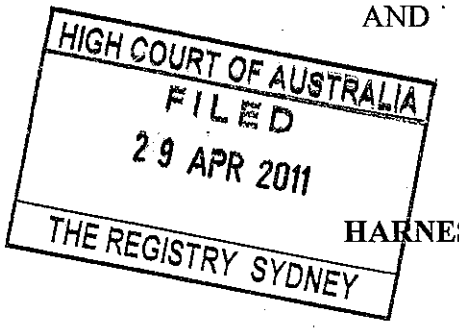
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No.S116 of 2011

BETWEEN

BETFAIR PTY LTD
(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
FOR NEW SOUTH WALES
Third Respondent

SUBMISSIONS OF THE THIRD RESPONDENT

Filed for the State of NSW on 29 April 2011
I V KNIGHT, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 SYDNEY

Ref: 200803539 T5
Contact: Paolo Buchberger

Ph: (02) 9224 5247
Fax: (02) 9224 5155

Part I: Publication of Submissions

1. The submissions are in a form suitable for publication on the Internet.

Part II: Statement of Issues

2. As a condition of all race field information use approvals that they respectively granted pursuant to s.33A of the Racing Administration Act 1998 (NSW), the first and second respondents (collectively, "the Authorities") imposed a requirement that the wagering operator pay a fee of 1.5% of its turnover on New South Wales thoroughbred racing, or harness racing (the "Turnover Condition").

3. In determining whether the imposition of the Turnover Condition on Betfair infringed s.92 of the Constitution, was it sufficient for Betfair to demonstrate the differential impact of the condition on its commission as compared with the impact on the commission of one intrastate operator, namely the TAB, without considering whether, and, if so, how, the Condition disturbed the competitive relativities between it as an interstate trader and that intrastate trader, let alone intrastate traders more broadly?

Part III: Section 78B Notices

4. The third respondent has considered whether any notice should be given in compliance with s.78B of the Judiciary Act 1903 (Cth) and notes that notices have been served under that section on each Attorney General.

Part IV: Material facts

5. The summary of the factual background that Betfair has provided is largely accurate. However, there are some matters which require qualification or further elaboration.

The market

6. Betfair correctly identifies the market as a national market for wagering on racing and sporting events, which includes wagering in person, by telephone, or on the internet (BWS [12]). There are a large number of participants in the market, with the 2007/8 Racing Fact Book revealing at least 651 bookmakers operating nationally, in addition to the totalizators and Betfair (Ex E, numbered p.10; as the primary judge noted at [282], no objection was taken to use of this Book for the truth of the statements therein).

7. Totalizator betting, which is conduced in each State and Territory by licensed off-course totalizators, tends to operate on a high profit margin business model. In the case of the TAB, which holds the licence in New South Wales, its average take out or commission from its off-course totalizator is about 16% of the quantum of all bets placed (FFC at [18]). Out of that commission, the TAB is required to pay:

(i) a number of significant betting taxes (see the reasons of the primary judge at [290]); and

(ii) a series of substantial fees under the Racing Distribution Agreement (the "RDA"), entry into which was a condition of it obtaining the licence to operate the only off-course totalizator in New South Wales (for which it initially paid $303 million) (see primary judge at [61], [282]; FFC [19]). The CEO of Betfair, Mr Twaits, accepted in cross-examination that when account was taken of taxes, levies and costs under the RDA, at least as at August 2007 about 66% of the TAB's commission was lost (xxm 23.11.09, T104-105).

8. Bookmakers tend to operate on a lower margin than totalizators. It was part of Betfair's case, for example, that local NSW bookmakers operate on a margin of between 3 and 6%, with the fee condition thus representing between 25 and 50% of their margin (FASOC [55] and [69]). Betfair also generally operates on a lower margin than totalizators, charging a commission of between 2 and 5%.

The race fields regime

9. The context in which the NSW race fields scheme was introduced is explained more fully in the NSW submissions to this Court in the Sportsbet case (at [7]-[13]). In brief, the wagering industry obtains a substantial benefit from the racing industry – an object of wagering – without any necessary corresponding obligation to pay for that benefit. In light of the substantial sums of money involved in the organisation and hosting of races, it is in the interests of both the wagering and racing industries that the former be required to make some payments to the latter, so as ensure the continued ready availability of racing.

10. The advent of internet and telephone betting facilitated the development of the national market and led to the erosion of the effectiveness of the traditional means of ensuring that those who derived a benefit from the racing industry contributed to its ongoing viability. Those previous means reflected the so-called Gentleman's Agreement, which was described by this Court in Betfair v Western Australia (2008) 234 CLR 418 ("Betfair v WA") at [69], pursuant to which all wagering operators were permitted to accept bets on events held in any State and Territory, with each polity collecting fees and taxes only from wagering operators which they have licensed. Under the new approach, legislation was developed pursuant to which the local racing industry could obtain a return for its product, in the form of race field information, from all wagering operators regardless of where they operated.

11. As the Full Court observed (at [88]), the regime established in Division 3 of Part 4 of the Racing Administration Act 1998 (NSW) ("the Act") and Part 3 of the Racing Administration Regulation 2005 (NSW) ("the Regulation"), together with the standard

conditions of approval that the Authorities respectively adopted, prescribe general conditions which apply alike to interstate and intrastate operators. The imposition of a fee for such information recognises that the product has a value in the marketplace, for which others are prepared to pay.

