IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ORIGINAL

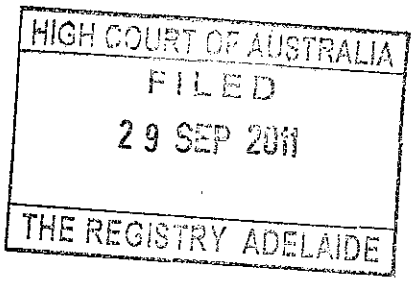
No. S116 of 2011

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

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S118 of 2011

BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 612)

Appellant

and

STATE OF NEW SOUTH WALES

First Respondent

RACING NEW SOUTH WALES
(ABN 86 281 604 417)

Second Respondent

HARNESS RACING NEW SOUTH WALES
(ABN 16 962 976 373)

Third Respondent

STATE OF SOUTH AUSTRALIA

Fourth Respondent

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING) AND THE STATE OF SOUTH AUSTRALIA IN RESPONSE TO THE HIGH COURT'S LETTER DATED 8 SEPTEMBER 2011

Date: 29 September 2011
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Introduction

1. The questions posed by the Court invite examination of the inter-relationship between the test for protectionism identified in *Cole v Whitfield*[1] and the concept of "competition" in the sense it is used in economics and trade practices law. In addition, the questions invite analysis of whether the protectionist framework can be applied to services (as opposed to goods), and whether the application of that framework is changed by the increasing potential for, and predominance of, markets which extend beyond State borders.

2. In order to answer the questions, it is necessary to recognise that the concept of protectionism, identified in *Cole v Whitfield* as the mischief to which s92 was directed,[2] is concerned in this context with identifying those laws or executive measures which in practical effect are likely to result in:

   i. segmentation of a market which would otherwise geographically extend beyond State borders so as to create a 'protected' sub-market within (but not necessarily aligning precisely with) State borders;
   ii. an increase in price of the good or service within that protected market (as compared to that which would otherwise prevail in the unprotected 'interstate' market);[3]
   iii. a decrease in the overall quantity of the good or service traded in that protected market (as compared to the quantity which might be expected to be traded in the absence of the impugned law or measure);[4] and/or
   iv. a decrease in the relative proportion of the good or service traded in that protected market by 'outsiders' (as compared to the relative proportion which might be expected to be traded by outsiders in the absence of the impugned law or measure).

3. Economic trade theory tells us that all of these effects are likely to be detrimental to the overall wealth or welfare of citizens of the Commonwealth as a whole. It is these concepts from trade theory which informed the inclusion of s92 within the *Commonwealth Constitution*, and which should continue to inform the application of s92 at the present time. Such concepts from trade theory should not, however, be confused with the separate branch of economic theory that analyses the effects of

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

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

3 The price increase arises in the following way. A good or service will be imported where the price prevailing in the national market is lower than the price prevailing in the state market. A protectionist law relating to that good or service has the effect of increasing the price of the imported good or service. This allows protected producers to sell at a price higher than would prevail if there was no protectionist measure.

4 The quantities traded of the good or service are effected by the changes in price discussed at footnote 3. If prices rise (compared to what would prevail in the absence of the protectionist measure) less of the good or service will be consumed in the protected part of the market.

firm size[5] and behaviour on the prices and quantities traded in a market (and is properly the concern of trade practices law). Each of these points is examined in more detail below, as a common basis for answering the specific questions that the Court has posed.

Trade Theory and protectionism – the enhancement of welfare for all via trade

4. Protectionist laws as barriers to trade have, at least since the controversial English corn-laws[6], been a concern of economics. The development of trade theory commences with the writings of Adam Smith[7] and David Ricardo.[8] Trade theory is that body of economic thought directed to explaining why and how countries engage in trade, and the welfare implications of that trade. It includes both abstract models and empirical work. That analysis has as a focus the gains from trade, the welfare benefits from free trade, and the costs associated with barriers to trade, including protectionist laws. [9] It does so utilising the tools of predicted supply and demand in markets for a good or service. Applying trade theory, a protectionist law has consequences that can be predicted and measured by using a model.[10] This means one can meaningfully consider whether such a law has a protectionist effect by reference to the effect on trade in that part of the market "insulated" or "protected" by the protectionist law.

