 60% of Betfair's revenue) remains the same.

Back bet turnover

16. In contrast to gross revenue, back bet turnover does not fulfil the same role in each business model. In the TAB's model, where punters may only make back bets, its revenue (through its commission or 'take out') is generated as a proportion of back bet turnover.[12] That is not the case for Betfair, where punters may make both back and lay bets. Betfair earns its revenue as a commission on a customer's net winnings in a market (not, as the AG(NSW) says at [74], as a commission "on bets"). Back bet turnover is not "*an element of Betfair's revenue*" (*contra* AG(WA) [10]), nor does it relevantly "receive" turnover[13] (*contra* AG(WA) [14]). Betfair's commission has no linear or direct relationship with back bet turnover.[14] Where wagering transactions by a punter do not result in net winnings, while there will be back bet turnover involved, Betfair will not earn any commission. Accordingly, Betfair cannot pay the race fields fee from 'back bet turnover' because any particular customer's wagering (and the back bet turnover it involves) may not result in any revenue for Betfair if that customer is not a net winner in the market.

17. The respondents seek to elevate the concept of 'back bet' turnover by focusing on the use made by a punter of a race field: RS [7]-[13]; and by contending that back bet turnover is "appropriate": [14]. However, as the respondents accept (at [79]), the relevant 'use' of the race fields is by a wagering operator, not by a punter. It is the wagering operator, not the punter, who is obliged to pay the impugned fee to the respondents. A wagering operator's use of the race field is not to win or capture back bet turnover; that proposition was expressly rejected by Mr Twaits whose evidence was uncontroverted.[15] Wagering operators use race

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[9] Twaits T20.5-.15 (20.11.09) (FC AB 4511), dealing with the revenue earned by Betfair as an agent for TOTE Tasmania.
[10] See the approval granted by Greyhound Racing NSW to Betfair on 31 August 2008 (FC AB 2749).
[11] Perram J [122]-[125].
[12] The AG(Vic) is incorrect to assert at [35] that a wagering operator's 'turnover' is a money flow that results from the purchase of a product. The money flow for the TAB for example is the commission extracted from the pool of back bet turnover wagered on an event, not 'turnover' itself. For Betfair the money flow is the commission earned on a customer's net winnings in a market: see AS [24].
[13] Twaits T99.26-.44 and T101.17.46 (19.11.09) (FC AB 4452 and 4454); Betfair's Market Terms and Conditions (FC AB 1673 ff).
[14] Betfair relies upon the lack of a direct or linear relationship between back bet turnover and gross revenue because the lack of the linear relationship leads to the discriminatory burden (see AS [25]; *contra* RS [15]).
[15] The respondents mis-describe the evidence of Mr Twaits in relation to the competition between wagering operators at RS [14(a)]. Mr Twaits rejected, several times, the proposition that wagering operators compete for back bet turnover: Twaits T49.18-.19 (20.11.09) (FC AB 4537), Twaits T120.17-.24 (19.11.09) (FC AB 4473); Twaits T124.1-.12 (19.11.09) (FC AB 4477).

fields to earn revenue.[16] That revenue is what a punter pays a wagering operator for the wagering service. And it is from that revenue that the race fields fee is paid.

18. The respondents' suggestion (RS [11]) that the legislative scheme (meaning 'back bet turnover') is one that measures 'use' at the point a customer's bet is accepted is clearly wrong, as is the contention that "*Betfair raises no challenge to this*" (RS [11(a)]). The legislative scheme does not adopt a technique of measuring 'use' at the point of acceptance of a bet – it permits the respondents to charge a wagering operator anything for the approval, up to a cap of 1.5% of its back bet turnover: cl 16 RA Reg. In any event, for the reasons discussed below, back bet turnover is not an effective measure of 'use'. As noted by Perram J at [240]-[244], "*as a proxy for numerical use the fee is hopeless*" and as a proxy for commercial benefit it is "*poor and unattractive*".

19. As to the factual matters raised by the respondents in relation to turnover (at [14]):

    a. Betfair and the TAB do not compete for back bet turnover - see [17] above (*contra* RS [14(a)]); they compete for revenue;

    b. back bet turnover has never been used to measure the use of race fields information: Perram J [247] (*contra* RS [14(b)]);

    c. Betfair does not use the metric of 'back bet turnover' except to comply with the respondents'[17] approvals (*contra* RS [14(c)]). The suggestion that Betfair's competitors use the concept of 'turnover' is overstated[18] (*contra* RS [14(d)]);

    d. Betfair's race fields fees accrued to the Victorian racing industry were calculated in a different way to the impugned fees and were completely offset by its payments to Tasmania[19] (*contra* RS [14(e)]).

Section 92: burdens of a protectionist kind

20. Betfair's case is consistent with well established doctrine. The respondents and (in some instances) the interveners have made submissions regarding the place of discriminatory burdens of a protectionist kind which invite this Court to depart from those principles. In the passages that follow, Betfair analyses those submissions.

The primary focus of the guarantee of free interstate trade and commerce in s 92 remains the identification of discriminatory burdens of a protectionist kind upon interstate trade

21. The respondents (but not the AG(NSW), nor any of the interveners) suggest that this is not the focus of s 92. Instead, they say that one should invoke some form of strict textual fundamentalism to divine the limits of s 92's guarantee (RS [58]-[59]). As this Court has noted, no such limitations were in fact expressed by the framers.[20] Of course, the terms of s 92 do support the proposition that, within its limits, the freedom is "absolute",[21] but that does not take matters very far in discerning where those lines are to be drawn.

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[16] Twaits T120.27-33 and T124.1-12 (19.11.09) (FC AB 4473 and 4477), Twaits T49.18-19 and T68.20-47 (20.11.09) (FC AB 4537 and 4556).

[17] See Twaits T110.42-.44, T120 and T124.6-.12 (19.11.09) (FC AB 4463, 4473 and 4477), Twaits T49.24-.34 and T54.32 (20.11.09) (FC AB 4537 and 4542).