The effect of the fee condition

12. The Full Court accepted that there was no protectionist object discernable on the face of the Act or Regulation (the validity of which Betfair did not challenge), or on the face of the fee condition (at [88]). The central issue for resolution in the case was whether the condition, as a matter of practical effect, imposed on Betfair, as an interstate trader, a discriminatory burden that was of a protectionist character. Betfair contended in this respect, and still contends, that:

    (i) the differential effect of the fee condition on its revenue stream subjected it to a disability or disadvantage as compared to the TAB, in terms of a significantly greater business cost, per revenue dollar (at [47]), and

    (ii) that disadvantage was sufficient to establish contravention of s.92, absent an acceptable justification or explanation for the differential treatment (at [56]).

13. Betfair relies on the primary judge's finding (at [153]) that the fee condition "discriminated" against it in terms of the impact of the condition on its revenue stream as compared with that of the TAB. That finding has to be read, however, with his Honour's further observation that "what is needed to enliven s 92 is not just discrimination but discriminatory protectionism" (at [162], extracted in the Full Court's reasons at [34]).

14. The primary judge held that Betfair could not succeed because, although the fee condition was discriminatory in the sense of requiring a greater percentage of Betfair's revenue than that of the TAB, Betfair had not identified in its pleading, and had not established, the way in which the discrimination of which it complained was properly characterized as protectionist (at [165]-[166]). Contrary to the suggestion in Betfair's submissions (at [88]), the primary judge did not determine the issue simply on his understanding of the pleading. His Honour went to some lengths to explain the failures of Betfair's case in fact (at [168]-[172]).

15. The Full Court disagreed with the primary judge's decision to the extent that his Honour determined the issue of protectionism adversely to Betfair on the basis of the absence of pleadings on that point (at [48]-[59]). Nonetheless, on its examination of the substance of the matter it agreed that Betfair's application was properly dismissed because of the absence of any attempt on its part to demonstrate that the apparently neutral fee condition was apt to have the practical effect of denying or diminishing any competitive advantage

it enjoyed by reason of its low margin business model (at [99]). Betfair had not, in other words, made good its claim that the fee condition had the practical effect of imposing on it a discriminatory burden that was of a protectionist character (at [92]).

16. In so far as Betfair relies (at [44]) on the finding of the primary judge that the imposition of the fee condition was not reasonably and appropriately adapted to the alleged legitimate object on the basis that it was not expressly overturned on appeal, that reliance is misplaced. The Full Court did not need to consider the nature of the measure in terms of whether it was reasonably appropriate and adapted to its object, in light of Betfair's failure to establish any discriminatory burden of a protectionist kind. It cannot be assumed that the Full Court did, or would have, reached the same view as the primary judge on that issue.

17. Betfair's further contention (at [44] and [109]) that the Full Court did not overturn, and thus implicitly accepted, the primary judge's finding that in setting the fee condition the Authorities' subjective intention was to protect the TAB's revenue from competition from interstate operators, fails to bring to account the primary judge's subsequent examination of, and conclusions as to, the role of the intention of a decision-maker in establishing contravention of s.92. His Honour concluded that there was no room for such intention to have any role in establishing either that a law or measure directly discriminated against interstate trade or commerce, or in establishing that the law or measure in its practical operation or effect is discriminatory in a protectionist sense, beyond the fact that "what a person intends to do can throw light on characterising what he or she has done" (at [212], also [236]-[237]). The Full Court's reference to his Honour's conclusions as to purpose do not suggest it considered those conclusions to be incorrect (see at [42] and [44(5)]).

Part V: Applicable Constitutional provisions, statutes and regulations

18. The third respondent accepts that the appendix to Betfair's submissions contains the relevant constitutional, statutory and regulatory provisions.

Part VI: The third respondent's argument

19. In this proceeding Betfair has always sought to run a practical effects case which, at its heart, is very simple. That case is summarised, for example, in its submissions to this Court at [47] (see also at [56]):

> ... the result of the the imposition of a fee based on 1.5% of back bet turnover, is that Betfair pays the respondents [ie the Authorities] 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.

20. That operation is said to be discrimination of a protectionist kind. The figures cited are based on the fact that neither Betfair nor (seemingly) the TAB had, to the point of trial, increased its commission rate after the imposition of the Turnover Condition, despite the costs of business having gone up. The 54-61% and 9% figures are thus simple arithmetical manifestations of the introduction of a flat fee when compared to existing margins. Obviously enough, the effect of such a flat fee will be higher, when expressed as a percentage of pre-existing commission rates, for a lower margin operator than a higher margin operator.

21. Betfair's simple case has always been fundamentally flawed:

(i) Betfair failed to establish the Turnover Condition was other than competitively neutral, that is, that it created any unequal competitive advantage for the TAB, or imposed an unequal competitive disadvantage for Betfair. It did not show that the Turnover Condition would in fact adversely affect it as compared to the TAB or, if it did so affect it, that differential effect was the result of the Condition, as opposed to a commercial decision by market participants as to whether to pass on the new fee to consumers or to bear it themselves and thus effectively reduce their margin.

(ii) Even if the arithmetical calculation on which Betfair relied demonstrated a differential effect of the Turnover Condition when compared to the effect of that condition on the TAB, Betfair did not demonstrate that that effect – when viewed in the context of the national wagering market – was such that it should be characterized as protectionist. Its complaint was based upon it being a lower margin operator compared to the TAB. But there are high and low margin operators both inside NSW and outside it. Merely showing that one interstate operator is disadvantaged vis-a-vis one local operator – in circumstances where the reverse may be true for other operators – cannot of itself be enough to establish that an impugned measure contravenes s.92 of the Constitution.