5. The basic model used in this analysis[11] predicts that a protectionist measure will generally result in a difference between prices in the protected market and the wider

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5 This is the analysis of the effects of monopoly, duopoly and firms which have market power.

6 The so-called Corn laws were in essence agricultural tariffs on the importation of cereal grain into the United Kingdom. They were imposed in 1815: *Importation Act 1815* (*55 Geo. 3 c. 26*). The laws were designed to protect British domestic agriculture from importation particularly from North America. The controversy over those laws was the subject of economic analysis particularly by the English economist, David Ricardo. They were repealed in 1842: *Importation Act 1842* (5 & 6 Vict. c. 14).

7 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1776), Book IV, Chapter 2: Restraints upon the Importation from Foreign Countries of such Goods as can be Produced at Home.

8 David Ricardo, *Essay on the Influence of a Low Price of Corn on the Profits of Stock* (1815); David Ricardo, *On the Principles of the Political Economy and Taxation* (1817), Chapter 7: On Foreign Trade.

9 In economic terms, when it is said that a protectionist law protects a market, what is meant is that it protects the producers in that market by raising the price at which the good is sold in that market. References in *Cole v Whitfield* to the "protection of domestic industry"[9] are to be understood as synonymous with the notion of protection of "local producers" or simply "production in the protected market".

10 In economics, a model is simply a simplification or abstraction of the economic behaviour being studied.

11 This is the simple partial equilibrium model found in all introductory trade theory text books. A relevant example is Krugman and Obstfeld, *International Economics - Theory and Policy*, (2006), p176-179.

market, changes in aggregate quantities traded, and differences in the relative proportions of the imported or domestic good or service.[12] The assumptions underpinning this basic model may need to be adjusted if they do not sufficiently approximate the particular nature or features of the market one is examining. More complex models allow for variation from the basic case, for example, where there is a monopoly,[13] or where the size of the protected market is sufficiently large to affect the 'external' prevailing price.[14] In these more complex cases, the choice of the appropriate model, and the predicted results of its application, may require expert economic evidence. However the legal test remains the same and the basic
10 approach in economics is the same in all cases: the tools of predicted supply and demand are used in order to determine whether a particular measure has (or is likely to have) protectionist effect, compared to what is likely to happen in the absence of the measure.

6. In some cases, it may be easy to determine whether a law is protectionist, either because its likely effects on prices and quantities traded in the protected sector of the market are uncontentious,[15] or because it is a type of law generally understood and accepted to have protectionist effect.[16] A law that *prohibits* interstate trade in a good or service will be such a case.[17] It may also be relatively simple where there is an

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12 Specifically, that simple partial equilibrium model predicts that in a market protected by a tariff (*as compared to where there is free trade*): prices will be higher, quantities traded will as an aggregate be lower and the producers from the protected market will have higher market share: see footnote 11 above.

13 *Krugman and Obstfeld,* International Economics - Theory and Policy, (2006), p199-202.

14 For example, if the market to be protected is large relative to the entire market, such as the United States market for cars relative to the world market for cars, its demand can affect the world price. Account must be taken of this feature in the model chosen. See *Krugman and Obstfeld,* International Economics - Theory and Policy, (2006), p203-206.

15 In *Cole v Whitfield* (1988) 165 CLR 360 the Court (at 393) referred to five traditional examples of protection of domestic industry: tariffs that increase the price of foreign goods, quotas on imports, differential railway rates, subsidies on goods produced, and discriminatory burdens on dealings with imports. But as the Court observed (at 408) the categories are not closed.

16 Some other 'obvious' examples have been recognised: in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 204, the Court noted: "At the same time, it could scarcely be denied that a prohibition or restriction upon the export of a commodity from a State with a view to conferring an advantage or benefit on producers within the State over out-of-State producers would amount to discrimination in a protectionist sense. If a State having a scarce resource or the most inexpensive supplies of raw material needed for a manufacturing operation prohibited the export of material from that resource or those supplies in order to confer a benefit on its domestic manufacturers as against out-of-State competitors, that prohibition would discriminate against interstate trade and commerce in a protectionist sense."