[18] The respondents rely solely on two ASX announcements by Centrebet (FC AB 2689) and International All Sports (FC AB 2715). Each of these documents deal prominently with revenue and earnings as the primary measures of financial performance, in priority to turnover. Tabcorp's financial results released to the ASX and associated documents likewise focus on revenue and profit results, not 'turnover': Tabcorp-Investor Compendium – August 2009 (FC AB 3293 and 3297), Tabcorp's announcement re 2009 Full Year Results (FC AB 3302, 3304, 3306, 3314-3316 and 3339).

[19] Twaits T134-137 (19.11.09) (FC AB 4487-4490).

[20] See e.g. *James v Cowan* (1930) 43 CLR 386 at 422 and *Cole v Whitfield* (1988) 165 CLR 360 (***Cole***) at 392. See also *Betfair v Western Australia* (2008) 234 CLR 418 (***Betfair***) at 454 [21], referring to the terms of s 92 as "familiar but still debatable".

[21] See *Cole* at 394.

22. Since *Cole*, this Court has accepted that the freedom is circumscribed such that it is engaged (and only engaged) where there is a discriminatory burden of a protectionist kind. That is not simply a matter of "convenience" (cf. RS [58]). Discrimination is the concept with which the constitutional guarantee of freedom of interstate trade and commerce in s 92 is "*centrally concerned*".[22] Nothing said in *Betfair* altered that position: see the joint judgment at 481 [118] and 481-2 [122] and the reasons of Heydon J at 483 [131]. See also AG(Vic) [9] and AG(NSW) [23].

There is no strict delineation between discrimination in the practical operation of a law and discrimination which appears on the face of a law

23. The respondents seek to draw bright lines between the following different species of discriminatory measures:[23]

    a. measures which, on their face, discriminate against interstate trade;

    b. measures which do not on their face discriminate against interstate trade, but nevertheless "discriminate" (by reference to a feature such as betting exchanges or non-refillable bottles), said to include *Betfair* and *Castlemaine*;[24] and

    c. measures which do "*not discriminate on their face at all*", which are said to require consideration of whether there has been, in the words of Gaudron and McHugh JJ in *Castlemaine*, "*equal treatment of those who are not equals*" producing an "*unequal outcome*".[25]

    Although not entirely clear, it appears that the AG(Vic) proposes a similar taxonomy (at [6(c)(i)(2)] and [51(a)]). Note also AG(NSW) at [72]-[79].

24. Those submissions seem to be largely founded upon a misreading of the passage from the reasons of Gaudron and McHugh JJ in *Castlemaine*. Properly analysed, their Honours were merely stating that for the purposes of s 92, the concept of discrimination encompasses discrimination in the practical effects of a measure, as well as discrimination evident on its face.[26] The formulation itself makes that clear - "*equal treatment*" connotes a measure which is facially neutral and "*those who are not equals*" requires consideration of the practical operation of the measure.

25. Betfair's case is and has always been that the fee condition has an unequal effect upon it as compared to the TAB (the dominant intrastate operator) as a matter of practicality or substance. Contrary to the submissions of the AG(NSW) (at [52] and [72]), Betfair has not conceded that the impugned measures are "*in ... substance, an equal measure*".

26. Neither principle nor authority warrant the development of three novel and poorly articulated sub-species of discrimination, each possibly requiring its own unique test for validity. To adapt what was said by Gummow J in *IW*, that would involve abandoning the succinct terms with which the constitutional conception of discrimination has been expressed, for sub-categories of discrimination akin to those employed in domestic anti-discrimination legislation, which has proved "*complex, obscure and productive of further disputation*".[27]

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[22] *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 457 [406] per Hayne J.
[23] See RS [69]-[70]. Although put as an alternative argument, it is apparent that that analysis is reflected in other parts of the respondents' argument – see e.g. RS [55]-[56].
[24] *Castlemaine Toohey's Ltd v South Australia* (1990) 169 CLR 436 (***Castlemaine***).
[25] At 480.
[26] See, specifically referring to that passage and explaining it in that fashion, Mason CJ and Gaudron J in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 358 and fn 19 (note also Dawson and Toohey JJ at 392). See also, *IW v City of Perth* (1997) 191 CLR 1 (***IW***) at 37 per Gummow J: "This passage [referring to the reasons of Gaudron and McHugh JJ in Castlemaine] deals with species of discrimination which elsewhere have been identified as 'direct' and 'indirect' discrimination".
[27] *IW* at 37.

27. There is no strict delineation between discrimination in the practical operation of a law and discrimination which appears on the face of a law[28] – they are merely aspects of the modern approach to characterisation. The AG(Vic) appears to accept as much (at [16]). It follows, as was made clear in *Cole* at 399, that the nature and the object of the relevant inquiry in "facial" and "practical effects" discrimination are identical: one asks whether interstate trade is subjected to "*a disability or disadvantage*" as compared to intrastate trade (*contra* AG(Vic) at [18]-[22] and [42]-[43]).

28. The AG(NSW) (at [55]) and the respondents (at [64]) seem to accept that proposition. Yet, for reasons that are not explained, they nevertheless insist that in the current matter (but not, it would seem, in a case founded upon facial discrimination[29]) Betfair is required to prove not only that the fee imposes a discriminatory burden on it as compared to the TAB which has a natural tendency to affect competition between them, but additionally that the impugned measure has particular competitive results as measured by market share or profitability.[30] That submission involves error, one which infected the reasons of the Full Court: [92], [107] (see AS [72]).

29. Of course in the case of a facially neutral law, the Court will require some probative material to satisfy itself that the practical operation of the law imposes a discriminatory burden of a protectionist kind (see AG(Cth) at [30]). That does not however require proof of an effect upon competition to a particular bright line threshold or proof of loss of market share or profitability, whether the law is facially neutral or facially discriminatory. The contrary submission misunderstands the place of the concept of protectionism in s 92 analysis (see further below at [34]-[46]).