22. Before addressing these two (overlapping) issues in turn, it is necessary to identify the relevant legal principles.

Legal principles

23. A governmental measure will contravene s.92 if it imposes a discriminatory burden upon interstate trade or commerce (compared to intrastate trade or commerce), that burden may be characterized as protectionist, and the burden is not proportionate to a legitimate end in the sense of being reasonably necessary to securing a non-protectionist object: e.g. Cole v

Whitfield (1988) 165 CLR 360 at 407-9; Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 471-473; Betfair v WA at [101]-[104] and [118]-[122].

24. The term "protection" is "concerned with the preclusion of competition" (Betfair v WA at [15]). Specifically, it is concerned with precluding competition from traders from outside the State (or Territory) in question. Section 92 prevents "the use of State boundaries as trade borders or barriers for the protection of intrastate players in a market from competition from interstate players in that market" (ibid at [36], see also [27] and [102]).

25. Such prohibited protection "occurs in a market for goods or services" (Betfair v WA at [15]). Thus an understanding of the relevant market is required. This involves consideration of matters which go to delineate markets, such as substitutability of goods/services and cross-elasticity of demand (ibid at [4] and [115]). It is in this sense that s.92 is concerned with goods/services "of the same kind" (ibid at [121], referring to Cole at 407-8, Barley Marketing Board for NSW v Norman (1990) 171 CLR 182 at 204-5). The guarantee takes account of both the supply-side and the demand-side, as the section operates to the benefit of consumers in creating and fostering national markets (Betfair v WA at [4], [12], [26], [39], [102], [121]-[122]).

26. Protectionist measures distort the operation of markets – to the detriment of consumers – by burdening interstate traders in a discriminatory way. Thus since Cole this Court has looked to effect of impugned measures on competition – specifically, asking whether the measure confers competitive advantages on local traders vis-à-vis interstate traders, and/or imposes competitive disadvantages on interstate traders vis-à-vis locals: Cole at 409; Bath v Alston Holdings Pty Ltd (1988) 165 CLR 411 at 427; Castlemaine Tooheys at 458-9, 464, 467-8; Norman at 202-3; Betfair v WA at [118]-[122].

27. This approach is consistent with that part of the United States case law dealing with the "negative" commerce clause relating to discrimination. The negative aspect relevantly "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors": New Energy Co of Ind. v Limbach, 486 US 269 (1988), 273-4; approved eg West Lynn Creamery Inc v Healy, 512 US 186 (1994), 192.

28. The concept of discrimination commonly involves the notion of departure from equality of treatment: Cole v Whitfield at 399, also 391.8 and 396.2. The position of interstate trade is not to be privileged above intrastate trade: cf Cole at 402-3, also Norman at 201.

29. The burden on interstate trade and commerce may be effected by the legal operation of a measure, apparent on its face, or by its practical effect: Cole at 399, 407-408. That discrimination per se is not enough was made clear in Cole v Whitfield. For example, the

Court said the following of general Commonwealth laws which involve no formal legal discrimination (at 407-8):

> It is, however, possible for a general law enacted under s.51(i) to offend s.92 if its effect is discriminatory and the discrimination is upon protectionist grounds. Whether such a law is discriminatory in effect and whether the discrimination is of a protectionist character are questions raising issues of fact and degree.

30. The notion of "protectionism", in the sense explained, serves to identify what types of burden on interstate trade and commerce are prohibited. Determining whether a measure is protectionist in this sense involves an assessment of the character of the measure – a characterization exercise (as Sportsbet correctly notes in its submissions to this Court at [79]). It must be shown that the discriminatory and protectionist burden is imposed "in a way or to an extent which warrants characterization of the law as protectionist": Cole at 408. Issues of the nature, extent and significance of the burden, and the manner in which it is imposed, thus arise. It is also necessary to examine the significance of the impugned measure in terms of its impact on interstate and intrastate trade and commerce.

31. As part of this characterization exercise, in Cole v Whitfield and the cases which have followed it the High Court has assessed the significance of the impact of a measure by reference to the competitive advantages and disadvantages for local and/or interstate traders flowing from the measure. This point flows from what has now been explained by the joint judgment in Betfair v WA, that protection concerns the preclusion of competition.

32. This characterization approach is unsurprising, and important, when it is recognized that on the one hand this Court has rejected the "individual rights" approach to s.92, but on the other hand it takes into account the practical effect of governmental measures, and indeed may do so by reference to just one interstate trader. The "individual rights" approach meant that s.92 was seen as "a constitutional guarantee of the right of the individual to engage in interstate trade" which could be infringed regardless of whether or not the governmental measure imposed a discriminatory burden of a protectionist kind. As the Court noted in Norman at 201, referring to Cole at 403, the theory had the effect of transforming s.92 into a source of discriminatory protectionism in reverse. It privileged interstate trade and traders over intrastate traders. That effect was distorting of the operation of efficient markets and served no national or constitutional purpose.

33. On the other hand, as is discussed further below, the first joint judgment in Castlemaine Tooheys stated at 475 that "[d]iscrimination 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". How is the acceptance of the

relevance to the s.92 analysis of the practical effects of a measure on individual traders to be reconciled with the rejection of the individual rights approach?