17 In *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, the impugned law effectively prohibited betting exchanges, which lawfully operated interstate, from providing services in Western Australia. See also in *Foggitt, Jones & Co Ltd v State of New South Wales* (1916) 21 CLR 357, a New South Wales law prevented the export of all stock and meat from that State; *Tasmania v Victoria* (1935) 52 CLR 157, where the importation of potatoes from Tasmania was banned in Victoria; in *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529, a Tasmanian

arrangement such as an *ad valorem* tax[18] or specific tariffs[19] or import quotas.[20] These cases fall into well established categories of laws that have protectionist effects as they apply to trade in goods.[21] There are also some well known categories of laws that will be protectionist in markets for services. Common examples include local content requirements[22] or residence requirements in the protected market for a trader in the service.[23]

7. Outside those categories there are more complex cases where the effect on prices or quantities consumed (and thus the existence of a protectionist effect) in the protected part of the market is not as apparent. Expert economic evidence will almost certainly be required to demonstrate that an impugned law has, or is likely to have, such an effect, in the absence of sufficient agreed facts between the parties.[24] Relevant

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law prohibited the sale and manufacturer which had certain colouring and flavouring ingredients added.

18 In *Bath v Alston Holdings* (1988) 165 CLR 411, a 25% *ad valorem* fee was imposed on tobacco other than that purchased in Victoria from a Victorian wholesaler.

19 In *Fox v Robbins* (1909) 8 CLR 15, a Western Australian law provided for a licensing scheme which provided for a higher fee for wine from grapes grown outside the State.

20 In *James v South Australia* (1927) 40 CLR 1, the impugned legislation allowed for the provision of marketing quotas, and in *James v Cowan* (1932) 47 CLR 386, the impugned legislation provided for the compulsory acquisition of dried fruit beyond the quota to be sold domestically. In *Grannall v Marrickville Margarine Proprietary Limited* (1955) 93 CLR 55, no margarine could be lawfully manufactured without a licence, which imposed a production quota.

21 These sorts of arrangements are sufficiently well known and employed to be the subject of specific international regulation in the *General Agreement on Tariffs and Trade 1947* ("GATT"): see Article XI - General Elimination of Quantitative Restrictions (which refers to quotas, and import or export licences); Article XXVIII - Tariff Negotiations (which refers to customs duties). To refer to the output of global institutions in this context is not to suggest that the content of s92 or its concerns share 'the same normative foundation' as that which led to the emergence of, for example, the International Labour Organisation or the World Trade Organisation (see *Betfair v WA* (2008) 234 CLR 418 at 459 [32]). The content of s92 and its concerns are derived from the Australian context, both colonial and current. That said, many of the barriers to international trade recognised in the GATT were similarly recognised as barriers to interstate commerce at the time of federation: see Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p846.

22 Such as that considered in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

23 Examples of this type of law are identified in the international agreement, *General Agreement on Trade in Services* ("GATS"), Article XVI, Market Access, cl. 2 (which includes reference to monopolies, exclusive service suppliers, limitations on the total number or value of service transactions, limitations on the number of employees in a service sector, measures which restrict participation to certain types of legal entity, and limitations on the participation of foreign capital).

24 In the past, such complex cases have often been referred to this Court on the basis of an agreed statement of facts. See, for example, *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, where the agreed facts were sufficient for the Court to conclude (at 203) that the impugned legislation would "not result in the exclusion of one group but not the other from any market; nor does the Act lead to any differences in price of product to maltsters in the two States"; similarly in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, the agreed facts included significant detail as regards prices and market shares (a proxy for

examples of more complex cases include requirements that all producers comply with environmental,[25] public health,[26] labelling or security requirements, which may indirectly discriminate in favour of local producers or service providers in their practical effect.

Trade Theory as the foundation for s92

8. That trade theory was the foundation of s92 was recognised by the Court in *Cole v Whitfield*, having undertaken an analysis of its historical development. From the 1850s until Federation, the debate surrounding free trade as opposed to protection
10 was an important issue in the politics of the colonies.[27] The imposition of tariffs, such as those in the 1880s in New South Wales[28] and in 1879 in Victoria,[29] and the reduction and abandonment of duties in South Australia in the 1850s and 1860s,[30] spurned debate throughout the colonies as to the relative merits of protection as against free trade.