The question of whether a fee is relevantly discriminatory in its effect is not answered by whether or not it is able to be characterised as "flat"

30. The reiteration of the term "flat fee" (see AG(NSW) [20], [37], [42]-[44] and [47] – see also AG(Vic) at [35], referring to "uniform fees" and AG(WA), referring to a "uniform burden" at [50]) is misleading. It diverts attention from the real question identified above, which is whether such a fee discriminates in its practical effect. As the United States Supreme Court said (in *American Trucking Associations, Inc. v Scheiner*):[31]

> ... the precedents upholding flat taxes [said by the Court to rest upon formalism, which merely obscured the question of whether the tax produces a forbidden effect] can no longer support the broad proposition, advanced by appellees, that every flat tax for the privilege of using a State's highways must be upheld even if it has a clearly discriminatory effect on commerce by reason of that commerce's interstate character.

31. In that case a "flat" fee or tax was levied by Pennsylvania at $36 per vehicle axle on all commercial truck owners using Pennsylvania roads. That fee was revealed as discriminatory in its effect when one had regard to the fact that in-state trucks travelled much greater distances on Pennsylvania roads than out of state trucks. Local operators were paying the same fee for a privilege that was several times more valuable to their businesses than to their out-of-state competitors. Similarly, the fee in the current matter is not "flat" either in the amount of the fee or in its practical operation upon different wagering operators.

32. The AG(NSW)'s example of the sales tax on wine (at [42]) does not assist his argument. A tax of 20% of the sale price of wine, that is 20% of the gross revenue received by wine sellers from their customers, is akin to the non-discriminatory alternative fee pleaded by Betfair in the present case.[32] By contrast, in this case the impugned levy has been applied by reference

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[28] See AS [66], [70].
[29] See e.g. the reference to *Fox v Robbins* (1908) 8 CLR 115 (***Fox v Robbins***) in AG(NSW) [51].
[30] See AG(NSW) [56]-[58] and RS [64] – see similarly the submissions of the AG(Vic) at [42]-[43].
[31] 483 US 266 at 296 (1987).
[32] FASOC [103(b)] and [109(b)].

to a criterion which is not of equal significance to all market participants (cf. AG(NSW) at [47][33]).

33. Neither *Norman*[34] nor *Bath*[35] support the AG(NSW)'s suggested development of a new doctrine of "flat fee formalism" (cf. AG(NSW) [46]-[50]). Unlike the current matter, there was no evidence in *Bath* that the manner in which the fee was calculated had a differential effect upon interstate operators. For similar reasons, there is no relevant analogy with *Norman*. It is plain (see at 204) that if the scheme in *Norman* had in its practical operation prevented interstate maltsters from competing on an even footing with domestic maltsters in the purchase of barley, it would have contravened s 92. That is the present case.

10 *There is no separate inquiry into protectionism*

34. The AG(Vic) proposes a separate inquiry into the existence of protectionism (see at [36]-[43], dealing with the so called "positive criterion"). There is no support in the authorities for that submission. This Court has made clear there is but one composite[36] inquiry: that is, whether the impugned measure is discriminatory in a protectionist sense.[37]

35. The AG(Vic) argues that one can eke out a separate protectionism inquiry under the rubric of "competitive advantage". Although eschewing any disaggregated test for protectionism, the submissions of the AG(NSW)[38] and the respondents[39] seek to make a similar point. However, the references in the authorities to a "competitive advantage" conferred upon intrastate trade do no more than point to the corollary of the existence of a discriminatory burden upon
20 interstate trade.[40] Like the Full Court, the respondents and some of the interveners have sought to overburden the concept of "competitive advantage" in a manner which is clearly at odds with *Cole*, *Bath*, *Castlemaine* and *Betfair*.[41]

36. As the respondents concede (at RS [63]), s 92 is engaged in a case where the discriminatory burden is minimal and the corresponding competitive disadvantage is necessarily "slight" or "very small". That concession is entirely at odds with the proposition that a broader inquiry into the effect on market share or profitability is required to satisfy a separate test for protectionism, or that the burden must be of "sufficient magnitude" to cause some unspecified threshold competitive effect – see AG(Vic) [41] and cf. the passage from *Castlemaine* at 472-3 extracted at [23] which refers to a burden that is 'not incidental'. There is
30 no support for those additional tests in the authorities. Their elusive nature makes it highly unlikely that any of them are required to be satisfied as a criterion for the validity of laws.[42]

37. That may be illustrated by considering the obvious case of customs duties. No party or intervener suggests that s 92 would permit such duties, regardless of their "magnitude" or "extent". Such a proposition could not stand with the clear statements in *Cole* at 393 and *Betfair* at 457 [27]. One then moves to discriminatory fiscal burdens, exemplified by the fee in *Fox v Robbins*. As Barton J observed in that matter, "*there is no difference in substance or effect ... between a burden such as this and a duty collected at the borders or the ports of one State on the products of another*".[43] That does not suggest that such an impost (of which the current case is an example) must be of a particular "magnitude" or result in particular threshold effects upon

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[33] AG(NSW) uses turnover in its ordinary accounting sense, rather than the specialised wagering concept of 'back bet turnover'.
[34] *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 (***Norman***).
[35] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 (***Bath***).
[36] A term used by Dr Coper to describe the nature of the relevant inquiry: see "Section 92 of the Australian Constitution since *Cole v Whitfield*" in Lee and Winterton *"Australian Constitutional Perspectives"* LBC 1992 p129 at 139-40.
[37] *Castlemaine* at 471.
[38] At [26], [30] and [35]-[36].
[39] At [64].
[40] See AS [74]-[75], a point which is seemingly acknowledged by the AG(Vic) at [38].
[41] See AS [75]- [78], with which the respondents and the interveners do not engage.
[42] See, by way of analogy, *Cole* at 402.5 and *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 360 per Brennan J.
[43] Note also the reference in *Cole* at 393 to "discriminatory burdens on dealings with imports" and the respondents' example at RS [63].

market share or profitability.[44] Nor are such matters "obvious" in the case of a facially discriminatory law (*contra* AG(Cth) at [29] and cf. AS [79]).