34. Any governmental measure affecting more than a handful of market participants will be likely to have different practical effects on different individual traders. That is simply a function of the fact that all persons, and businesses, are different. For any such measure, therefore, it is highly likely that one or more interstate trader(s) will be able to compare themselves with one or more local trader(s), and say that the practical burden on the identified interstate trader is greater than that of the local trader. If such an effect, alone, was enough to trigger the application of s.92 then a substantial step would have been taken back towards the individual rights approach. Once more, individual traders would be privileged and protected from regulation. That backwards step is avoided by the requirement that sufficient also be shown to characterize the measure as protectionist – the mere identification of the discriminatory burden (comparing one or more interstate traders with one or more locals) is not enough.

35. Although a discriminatory burden placed on one (or a few) interstate traders compared to some local traders may be enough to contravene s.92, that is not because such discrimination exists per se. For example, there may be other interstate traders of significance who do not bear that heavier burden, and there may be other local traders who themselves bear that heavy burden, or an even heavier one. Thus it is necessary to look to the nature, significance and extent of the burdens, and whether and to what extent the differential effect of the burden benefits and protects local traders. It is necessary to look to whether the imposition of a heavier burden on one or more interstate traders is mere happenstance, or operates in the particular market in such a way as to preclude competition such as to protect the local traders. It is in this sense that it is relevant to assess whether there is some nexus between the imposition of the regulatory burden and the fact that heavier burdens fall on interstate trade (cf Betfair's submissions at [95]ff).

Betfair's failure to establish a lack of competitive neutrality

36. Betfair argues that the effect of the fee condition is to restrict what otherwise is the operation of competition in the national market (at [57]). The restriction on competition that it identifies takes the form of the "much greater business cost" that the condition imposes on it, per revenue dollar, as compared to the TAB (at [56]). It asserts that no further inquiry into the effect of the measure on other intrastate operators, or other interstate operators, is necessary (at [60]).

37. It is a truism that a new flat rate fee will have a proportionately greater impact on a low margin operator than a high margin operator, in terms of the past commissions charged. The statement that the fee condition reduces Betfair's past and unchanged commissions

by between 54% and 64%, and the TAB's commissions by 9.375%, manifests this truism without taking the constitutional analysis very far.

38. Betfair submits that the effect of the turnover fee has one of two likely consequences: either it has to increase its commission rate and therefore its margin (expressed as a percentage of back bet turnover) so that it would be less competitive on price with the TAB than was previously the case, or it has to absorb the fee and pay remaining fees, taxes and costs before it has any profit, as compared to the TAB which has to absorb a lower additional cost (subs [50]).

39. Betfair fails to address the competitive relativities in this regard. It is quite right to recognise at [49] that it has a choice in how it responds to such a new business input cost. So, too, did and does the TAB, along with every other participant in the national market who/which offers wagering on NSW races. Betfair has, to date, made the choice to absorb the cost without increasing its commission. The TAB has it seems, to date, made a similar choice (note Betfair, unlike Sportsbet, did not rely on the settlement under the RDA between the Authorities and the TAB – and even if it had done, that would have been answered in the manner set out in the NSW submissions in the Sportsbet v NSW case).

40. These choices are commercial choices in the competitive national market place. Insofar as wagering operators absorb the fee rather than increasing their commission rate, they are making a commercial choice to reduce their net margin. But that is true for all wagering operators. If all wagering operators increased their commission rate so as to maintain their net margin, there would be no change in the relative competitive positions of the operators. No doubt there may then be some fall in demand because of the increase in price, reflecting whatever elasticity of demand exists in this market (a matter, incidentally, not examined by Betfair in the trial). But that is true whenever price goes up because of a new business input cost, including any governmental levy.

41. Betfair invokes a quotation from a Productivity Commission report (at [65]) suggesting that "the economics is relatively straightforward" and that the effect of a turnover–based fee is to either drive low-margin operators out of business (if they do not increase their margins) or require them to increase their prices. But it is hardly novel or startling, let alone unconstitutional, that the effect of a new governmental levy may be to require businesses to either take an effective cut in their margin or to increase their prices.

42. If the Commonwealth, say, imposed a new levy on retail sales of wine at a rate of 20% of sale price, then retailers would need to make choices as to how much, if any, of the levy to pass on to consumers, taking account of the competitive forces in the marketplace. To the extent the levy was not passed on, this would represent a cut in net margin. To the

extent it was, it would no doubt have some effect on demand. Further, a higher margin operator might have more ability to absorb the new levy than a lower margin operator. Yet none of these things could mean that such a levy was invalid. There is no preclusion of competition – merely a new cost input to be borne equally by all. As the Full Court put it here at [94], "[n]o disturbance of competition is shown merely by showing that the percentage of the turnover of a low margin operator captured by an impost is greater than the percentage of turnover taken from a high margin operator".

43. Innumerable government-sanctioned charges are set on a flat basis. The Commonwealth imposes, for instance, licence fees for broadcasting licences which are calculated as a proportion of revenue: Television Licence Fees Act 1964 (Cth), ss 4, 6, 7; Radio Licence Fees Act 1964 (Cth), ss 4, 6, 7 and Broadcasting Services Act 1992 (Cth), Pt 14A; note Amalgamated Television Services Pty Ltd v ABT (1989) 91 ALR 363 at 371. It also imposes a great many excise taxes which are generally imposed on a flat basis by reference to the amount or value of a commodity: see eg Primary Industries (Excise) Levies Act 1999 (Cth) and the associated regulations. Norman provides another illustration (discussed below). Acceptance of Betfair's argument would mean that s.92 would often operate to extend the s.90 prohibition on excises so as to bind the Commonwealth.