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relative quantities traded within a market) before and after the impugned measures were introduced: see at 437-438, and 446-449.

25 See *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436, where the justification for the impugned law favouring sale of beer in refillable bottles was to reduce litter and to conserve natural gas resources within the State.

26 In *North Eastern Dairy Co Limited v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559, a New South Wales regulation provided that no milk could be sold in the State without being pasteurized within the State. In *Minnesota v Barber* 136 US 313 (1890) a Minnesota statute prohibited the sale of meat unless the animal was first inspected and certified by an Inspector as free of illness and in good health prior to slaughter, which effectively meant that all meat lawfully sold for human consumption was to be slaughtered in Minnesota. But see *Harper v Victoria* (1966) 114 CLR 361, in which a Victorian Act provided that all eggs were to be graded and tested for quality prior to their sale.

27 *Cole v Whitfield* (1988) 165 CLR 360, 386.

28 The imposition of *ad valorem* imposts on several commodities and the increase on the duty imposed on others from 17 March 1871 to 31 December 1873 spurned petitions made to the Parliament of New South Wales numbering in the thousands, see GJR Linge, *Industrial Awakening: A Geography of Australian Manufacturing 1788 to 1890* (Australian National University Press, 1979) 457.

29 In particular, the ad valorem duty on imported calf and kid leather was found, by the Tariff Commission in 1882, to actually have a negative impact on local bootmakers, as the local products were not of the quality of that produced in England and America. Further, it was noted in 1881 that tariffs had the effect of the Ballarat Woollen Company establishing a plant for £40,000, which would have cost £10,000 in Great Britain. See GJR Linge, *Industrial Awakening: A Geography of Australian Manufacturing 1788 to 1890* (Australian National University Press, 1979) 251, 255.

30 In a letter to the other colonies, South Australia expressed concern regarding the barriers established by the colonies' respective duties laws, and removed all ad valorem duties in 1860. The effect on revenue, as well as the perceived effect on local industries, spurned significant debate, and several moves to reintroduce duties. The debate reached the point that in 1890 a Royal Commission was appointed to enquire as to the possibility of free trade between the colonies. A response to a questionnaire showed that the majority of manufacturers were in favour of free trade. See GJR Linge, *Industrial Awakening: A Geography of Australian Manufacturing 1788 to 1890* (Australian National University Press, 1979) 616-20.

9. It is against this backdrop that the members of the Convention Debates discussed the clause that eventually became s92. [31] The framers were concerned with trade between colonies not being hindered by laws of preference. This was the evident purpose and effect that was recognised by the Framers; that the colonies would have to abandon their laws of protection and preference in favour of free trade.[32] That the Framers were concerned that s92 ought not apply to the regulation of industry and competition in general is clear by the justification, as expressed by Dr Quick, for the amendment regarding the original words "throughout the Commonwealth".[33]

10 10. From its analysis of the convention debates, and of contemporary economic material from the 19th century, the Court in *Cole v Whitfield* recognised that "the expression of 'free trade' commonly signified in the nineteenth century, as it does today, an absence of protectionism, i.e. the protection of domestic industries against foreign competition".[34] Consequently, the Court concluded that "[t]he history of s. 92 points to the elimination of protection as the object of s. 92 in its application to trade and commerce".[35]

Trade Theory as distinct from the enhancement of competition in markets

11. It is correct that one consequence of a law that is protectionist (in the sense described
20 above) is that it diminishes competition with the imported good or service in the

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31 See for a further discussion of the Convention debates *Written Submissions of the Attorney-General for the State of South Australia (Betfair)*, [6]-[10]; Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 100-6.

32 As Mr McMillan said, in the Convention Debates in Melbourne, 1898; "I am quite willing to acknowledge the fact that a certain policy has been set up by the different colonies of Australia, but that is part and parcel of their protective system. In going into this Federation they must give up the protective system as far as intercolonial free-trade is concerned." *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 1898 (Melbourne, 1898) Vol 2, 2345.