38. No doubt, the discriminatory burden must be one which is capable of affecting what would otherwise be the operation of competition within the relevant market (see AG(Vic) at [37]). Betfair has never contended otherwise (see AS [57]). It does not suggest (at AS [72] or otherwise: *contra* RS [60]) that concepts familiar to competition law have no role to play in an s 92 inquiry or should be "downplayed" (*contra* AG(NSW) [53]). Those matters fall to be considered by reference to the nature of the burden itself and its "tendency" or "likely" or "necessary" effects, rather than requiring a separate inquiry to determine whether there has been an effect upon competition to a particular bright line threshold (see AS [64] and [83]). If that is all that is intended by the AG(Cth)'s submissions regarding a "meaningful" burden upon interstate trade (at [16]-[20]), so much may be accepted. Such a tendency or likelihood will be readily discernable where there is a discriminatory fiscal burden (see AS [61]). In the present case, a fee that represents 60% of Betfair's revenue on NSW horse racing, but only 10% of TAB's revenue, will necessarily restrict what would otherwise be the operation of competition between Betfair and the TAB: see AS [47], [64]-[65] and [84]-[89] (*contra* RS [63] and AG(NSW) [57]-[58]). A further detailed economic analysis encompassing matters such as market share and profitability is not required (see AS [83]).

39. The respondents[45] (at [28] and [35]), the AG(NSW) (at [20] and [57(iii)]) and the AG(SA) at [15]) reiterate the misconception (rejected by the trial judge: [206][46]) that Betfair's absorption of the impugned fee to date is somehow proof that the fee has no likely competitive effect.[47] That argument finds no support in the authorities.[48] It also ignores not only the evidence that Betfair had not made a business decision about the impugned fee pending the outcome of this litigation, but more importantly, the evidence that even if Betfair continues to absorb the fee, it is left with only 40% of its gross revenue to pay any remaining fees, taxes and costs.[49] The TAB of course retains 91% of its gross revenue to pay its taxes and costs prior to profit. (The AG(SA)'s suggestion (at [19]) that Betfair has two further options should be rejected. Both start from the proposition that Betfair "do nothing" which requires it to absorb the fee.)

40. The alternative decision, to increase prices, would mean a change in the price relativities between the TAB and Betfair (*contra* AG(NSW) at [75]). It is no answer, as suggested by the AG(NSW) at [40] (making the same fundamental error as the Full Court) to suggest all operators could increase their prices so as to maintain their net (profit) margin. Betfair would need to increase its prices by 60% to pass on the fee assuming no decrease in demand as a result. In contrast, TAB (to the extent it paid the fee) would only need to increase its prices by 10%. The AG(WA)'s attempt to conduct a more complex analysis of this point makes a number of fundamental errors: see [78] below.

41. Rather than analyse the effect of the impugned fee in this manner, the respondents return instead to the mantra that the "*present fee is imposed equally at the level of turnover*" RS [63]. That does not address the point that, even if imposed in terms that are facially neutral, the

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[44] Note, referring to *Fox v Robbins, Bath* at 429.9.

[45] The respondents also suggest that Betfair disavowed the contention that a turnover fee had an adverse effect on competition by reference to [33] of Betfair's opening submissions in the trial. However, that paragraph referred to the irrelevance to the s 92 analysis of whether or not Betfair could pass on the fee.

[46] See also *Sportsbet* at 261 [128].

[47] Further, Mr Twaits' evidence (Twaits 13.11.09 at [40]-[43] (FC AB 4423); T39.46 (20.11.09) (FC AB 4530)) was dealing with the reliance by the respondents on s 4 of the *Recovery of Imposts Act 1963* (NSW) (see Defence [111.2]). It was necessary for the purposes of that section to establish that Betfair has not "charged to or recovered from, and will not charge to or recover from, any other person any amount in respect of the whole or any part of the amount paid", that is the fees *already paid* to the respondents under protest pending the outcome of this litigation. The fact that Betfair has been prepared to pursue its rights through this litigation cannot support any submission that Betfair is not being impeded in its interstate trade.

[48] See *Castlemaine* at 463 (see also [69] of the Special Case at 447-8). For example, when considering the effect of the increase in the deposit in *Castlemaine*, the Court proceeded on the basis of the comparative bottle cost analysis but did not suggest that it was necessary to consider whether the plaintiffs were able to "absorb" the increased costs.

[49] The impact of the race fields fee on Betfair's profitability, taking into account statutory fees and taxes, and before payment of any other costs, is shown in Annexure A to Betfair's reply submissions at first instance: FC AB 5200, extracting relevant primary financial records in evidence.

protectionist nature of the discriminatory burden is revealed when one has regard to its practical effect.

42. The respondents and some of the interveners also argue, with varying degrees of emphasis, that the practical effect of the fee in the current matter is to be distinguished from that considered in *Castlemaine*, on the basis that the current matter involves a market which is geographically large, comprised of many participants and employing four broad categories of business model (RS [67], AG(NSW) at [59]-[71] and AG(Vic) at [22]-[24]). Nothing in the reasons of the Court suggests those matters were crucial to the outcome. It is difficult to understand how restricting the operation of s 92 to concentrated local markets of homogeneous competitors serves the purpose, identified by the High Court in *Betfair*, of preserving national unity and of creating and fostering national markets.[50] In any event, the case stated in *Castlemaine* indicated that the beer market was (at least to some extent) a national market.[51]

43. Whether described as the "major player" making up more than three quarters of intrastate trade,[52] or the dominant wagering operator, as accepted by the trial judge,[53] the TAB was the obvious point of comparison on the intrastate side in the current matter. Even if that were not the case, the evidence was that few NSW bookmakers were likely to be adversely affected by the fee, because of the fee free threshold.[54] In relation to harness racing, TAB was the only intrastate wagering operator that had a turnover above the threshold set by HRNSW.[55]

44. The suggestion that Betfair's case is fatally flawed for having failed to address the position of other interstate operators is inconsistent with both the statement in *Castlemaine* at 475 and the result in *Betfair*. The "betting exchange criterion" in s 24(1)(aa) of the *Betting Control Act 1954* (WA) did not encompass all of the various forms of interstate wagering services (interstate bookmakers and interstate TABs) competing with intrastate operators in Western Australia (see AS fn 98). Like CUB in *Castlemaine*, those interstate operators were advantaged by the legislation, in so far as they competed with Betfair to supply wagering services in Western Australia. That did not prevent this Court from determining that the facially neutral terms of s 24(1)(aa) contravened s 92. It is precisely because one is now necessarily dealing with large, varied national markets in the age of the internet that it cannot be correct to insist that a measure must have a uniform deleterious effect upon all interstate operators before s 92 is engaged. The reasons of the plurality in *Betfair* at 481 [121] make it clear that it is sufficient for the discriminatory burden to shield intrastate operators from the "*competition that* [a single interstate competitor – being, in that case and in this case, Betfair] *otherwise would present*" (see AS [56](a)[56]). The contrary submissions of the AG(Cth) (at [12]-[13]) appear to proceed from the erroneous premise that there is to be a broader independent inquiry into the effect of the measure upon competition *per se* in the relevant market (see above).