44. At a more general level, taken to its logical conclusion Betfair's argument would mean that where price setting was subject to s.92, the owner of a product could never set a flat fee (ie one not dependent upon considering the profits and capacity to pay of the payer) unless all participants, interstate and intrastate alike, adopted the same or a similar business model, and was subject to the same or similar regulatory fees and taxes, so that the fee did not have a differential operation as between interstate and intrastate participants. Similar doubts would arise about any other taxes, fees or prices set under federal, State or Territory legislation.

45. Section 92 does not have the effect of creating a constitutional right in individual interstate traders to maintain pre-existing low margins. Nor does the provision implicitly incorporate some economic theory that low margin operators are to be preferenced over higher margin operators. Betfair itself submits 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" (at [81]). Yet its complaint comes down to the effect on its profitability if it chooses not to increase its commission rate. There is no analogy between a business model decision as to what margin to charge, and a decision as to whether to relocate from one State to the other so as to avoid being unduly burdened (cf Betfair submissions at [94]). The latter point – facilitating interstate trade and commerce

– is the very thing protected by s.92. Even Betfair accepts that profitability is not so protected.

46. Each of Bath v Alston and Norman stand in the path of Betfair's argument. In Bath v Alston the majority judgment made clear, twice, that if the fee had been applied to tobacco retailers without differentiating between tobacco bought within and outside Victoria then the measure would have been valid (see at 424-5). The minority necessarily took the same view. The tax at issue was ad valorem – it was of the species later held invalid by reason of s.90. It was imposed at the retail level at a rate of 25% of the value of the tobacco sold, that value being determined as 4/5 of the gross amount (including duties) for which in the Commissioner's view "it would ordinarily be expected to be purchased by persons engaging in tobacco retailing" (see at 422). In effect, thus, it was levied at something like 20-25% of wholesale value.

47. Such a levy is thus a proportion of the (likely) wholesale purchase price, imposed at a flat rate, in a way which impacts upon the retail sale price (and thus turnover), and is much the same in substance as a turnover charge. It applies in a flat way, and may thus impact low and high margin operators in different ways, in that a high margin operator might be more capable of bearing the impost. Yet this was not suggested to be relevant to validity.

48. Norman considered the validity of a NSW compulsory acquisition/marketing scheme for malt barley. The scheme had been applied to malting barley with the express aim of increasing returns achievable for NSW malt barley growers (see at 195.8 and 196.4). Challengers to the scheme argued that it was necessarily protectionist because it gave small NSW producers the benefit of the marketing authority's increased bargaining power against large purchasers, especially interstate maltsters (see at 202). The challenge was rejected. The Court held that whilst the scheme might terminate an advantage held by some (large) NSW barley growers to sell at low prices, this might actually aid the position of interstate barley growers (at 202).

49. Insofar as the argument was directed to the position of the maltsters, it was accepted that the scheme terminated an advantage of Victorian maltsters in buying at low prices from NSW growers near the State border. But that advantage was also terminated for NSW maltsters: "[Victorian] maltsters may now pay more than they did when they purchased from border growers in that State, but they are treated equally with maltsters in that State" (at 202). The Court added at 203:

> The Act does not result in the exclusion of one group but not the other from any market; nor does the Act lead to any difference in price of product to maltsters in the two States. Consequently the New South Wales maltster is given no competitive advantage over his Victorian counterpart. So the operation of the Act does not result in 'a departure from equality of treatment' of interstate and

intrastate trade and commerce, that being the object of the constitutional injunction in s.92: Cole v Whitfield [at 399].

50. Thus, as in Bath v Alston, the fact of equality of treatment of relevant competitors was held to answer the s.92 complaint. Doubtless the effect of the increase in prices for malting barley would impact upon different maltsters in different ways. But, again, this was not suggested to be relevant to validity.

51. As the Full Court stated, no decided case on s.92 suggests that it is concerned to protect the business model adopted by interstate traders (at [68]; [80]; [95]). Betfair asserts (at [62]) that Fox v Robbins (1908) 8 CLR 11 is analogous with the present case. The legislation at issue there was a measure which clearly imposed a discriminatory burden of a protectionist kind, the differential fee being imposed by reference to the origin of the wine. There is no such inequality here.

52. Indeed, it is notable that Betfair at [63] submits that "the current case" involves discrimination by "the equal treatment of those who are not equals". The claim of not being equals is addressed below. What is revealing is that Betfair appears to accept that the Turnover Condition is, in form and substance, an equal measure.

53. Betfair suggests that the Full Court imposed "an unnecessary gloss" (at [72]-[83]) on s.92 by considering that it was necessary to take account of the competitive effects of the measure and, in particular, to assess whether it created any competitive advantage for local traders (in particular the TAB) and/or any competitive disadvantage for interstate traders (and in particular Betfair). It seeks to downplay the significance of competitive effects and or market considerations (at [53] and [74]). Yet these things are no gloss. It is fundamental to s.92 analysis to take account of the competitive effects of an impugned measure. So much has been apparent in all the cases from and including Cole, and was explained in the joint judgment in Betfair v WA by reference to the notion of precluding competition.