33 In the Convention Debates in Melbourne, 1898, Dr Quick said; "In order to express what is really intended, it would be better to use the words "between the states" instead of the words "throughout the Commonwealth." The latter words seem to be sufficiently comprehensive to include every locality within the Commonwealth, and they might be construed to include a prohibition of auctioneers' and pedlars' licenses. I am sure that no such thing is intended. Whilst we are anxious to provide for absolute freedom of trade on the frontiers between the colonies, there is no desire to interfere with the local regulation of trade once the packager, goods, wares, and merchandise have arrived within the state territory." In response to a comment from Mr McMillan that "throughout the Commonwealth" was comprehensive, Dr Quick elaborated; "It is too comprehensive. It follows the packages beyond the frontier. What you want to secure is free passage across the frontier." Mr Barton then said "Free passage across the frontier from all preferences", to which Dr Quick, agreeing, said "Yes; freedom from preference or obstructions". *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 1898 (Melbourne, 1898) Vol 1, 1016-7.

34 *Cole v Whitfield* (1988) 165 CLR 360, 392-3.

35 *Cole v Whitfield* (1988) 165 CLR 360, 394.

protected market.[36] However, a test for s92 that has as its focus 'the effect on competition' is not to be favoured for two reasons.

12. First, competition is not something that is itself capable of direct measurement. One instead looks toward prices and quantities traded in the market and analyses these to discern an effect on competition. This suggests that 'effect on competition' as a legal test might not be very helpful. Loss of competition is a consequence of a law that is protectionist, but that loss is discerned from the same criteria one uses to identify that the law is protectionist.

13. Second, only a lessening of a certain aspect of competition is relevant for the analysis. In the context of s92, it is the diminishing of competition brought about by the domestic industry not having to *compete with the imported product or service* which is relevant, not a diminution in competition more generally.

14. The point is that the change in semantic emphasis to one of 'competition' brings with it some dangers. It is easily confused with an analysis of the state of competition generally in the market. Enhancement of competition is often discussed both in law and economics with a view to examining the effects on competition caused by factors such as firm size and firm behaviour. These matters are the concern of the branch of economic theory - a branch of microeconomics - that analyses the effects of firm size and behaviour (and other matters) on the prices and quantities traded in a market. That area is the concern of the related area of law addressed in Part IV of the *Competition and Consumer Act 2010 (Cth)* (known in the United States as anti-trust).[37]

15. The concerns of competition policy are, of course, concepts narrower than the concern of the founders of the *Constitution*, and what was effected, by s92. It is true that free trade and competition policy may be complementary, but they are distinct. Section 92 does not, for example, seek to guarantee that firms within a market are unable to misuse market power.

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36 This is, of course, not the only consequence. By diminishing trade the protectionist law also has an effect on welfare in the exporting unprotected market. It also distorts incentives in the protected market and thus distorts production in that market. There also other long term effects.

16. Such a distinction is readily apparent in the European context, in that the provisions of the Treaty on the Functioning of the European Union (TFEU) which guarantee the "four freedoms" of the internal market (the free movement of persons, goods, services and capital)[38] are entirely separate from the provisions which implement European competition policy.[39]

17. This analysis is also supported by the "dormant commerce clause" jurisprudence which has developed in the United States by necessary implication from Congress' power to regulate commerce amongst the States granted by Article 1, § 8 of the *Constitution of the United States.*[40] The "chief occasion" of § 8 was to solve the "oppressed and degraded" state existing prior to the *Constitution*, marked by the "mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliations".[41] Consequently, the Supreme Court developed the limitation of State legislative power whereby "no state can ... impose upon the products of other states ... more onerous public burdens or taxes than it imposes upon the like products of its own territory."[42]

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37 This is the sense in which competition is discussed in National Competition Policy. While it is true that that Policy will change the sorts of cases brought under s92, it does not mean its conception of competition is the competition to be analysed for the purposes of s92.