45. In any event, adopting the AG(Vic)'s analysis (at [22] and [25], relying on *Betfair*) the impugned fee "*in practice imposes a significant burden upon a particular interstate trader, in circumstances where that particular trader poses a significant threat to local traders*". Each fact identified by AG(Vic) in *Betfair* to find that threat is present, and probably magnified, in the current case. The findings made in the present proceedings demonstrate that Betfair had a substantial and

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[50] *Betfair* at 452 [12], 474 [88], 477 [102].
[51] See [5] of the case stated, at 438.
[52] RS fn 8.
[53] Perram J at [36].
[54] See the material referred to in AS at [40] and the findings of Perram J at [312].
[55] The analysis in the documents entitled "Race Fields Revenue - By Source and Rate" (FC AB 2814) and "Race Fields Revenue - By Source and Timing" (FC AB 2821) shows that all New South Wales bookmakers had a turnover on NSW harness racing below the $2.5 million threshold ultimately set by HRNSW. See also HRNSW "Race Fields Update" (FC AB 2826).
[56] Note also *Betfair* at 456 [26], referring to "individuals and trading and financial corporations" engaged in intercolonial trade whose businesses were "affected by the adoption by government of particular commercial policies".

increasing presence in New South Wales prior to the introduction of the NSW race fields fees.[57]

46. The decision of the US Supreme Court in *Exxon Corp v Governor of Maryland* does not assist the AG(Vic) (see at [18] and fn 30). There was, in that case, no relevantly comparable intrastate trade and therefore no discrimination.[58]

The positions of Betfair and the TAB were relevantly different, such that the fee had a vastly different impact upon Betfair

47. Approaching matters from the other end of the discrimination inquiry, the respondents and the AG(NSW) submit that Betfair should fail because it has failed to identify a difference between its position and that of the TAB which is "material" (AG(NSW) [74]) or "relevant" (RS [55]). What is meant by those criticisms is not altogether clear. Plainly, the position of Betfair is different from that of the TAB in a material and relevant way. So much is apparent from the six-fold higher business cost per revenue dollar imposed upon Betfair by the impugned fee.

48. The respondents argue that Betfair has inappropriately sought to "privilege" or "elevate" artificially one part of its operations, i.e. gross revenue. For the reasons given above, revenue is in fact the only useful point of comparison for the impact of the fee upon different wagering operators.

49. The respondents also seemingly argue that gross revenue is not a relevant point of comparison because Betfair has some degree of control over it (RS [25], [28]). There was no suggestion in *Castlemaine* or *NEDCO* or the decisions in the United States such as *Pike*[59] that the plaintiffs ought to change the way they did business in order to avoid the imposition of a discriminatory burden (or that the hypothetical capacity to do so removed any room for the operation of the constitutional guarantee). The use of the term "relevant difference" in the reasons of Gaudron and McHugh JJ in *Castlemaine* does not imply that the difference must be immutable or beyond the control of the party impugning the measure to be relevant. The same flaw infects the submission of the AG(NSW) that s 92 is not engaged when one is dealing with "commercial choices" (see at [21(i)], [39], [40] and [41]). Here, the context reveals that the respondents appreciated the differences among existing participants in the market and intended the differential effect of the fee.[60]

50. The decision in *Castlemaine* is also at odds with the AG(NSW)'s submission that one can ignore any difference between the manner in which Betfair and the TAB earn revenue, because one is dealing with substitutable products or services offered by market participants competing on price (AG(NSW) [74]). The goods manufactured by the various producers in *Castlemaine* were equally substitutable: see the description of the composition of the market at 438, [7] of the case stated. That did not lead the Court to conclude that the differences in bottling methods which underlay the disparate impact of the impugned measures could be put to one side (see also *Betfair* at [122]). Nor do any difficulties arise from the fact that the practical effect of the measure upon Betfair is in part related to the regulatory environment in

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[57] Betfair's commission earned on New South Wales thoroughbred racing had increased from $2.7m in 2005/06 to $4.7m in 2008/09 (see Perram J at [132]) and Betfair had a substantial presence in relation to harness racing (Perram J at [134]). Racing NSW in its 2004 Strategic Plan for the NSW Thoroughbred Racing Industry (FC AB 567) cited with approval a passage from the Betting Exchange Task Force Report dated 10.7.03 (FC AB 343) describing betting exchanges as posing "a serious threat to current betting turnover levels" of competitors including TAB. In its Annual Report for 2004/05, Racing NSW described Betfair as "a major threat" to be dealt with through race fields legislation (FC AB 880). See also the letter from Racing NSW to the Minister for Gaming and Racing dated 30.10.07 expressing concern about the "possible introduction" of Betfair into New South Wales, and calling for the proclamation of the race fields legislation (FC AB 1437); and the HRNSW Annual Report for 2004/05 (FC AB 3479, 3483 and 3490).

[58] 437 US 117 (1978) at 123 ("no petroleum products are produced or refined in Maryland") and at 125 ("Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless").

[59] *Pike v Bruce Church Inc* 397 US 137 (1969).

[60] See, having regard to similar contextual matters, Heydon J in *Betfair* at [144]; see also AS [44]-[48].