54. The Full Court was not applying a "substantial lessening of competition" test, but it was looking to whether Betfair had established any effect on competition which was not competitively neutral. The importance of assessing the effect of the impugned measure on the supply side or demand side of the market, as opposed to its effect on one interstate trader as compared with one intrastate trader, is consistent with the concern of s.92 to protect against the preclusion of competition in a market for goods or services.

55. Betfair argues (at [66]-[71]) that the Full Court erected a false dichotomy between facial and practical discrimination. The Court did no such thing. The point being made was a very simple one. Betfair sought to make its case not by reference to the claimed practical effects of the approvals and the Turnover Conditions – as was clearly open to it. But if

that is the claim, then it has to be made good. This Betfair did not do – it did not attempt it beyond, in essence, reciting its arithmetical argument. As the Full Court stated at [92]:

> The authorities direct attention to the question whether the substantial effect of the imposition of the fee is to impose a burden which so disadvantages the provision of interstate wagering services by betting exchanges such as Betfair or interstate bookmakers, as to raise a protective barrier around wagering services provided by traders in New South Wales. Betfair seeks to answer this question by pointing to the fact that the fee takes a greater percentage of Betfair's commission than it takes of TAB's commission. To make this arithmetical point is not to show that the fee disadvantages interstate bookmakers or betting exchanges (which may or may not use the same low margin business model as Betfair) so as to protect the TAB and intrastate bookmakers from interstate competition. Nor is it even to show that Betfair is not able to continue to enjoy any competitive advantage which it enjoys by reason of its business model. By limiting its case to the arithmetical point to which we have referred, Betfair eschewed the "questions of fact and degree" with which it was required to engage if it was to make good its case of discrimination in fact.

56. As the Full Court observed at [98]-[99], Betfair did not seek to demonstrate that the fee condition would have any effect on the competitive relativities of the market and its position in that market. It did not show, for example, that the fee condition would result in any loss of market share, or its profitability. Without such evidence, Betfair could not demonstrate that "the apparently neutral fee is apt to have the practical effect of denying or diminishing the competitive advantage which it enjoys by reason of its low margin business model" (FFC at [99]; see also [107]). The Full Court's consideration in this context that such practical effect or likely effect on Betfair of the fee condition as was identified should be material in order for s.92 to apply is hardly surprising.

57. There was, in fact, no evidence of any practical inhibition or preclusion of competition from Betfair:

(i) Betfair continued to expect "healthy" rates of growth of its business (see Betfair's Long Range Plans: FY10,11,12, Ex B, 3824 at 3834; Betfair Budget 2009/10, Ex B, 4038 at 4052-4053; Twaits xxm 19.11.09, T126/5-127/25; 20.11.09, T31/5-15).

(ii) The evidence of the CEO of Betfair, Mr Twaits, suggested that Betfair had not done any formal planning in the event that the validity of the Authorities' decision to impose the Turnover Condition is upheld (xxm 20.11.09, T42/1-17).

(iii) Even the possibility of change has to be seen in a context where Mr Twaits stated in his third affidavit, sworn on 13 November 2009, at [43] that:

> My view is that Betfair should not seek to charge to or recover from customers or any other person the additional amount charged by Racing NSW and HRNSW and paid by Betfair. There has been no resolution by the Board in relation to this issue. I do not intend to propose to the Board that such a resolution seeking such recovery be made. I am not aware of any Board member having a contrary view.

If no change is currently even capable of being contemplated, it is difficult to see it as a substantial impediment to the continued interstate trade of Betfair. In cross-examination, Mr Twaits accepted that in terms of competitive activity on the part of Betfair occurring in the interface between it and the pool of potential customers – it being on the supply side competing against various wagering operators in the internet sector – there was no discernable behaviour which was any different after the fee came into force than before it was in force, referable to the race fields fee (xxm 20.11.09, T40/30-46).

(iv) Mr Twaits did not give evidence that the Turnover Conditions had such an effect as to mean that Betfair could not profitably offer wagering services with respect to NSW racing; that Betfair could not continue to compete in the market, including with respect to NSW races; that Betfair would not continue to gain market share; or that Betfair could not adjust its model so as to deal with the Turnover Condition in an economic way.

(v) Betfair submits (at [49]) that in the 9 months after the Turnover Condition was introduced Betfair's gross profit was only 1.6% of its gross revenue. Yet this statement leaves out of account the very substantial payments that Betfair was required to make to support Tasmanian racing (and also in payments to the Tasmanian Government). It is notable that Betfair had done some calculations on the effects on its revenue if all State and Territory governments adopted the NSW approach. These figures – for which Betfair has claimed confidentiality – are revealing (Betfair Budget 2009/10, Ex B, 4038 at 4041). And this is so even though they proceed on the assumption of no increase in margin by Betfair.

58. Betfair's challenge could not be made out without consideration of the nature of the national market, the practical economic effects of the fee conditions on competitors, and the linkage (or otherwise) between those effects and the operation of interstate and intrastate trade and commerce. It did not make out its case.

Betfair's simplistic comparison between one local and one interstate trader

59. Betfair's case was simple not only in its focus on one arithmetical matter, but also in the comparison undertaken. It asserts in its submissions to this Court at [60] that "the relevant inquiry is whether the impugned fee condition imposed a more onerous burden upon Betfair as compared to the TAB", and a "broader inquiry encompassing other market participants on the supply side is unnecessary". It bases this claim on the decision in Castlemaine Tooheys, especially on the passage at 475 that "[d]iscrimination 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".