Tasmania (*contra* AG(NSW) at [76]-[78] and RS [26]). Such a possibility did not appear to trouble the majority in *Bath*.[61]

There is no requirement that the discriminatory criterion have some form of nexus to "interstate status"

51. The respondents (RS [68]-[72], albeit as an alternative argument), the AG(Vic) (at [31]-[32]) and perhaps the AG(NSW) (at [35]) contend that *"the absence of any nexus with interstate trade"* is fatal to Betfair's claim. That submission is inconsistent with principle and at odds with the result in *Betfair* and *Castlemaine* (AS [95]-[99]).

52. The respondents seek to explain away *Betfair* and *Castlemaine* by distinguishing between three categories of discrimination (see at [23] above). They argue that the engagement of s 92 in the third category (said to include the current matter), but not the second (said to include *Betfair* and *Castlemaine*), depends upon showing that there has been equal treatment of unequals. That in turn is said to require identification of a "*relevant difference*", being one with a nexus to interstate status (RS [70]-[71]). The AG(Vic) seemingly embraces that submission (at [34], [35]). However, in *Castlemaine*, Gaudron and McHugh JJ in referring to "*relevant difference*" were simply speaking of discrimination in the practical effects of a measure (see above). So understood, the submission that *Betfair* and *Castlemaine* dealt with some different species of discrimination, and may on that basis be distinguished, fails.

Concepts and evidence

Concepts: margin, price and commission

53. The respondents, the AG(NSW) and some of the interveners complicate a simple case by using a confusing array of economic terms without paying careful attention to their meaning. In particular, the terms "margin", "price" and "commission" are used in various submissions in different ways. Betfair uses each term in a particular way in its submissions.[62]

54. Most important is the use of the term 'margin'. When Perram J refers to Betfair as a 'low margin' operator, his Honour is referring to Betfair operating with a low 'revenue margin' as that term is understood in the wagering industry: the wagering operator's revenue expressed as a proportion of its back bet turnover: at [136] read with [153]. In his 18 June 2008 Board Report Mr V'Landys is referring to revenue margin. That is not a wagering operator's revenue (*contra* AG(WA) [15]) nor is it a wagering operator's profit margin (*contra* AG(NSW) at [7], AG(WA) at [17], [18], [28], [29]). The TAB is regarded as a ' high margin' operator because the revenue it gains (given its commission is 16%) as a proportion of its back bet turnover is relatively high when compared to a bookmaker's revenue as a proportion to its back bet turnover (identified by Mr V'Landys as in the order of 6%[63]). The trial judge identified Betfair's revenue margin as on average 2.5%. This was merely a statistical calculation as there was no direct or linear relationship between Betfair's revenue and its back bet turnover (see Perram J [136] and [244]; as the AG(WA) accepts at fn 39).

55. Both the AG(NSW) at [37] and the AG(WA) at [17]-[18] wrongly submit that a tax or charge calculated by reference to revenue will burden a high margin operator "proportionately" more. This is incorrect. In fact, a tax or fee imposed on gross revenue will have no proportionate difference between operators. This is the very argument put by Betfair as to why gross revenue is a preferable metric: see AS[50(b)] and the calculations in fn 83. By contrast, a fee based on back bet turnover has a disproportionate effect between operators (whether absorbed or passed on to customers).

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[61] Note the first possibility identified at 426, being that the interstate traders bore equal or higher taxes in their home state. As to the Attorney's submission that the majority indicated that Victoria could have imposed an "equal retail level tax" the short answer is that the fee in the current matter is not as a matter of substance "equal". See above at [2] and [30]-[33] regarding "flat fees".

[62] A detailed table addressing these terms and where and how they are used in the respondents' and interveners' submissions can be provided during the course of oral argument.

[63] CEO 18 June 2008 Report to the RNSW Board (**18 June 2008 Board Report**) at p 44 (FC AB 1873).

Productivity Commission Report and Annexure A

56. Contrary to RS [37], the Productivity Commission Report contains information the Court will find of assistance in determining the constitutional issue before it (AS fn 9). The respondents themselves relied on the draft Report below. [64] Further, contrary to RS [37(c)], the impact of increases in commission rates on odds was the subject of Mr Twaits' second affidavit. That evidence was unchallenged. The matter was dealt with by Betfair in opening and closing submissions, by the respondents and by the AG(NSW).[65]

57. Annexure A, with which the respondents take issue at [39], was a summary of the extensive financial evidence tendered in the proceedings, which the respondents had every opportunity to address: Perram J at [328]-[329]. Annexure A is not "*a more detailed version of Betfair's arithmetical exercise*"; it looks at the actual affect on Betfair's gross profit, an exercise the Full Court assumed had not been done. The respondents' complaint about its reference to taxes and fees is also unjustified. Those taxes and payments were treated equally in calculating Betfair's gross profit before and after the introduction of the impugned fee. That is, they have no net impact on the analysis.

Purpose

58. The respondents submit that the Court can be satisfied that they were indifferent to any revenue leakage from local traders: [41]; and that Betfair's case on purpose is restricted to the choice between back bet turnover and gross revenue: [42].

59. Betfair's case on purpose is that the respondents chose to impose a fee of 1.5% of back bet turnover in order to protect the revenues of the TAB.

60. The respondents chose not to lead any evidence from any of their board members who participated in the decisions to impose the fee. Betfair submits that the respondents' documents reveal a protectionist purpose (see AS [35]-[37], [39]-[40]), including the TAB presentation which was before the Racing NSW Board,[66] and represented the Board's views.[67] The respondents' submission as to how documents including phrases such as "revenue leakage" should be interpreted should be rejected as contrary to their plain reading. The allegedly non-protectionist object relied upon by the respondents was rejected by the trial judge as not the object that either respondent had in mind. In doing so, his Honour found: "*Rather, their actual purpose was to protect the revenues of the TAB from competition from interstate operators*": [239].

61. The respondents ask the Court to conclude that the race fields fee "*was indifferent to any leakage*": RS [41]. This submission should be rejected. The respondents identified a problem in the increased use of telephone and internet betting resulting in loss of revenue for the monopoly off course intrastate wagering operator (and thus for the respondents, who receive fees from TAB calculated by reference to its revenue) – that is "revenue leakage". A fee was chosen, not to be "indifferent" to this leakage, but rather to stem this tide by forcing those competing wagering operators to increase their prices[68] or cease operations[69] - both suggested by Mr V'Landys in his reports to the Board of Racing NSW. Further, as the email at AS [37] shows, the respondents had asked for the legislation to be drafted in a way that did not require differences between wagering operators to be taken into account in setting fees.

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[64] Respondents' closing submissions at first instance at [126] and fn 219.

[65] Betfair's opening (T7.10-.13 (18.11.09) (FC AB 4623)); Betfair's closing (T265.21-.39 (26.11.09) (FC AB 4704)); Betfair's closing submissions in reply at [7], [15]-[19] and [82] which the respondents referred to in their further closing submissions at [22]; AG(NSW) closing submissions at first instance [278].

[66] See Extracted papers for meeting of RNSW Board on 18.12.07 including a copy of the TAB presentation and Board Report at p 20 (FC AB 1488); Minutes of Meeting RNSW Board on 1812.07 (FC AB 1584); *Telstra Corporation Limited v Hurstville City Council* (2002) 118 FCR 198 at 221 [50].

[67] See Draft and final minutes of the Business and Strategy Committee held on 20.11.07 esp. at p4 (FC AB 1441, 1443, 1447 and 1449).

[68] Perram J at [220]; 18 June 2008 Board Report at p 43-44 (FC AB 1872).

[69] 18 June 2008 Board Report at p 29 and p 45 (FC AB 1858 and 1874); see also Briefing notes for discussion with Ken Callender (Daily Telegraph journalist) (01.06.08) at p 2 (FC AB 1811).

62. The purpose or object of a discriminatory burden is relevant to s 92's characterisation question on three different approaches (AS [100]-[103]). It is unclear whether the respondents at RS [74]-[76] are addressing all three. If so, the respondents' submission to each is that purpose is no longer relevant in s 92 doctrine because what is relevant is "effect" (RS [74]). However, in *Cole*, on which the respondents rely for this point, the Court variously described s 92 as striking down "*discriminatory burdens of a protectionist kind*" (at 398), "*discriminatory burdens having a protectionist purpose or effect*" (at 404), "*discrimination on protectionist grounds*" (at 407) and "*discrimination of a protectionist character*" (at 408) (*contra* RS [75]). It is clear that purpose, and in the case of an administrative decision maker necessarily the actual purpose or intention, is relevant to the characterisation of a discriminatory burden as protectionist. (Contrary to RS [75], Betfair's submissions on purpose assume a discriminatory burden has been established.)

63. The AG(NSW), the AG(WA) and the AG(Vic) adopt and apply to the respondents' decisions, the orthodox assessment of legislative object.[70] Only the AG(WA) offers a further submission ([60]) which is to the effect that Betfair cannot rely on the improper purpose of a decision maker to submit that the statute is protectionist. Betfair of course is not making that submission. Betfair submits that the respondents' improper purpose in imposing the discriminatory burden of the impugned fee is sufficient for the Court to find that the fee infringes the freedom guaranteed by s 92 of the Constitution.

Reasonably appropriate and adapted to a legitimate object

Onus

64. It is illogical and contrary to authority to assert (RS [78]) that Betfair somehow bears the onus of establishing that the respondents' object is a legitimate one and that the respondents' measure is reasonably appropriate and adapted to that object.[71] In *Castlemaine*, South Australia bore the relevant onus: see e.g. at 474.10-477.8. Similarly, in *Betfair* at [102]-[103] and [112], the plurality adopted Mason J's statement in *NEDCO*: "*As the defendant has failed to show that the discriminatory mode of regulation selected is necessary for the protection of public health, it is in my judgment not a reasonable regulation of the interstate trade in pasteurized milk*".[72]

Object

65. The alleged legitimate object of seeking contribution from wagering operators who use the race fields for profit (see RS [79]) was found by the trial judge not to be the respondents' actual object ("*their actual purpose was to protect the revenues of the TAB from competition from interstate operators*": [239]). That putative object should be rejected (see also "Purpose" above). The respondents have not identified any error in the trial judge's analysis and conclusions which would support any other conclusion.

Reasonably appropriate and adapted

66. Nothing posited by the respondents at RS [14] supports the contention that back bet turnover is an appropriate measure of the use by a wagering operator of NSW race fields information to make profit. The respondents' submissions were rejected by the trial judge (at [242]-[244] and [252]); and are simply answered by his Honour's primary finding that back bet turnover did not measure 'use' nor was it a proxy for use.

67. The respondents' attempts to identify the benefits of turnover as against the perils of gross revenue can be countered individually (see [11]-[14] and [19] above) but in any event were not the subject of any evidence led by the respondents, nor any evidence gleaned from the documentary record. As the trial judge said, "*although the respondents were quick to condemn the*

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[70] AG(NSW) *Sportsbet* submissions [74]-[75]; AG(WA) [56]-[61]; and AG(Vic) [14] and [51(a)(iii)].

[71] It is also inconsistent with the approach taken in the United States by the Supreme Court, see e.g. *Hughes v Oklahoma* 441 US 321 at 336 (1979); *Wyoming v Oklahoma* 502 US 437 at 456 (1992).

[72] This is consistent with the approach previously taken to the application of the "*reasonable regulation*" limb of the s 92 test in *Bank of New South Wales v Commonwealth* (1949) 79 CLR 497 at 639-641.

collection of fees based on gross revenue, they called no witness to swear to the existence of those difficulties": [248].

68. Further, as the trial judge found in relation to the respondents' argument that the choice of back bet turnover was within the margin of appreciation, "*assuming such a margin exists this fee falls very far outside it*": [251].

69. The respondents fell far short of proving that the impugned fee was reasonably appropriate and adapted to the pleaded legitimate object whether the so called "contestable views" referred to at RS [83] are taken into account or not. It is not enough for the respondents to show that back bet turnover was an available option in order to discharge their onus. They are required to show that they held the claimed non-protectionist object and that a back bet turnover fee was reasonably necessary in order to obtain that object. They have not demonstrated either, particularly in light of the existence of a reasonable non-discriminatory alternative measure (*Castlemaine* at 472), namely a fee based on gross revenue.