60. For the reasons discussed above (under the heading "Legal Principles"), such an argument is too simplistic. In a market of any complexity it will commonly be the case that one interstate trader can argue that they are relatively disadvantaged by a governmental measure vis-à-vis one local trader. But this does not suffice to characterise the measure as protectionist. It is necessary to take account of the nature of the market and the competitive effects of the measure in that market.

61. A difference between Bath and Norman on the one hand and Castlemaine Tooheys on the other is that in the former two cases the markets were reasonably large and diffuse. In contrast, in Castlemaine Tooheys there were just three main established competitors (two locals – Coopers and South Australian Brewing – and CUB from Victoria). There was one new interstate challenger – the Bond Group. That Group had been substantially increasing its market share for the sale of beer within South Australia before the impugned amendments were enacted in 1986. The three established competitors used refillable bottles. Bond Group used non-refillable bottles (see at 458-459).

62. Prior to the enactment of the amendments the scheme provided for a mandatory refundable deposit on all bottles of 5 cents per bottle. In practical terms this favoured the brewers which used refillable bottles (especially the local brewers). The Bond Group had no interest in return of its non-refillable bottles, and thus gained no advantage from the imposition of the 5 cents refund requirement. Importantly, however, "there were other advantages flowing from the use of non-refillable bottles", including a lower initial purchase price, the lower cost of plant and equipment and lower transport costs (at 459). Accordingly, the exemption did not place the Bond companies at a "discernable competitive disadvantage so long as the amount of the deposit differential did not exceed 5 cents" (at 459.2).

63. This aspect of the Court's analysis illustrates that it is necessary to take account of all the circumstances, including the various competitive advantages and disadvantages in play.

Moreover, the mere fact that a regulatory scheme imposes some comparative disadvantage/burden on interstate trade is not sufficient to warrant characterization of the measure as contravening s.92.

64. By reason of the 1986 amendments, the refund amount for non-refillable bottles went from 5 cents to 15 cents per bottle, but was only 4 cents per refillable bottle. As the Court noted, the Act and accompanying regulations disadvantaged the Bond companies in two respects (at 462-463). First, the Bond companies' non-refillable bottles became subject to a refund amount of 15 cents, whereas the refillable bottles of its competitors were subject to a refund amount of 4 cents. The difference between prescribed amounts of 15 and 4 cents resulted in "a price differential which made the Bond brewing companies' product non-competitive" (at 463). It was "uneconomic for the Bond brewing companies to convert their existing interstate plants to use refillable bottles" (at 464).

65. Secondly, the Bond companies' non-refillable bottles were not eligible to be exempted from the application of s.7 of the Act as amended, which required retailers to accept delivery of bottles and pay the amount of the refund, being 15 cents. By contrast, the refillable bottles the South Australian brewers were using were eligible for exemption from s.7 and were so exempted. Accordingly, the retailers selling Bond beer were obliged to comply with s.7 and accept delivery of such bottles and pay a refund of 15 cents per bottle, whilst retailers selling South Australian beer in refillable bottles, not being obliged to comply with s.7, were not bound to accept delivery of them or pay the refund of 4 cents per bottle. The natural result of the requirement that retailers pay the refund amount was that they were not inclined to stock a beer when the volume of sales of a particular brand was not high (see at 463-464).

66. The practical effect of the changes to the scheme was "to prevent the Bond brewing companies obtaining a market share in packaged beer in South Australia in excess of 1 per cent whilst their competitors used refillable beer bottles" (at 464). In contrast, as recorded in the stated case at 447, "[i]n the market conditions existing in 1986 (and without any external factors), the first three plaintiffs together could have captured up to 10 per cent of the market for packaged beer in South Australia".

67. An argument was made that the statutory scheme "advantaged CUB as much as the domestic brewers so long as CUB supplied beer in refillable bottles" (at 475). The joint judgment stated in response that the impact of the provision on CUB was a relevant consideration: it "might tend to suggest that the intended legislative object was not to discriminate against interstate brewers". But it was said not to be a conclusive consideration: "[i]t does not negate the purpose of discriminating against interstate trade consisting, in the main, of the trade of the Bond brewing companies ... After all, it was the

growing market share of those companies, not CUB, that threatened the market share of the domestic brewers " (at 475).

68. The Court did not merely hold that because one interstate trader was disadvantaged vis-à-vis the locals, that was enough to lead to invalidity. Rather, it assessed the measure in its context and taking account of its competitive effects. Bond Group, as an interstate trader, had been expanding its market share rapidly, at the cost of the three incumbents. Bond Group was thus a substantial new competitive threat. The legislative measure acted to neutralise this interstate competitive challenge. The fact that one of the three incumbent competitors was from interstate and also stood to benefit from the legislative measures, did not detract from their protective character.

69. The wagering market is quite different from the South Australian retail beer market. As described at [6]-[8] above:

(i) the market is geographically large;

(ii) it has numerous competitors (over 600);

(iii) there are four broad models of operator (race course bookmakers, corporate bookmakers, totalizators and Betfair); and

(iv) these operate on a wide range of margins.

70. There is no race fields model which will please everybody. Any funding model adopted will affect different types of competitors in different ways. Betfair's main complaint relates to the fact that it operates on a lower margin than the TAB. Yet there are low and margin operators both within and outside NSW. As noted above, local bookmakers operate on low margins. And totalizators around the country tend to operate on higher margins. Thus in this market – in contrast to that considered in Castlemaine Tooheys – the mere fact of discrimination between one interstate competitor and one local operator cannot of itself establish that the measure is protectionist in character.