Validity of the RA Regulation

70. The respondents contend that the nature of Betfair's case requires it to challenge the statutory scheme because: the regulations "authorise" what the respondents have done: RS [49]; and the "*model laid out in the Regulations*" cannot be complied with on Betfair's case: RS [51].

71. For the reasons set out below, nothing in cl 16 or the RA Act requires the respondents to impose a fee at all, to impose the same fee on all wagering operators, to impose a fee calculated by reference to back bet turnover, or to impose a fee at the maximum rate permitted. (See NSW's submissions in *Sportsbet* at [65] which reflect Betfair's submissions on this point.)

72. First, the RA Regulation does not in fact relevantly "authorise" anything. The discretionary power to impose a fee condition is contained in s 33A(2)(a) of the RA Act, which makes it clear that the regulations may provide that any such condition is to be imposed in accordance with certain "requirements". Clause 16(2)(a) is properly understood as a "requirement" of that nature.

73. Secondly, neither the RA Act nor the RA Regulation may "authorise" a breach of s 92. If the respondents have imposed a fee that may be characterised as imposing a discriminatory burden of a protectionist kind, the fee is invalid.[73] That the statutory scheme envisages that a fee of 1.5% of back bet turnover may be imposed does not mean that the imposition of such a fee is protected from the reach of the various constitutional guarantees.

74. Thirdly, there is no "model" laid out in cl 16 of the RA Regulation. Approvals may be granted pursuant to the legislative scheme that comply with s 92. As cl 16 of the RA Regulation permits the respondents to impose a fee condition that "does not exceed" 1.5% of back bet turnover, it is possible for any fee condition and thus any approval to comply with s 92. Contrary to the respondents' submissions (RS [47]), the RA Regulation does not identify "[back bet] *turnover as an appropriate measure for the equal treatment of all relevant kinds of wagering operators*". Rather, it uses that metric to establish a requirement capping the fee the respondents may impose. Pursuant to ss 31 and 33 of the *Interpretation Act* 1987 (NSW) the statutory scheme must be construed so as not to exceed the power conferred by the RA Act, including the constraint imposed by s 92 of the Constitution.

75. The factual submission put by the respondents at RS [50] as to an alternative basis for calculating the relevant fee imposed by cl 16 (up to the maximum) is irrelevant to the legal question of whether or not it was necessary for Betfair to challenge the statutory scheme as

[73] See Brennan J in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 612 and 613-614, referring to *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 522 per Dixon, McTiernan and Fullagar JJ. The latter authority is inconsistent with the respondents' argument (*contra* RS [51]).

well as the approvals. In any event, the "*insuperable difficulties in terms of timing*" were not the subject of any evidence by the respondents. The evidence showing the ease with which projections are used as the basis for assessing the fees payable under the respondents' current fee conditions demonstrates the contrary.[74]

PART III INTERVENERS' SUBMISSIONS

76. Where relevant, the interveners' submissions are dealt with above.

77. The AG(Vic) also puts in issue whether Betfair is in interstate trade: [53]-[65], implying, with no evidentiary basis, that Betfair's internet business could be a mere "expedient": [60]. In these proceedings (and in *Betfair v WA*[75]) there was significant evidence establishing Betfair's participation in interstate trade.[76] In addition, it is not lawful for Betfair to operate from New South Wales.[77]

78. The AG(WA) at [28]-[46] purports to mount an argument based on the effect of the 1.5% turnover fee on returns to punters. The analysis is infected by a number of fundamental errors. For example in [28] the Attorney is referring to profit margin, not revenue margin (revenue as a proportion to back bet turnover), or Betfair's gross revenue (commissions on net winnings in a market). Thus, the essence of Betfair's complaint is not as described at [28] (*contra* [29]). The hypothetical examples given by the Attorney in the paragraphs that follow, descending into the minutia of percentage changes in potential returns to punters (rather than prices charged by wagering operators) are also flawed. For example the Attorney seems to be under the mistaken impression that an increase in the price (cost) to punters (by lowering the odds) will somehow cause punters to increase their wagering activity and generate more revenue for the bookmaker (at [36]); or that imposition of a fee will see a punter still seek only the same return as when no fee was payable ([42]-[43]). Further, as the Attorney concedes at [45], if only punters on the back side of the bet pay the fee, this is likely to encourage punters to make lay bets instead. It is no answer to say that those lay bets need to be matched – the bet may no longer be attractive to punters on the back side and there may in fact be no bet at all. No satisfactory solution is proposed by the Attorney. Contrary to AG(WA) [41], the "*simplest way*" for Betfair to seek to pass on the fee would be for Betfair to increase its commission rate, that is, the price (cost) to the punter, which would in turn affect the odds available to punters. The impact of the fee on price is as set out in AS fn 83.

79. Betfair's arguments about the competitive effects of the impugned fee are simple. Betfair is required to pay to the respondents 60c of each $1 earned from NSW horse racing. The TAB is required to pay only 10c. Betfair either passes on the fee (thus affecting its competitive position in the market directly) or it absorbs the fee (thus affecting its competitive position in the market indirectly as it has less revenue available to spend on other aspects of its business including advertising). As the Productivity Commission has said, "*the economics is relatively straightforward*".

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[74] RNSW NSW thoroughbred race field information use approvals for Australian Wagering Operators standard conditions 01.07.09 – cls. 2.5-2.6 (FC AB 3217-3218); see also Race Fields Information paper for new Board of Racing NSW dated 21.11.08 (FC AB 2927).

[75] See Special Case at [18]-[31]; *Betfair* at 419.

[76] Including that Betfair is licensed in Tasmania, and conducts its business from Hobart including by way of a server located in Tasmania: Perram J at [4], [263], [270].

[77] Perram J at [79]-[84]. *Cf. Hospital Provident Fund Pty Limited v Victoria* (1953) 87 CLR 1.