71. Betfair's complaint is that the choice made here does not suit it as much as a "gross revenue" model. Such a model would, however, put a greater share of the burden on to high margin operators. If a gross revenue model had been adopted then interstate totalizators could equally complain that this served to protect local (relatively low margin) bookmakers. If such a model had been adopted there is every reason to think that there would still have been a s.92 challenge, just brought by other interstate operators.

Betfair's claim of equal treatment of unequals

72. Gaudron and McHugh JJ said in Castlemaine Tooheys at 480 that "the essence of the legal notion of discrimination lies in the unequal treatment of equals, and, conversely, in

the equal treatment of unequals". Betfair now invokes this notion to suggest that the fee conditions discriminated against it "because of the fundamentally different nature of a betting exchange business" (at [63]). As noted above, the corollary of the argument is that Betfair apparently concedes that the Turnover Conditions apply equally, in form and substance.

73. Betfair now argues (at [63]) that it is in a materially different position from other wagering operators – or at least the TAB – because of two factors: that its earns its commission on "a different money flow" from that of the TAB; and that it earns its commission at a different rate, which is capped by Tasmania at 5%.

74. As to the former factor, it is true that there is a difference in wagering model. Both the Betfair model and the TAB model, however, involve taking a commission on bets (in contrast, as it happens, to traditional bookmakers, who profit from achieving an "overround"). Yet Betfair is operating – as it established in Betfair v WA – in a national market where its product is substitutable for betting products sold by bookmakers and TABs. And there is no doubt that it competes with other wagering operators on price – where price means the net returns to punters on particular bets, taking account of the different rates of commission taken from the bet. Betfair made the fact that it was competing on price very clear in its evidence and submissions below. For example, it asserted in its written submissions to the Full Federal Court that "Competition between wagering operators is largely on price" (at [30], relying on evidence of Mr Twaits in this regard). In its submissions to this Court it refers at [47] to its "commission" compared to the TAB's "commission". It is the very comparison between the "take out" from the commissions which lies at the heart of its case. Thus the difference between the charging model for Betfair and the TAB – which is much less significant than the difference in model between those two operators and bookmakers – is not material.

75. As to the latter factor, there is nothing inherent in being a betting exchange that requires Betfair to charge a lower margin. Its rate of commission is its choice, reflecting its business model.

76. To the extent that Betfair relies on the fact that Tasmania imposes a 5% limit on the commission it may charge, as a competitive linkage to interstate trade which is relevant to establishing that the claimed discrimination is protectionist (at [63]), that submission should be rejected for both legal and factual reasons. The restrictions placed on Betfair by Tasmania cannot be binding upon other State governments. Section 92 protects interstate trade, not local trade (see the NSW submissions to this Court in Sportsbet at [30]-[31]). If NSW, or Tasmania, wishes to impose additional burdens on its local operators it may do so.

77. Section 92 does not then mean that this has some knock-on effect on other State governments, such that if operators are subject to competitive restraints by their local governments then the interstate governments cannot impose any additional burden upon those traders – even if this is done in an equal way – because (given the local restraints) this would, say, make it uneconomic for these operators to trade in the interstate market. To take the contrary view would be to give a rather perverse first-mover advantage to States which imposed such limitations – by handicapping its own local traders, the first-moving State would then be protecting them from other States imposing additional burdens. That view would impose the lowest common legislative denominator on all.

78. If Tasmania chooses to handicap Betfair, as its licensee, that is its choice. But the consequences of that choice cannot bind every other State. So much is illustrated by considering Bath v Alston and Norman. In Bath, as noted above, the majority clearly indicated that Victoria could have imposed an equal retail level tax – and that was so even though, evidently enough, this might render products from some other States non-competitive if they had been subject to their own local wholesale taxes. In Norman, the Court noted at 202 that the effect of the NSW scheme might be to "enhance the competitive selling position of growers" outside NSW. That competitive disadvantage imposed by NSW on its growers could not mean that no other State could impose any additional burden on NSW barley, given that it was already in a competitively disadvantaged position.

79. In any event, the facts do not support Betfair. Whilst its commission is currently capped at 5%, in fact Betfair operates at an average commission on NSW racing of about 2.5% (primary judge at [136]). It thus still has substantial room to move insofar as it wishes to adjust its commission to take account of the Turnover Condition. Indeed, it could pass the fee on in full and still be 1% below its current cap.

The significance of purpose in the s.92 analysis

80. This issue is dealt with at [74]-[75] of the NSW submissions in Sportsbet v NSW. It may be noted that Betfair now seeks to depart from what it accepted below in oral argument in the Full Court: see Full Court at [44(5)].

Conclusion

81. The appeal should be dismissed. In relation to costs, although the NSW Attorney-General is a necessary party to this appeal pursuant to s.78A(3) of the Judiciary Act, his role in the litigation has been that of intervener. In that context, the Attorney neither seeks costs, nor does Betfair seek costs sought against him.

Dated: 29 April 2011

M G SEXTON SC SG
PH 02 9231 9440
FAX 02 9231 9444
Michael_Sexton@agd.nsw.gov.au

J K KIRK
PH: 02 9223 9477
FAX 02 8028 6060
kirk@wentworthchambers.com.au

A M MITCHELMORE
PH 02 9223 7654
FAX 02 9221 5604
amitchelmore@sixthfloor.com.au