38 Articles 26 to 66 of the TFEU, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF (accessed on 29 September 2011). Separate jurisprudence has developed in relation to the application of each of the four freedoms. In relation to services, Article 56 of the TFEU prohibits restrictions on the freedom to provide services to recipients in other Member States. In *Schindler* (Case C-275/92, ECR 1994 Page I-01039) the Court of Justice of the European Union (CJEU) confirmed for the first time that the provision and use of cross-border gambling offers is an economic activity that falls within the scope of the Treaty. The Court furthermore held in *Gambelli* (Case C-243/01, ECR 2003 Page I-13031) that services offered by electronic means were covered and that national legislation which prohibits operators established in a Member State from offering on-line gambling services to consumers in another Member State, or hampers the freedom to receive or to benefit as a recipient from the services offered by a supplier established in another Member State, constitutes a restriction on the freedom to provide services. Restrictions are only acceptable as exceptional measures expressly provided for in Articles 51 and 52 TFEU (including public policy, public security or public health), or justified, in accordance with the case-law of the Court, for reasons of overriding general interest. For recent analysis of the application of the freedom to provide services in the area of internet gambling, see Judgment of the CJEU in Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [3 June 2010]; Opinion of Advocate General Mazak in Case C-64/08 *Engelmann* [23 February 2010], and Judgment of the CJEU in Case C-347/09 *Jochen Dickinger, Franz Omer* [15 September 2011].

39 Articles 101 to 109 of the TFEU, within Title VII of Part 3, which is entitled "Common rules on competition, taxation and approximation of laws". The key provisions are Articles 101 and 102, which respectively prohibit anti-competitive agreements (cartels) and abuse of dominant market power which "may affect trade between Member States".

40 Such jurisprudence is separate from the jurisprudence developed in relation to the scope of Congress' legislative power to pass antitrust laws pursuant to Article 1, § 8.

41 *Baldwin v G.A.F Seeling* 294 US 511, 522; *Guy v Baltimore* 100 US 434, 440 (1879).

42 *Guy v Baltimore* 100 US 434, 439 (1879). This has recently been restated in the case of *GM Motors Corp v Tracy* 519 US 278, 287 (1997) as "the negative or dormant implication of the

18. Consistent with the trade theory analysis above, the Supreme Court drew the distinction between burdens on commerce "among the States" and the regulation of competition more generally within the market. In *General Motors Corp v Tracy*, in the context of the regulation of the natural gas industry, the Court said;[43]

> While recognizing the interstate character of commerce in natural gas, the Court nonetheless affirmed the States' power to regulate, as a matter of local concern, all direct sales of gas to consumers within their borders, absent congressional prohibition of such state regulation. At the same time, the Court concluded that the dormant Commerce Clause prevents the States from regulating interstate transportation or sales for resale of natural gas.

19. It therefore remains more meaningful to speak of s92 as prohibiting a protectionist law, as opposed to a law which has detrimental effect on competition. That identifies clearly the issue for analysis.

20. Based on the foregoing, South Australia submits the following answers to the questions posed by the Court.

I. How does the concept of free trade in s92 apply in relation to a national market for services?

21. The concept of free trade with respect to services applies as it does with respect to goods. However, because of the intrinsic nature of a service, protectionism within a market for services will often be in a different form to that for goods.[44] That is, save for cases where the barrier to trade in services is a prohibition, such as the impugned Western Australian law in *Betfair*, they will often be of a different type.

22. Protectionism carries with it the idea that a part of a wider market in which goods or services are traded will be protected from conditions prevailing elsewhere. In the context of a federation, this means a law which protects a State-specific part of a market, which otherwise geographically extends beyond State borders (whether it is the market for beer to be sold in South Australia, or wagering on horse and hound racing staged in New South Wales).

Commerce Clause prohibits state taxation or regulation that discriminates or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace".

[43] 519 US 278, 290 (1997). See also *Pennsylvania Gas Co v Public Service Commission* 252 US 23, 28-31 (1920); *Public Utilities Commission v Landon* 249 US 236, 245 (1919); *Pennsylvania v West Virginia* 262 US 553, 596-598 (1923); *Illinois Natural Gas Co v Central Illinois Public Service Co* 314 US 498, 504-505 (1942); *Missouri ex rel Barrett v Kansas Natural Gas Co* 265 US 298, 307-308 (1924).

23. The concept of free trade in s92 applies in relation to a national (or 'interstate') market for services by prohibiting a law which is likely to have the effect of creating a protected area within a State where prices, and relative quantities traded, benefit a local service provider (or providers), as compared to the expected scenario without the impugned law. The prices and quantities of trade prevailing in the national market (unaffected by the protectionist law) provide an important piece of evidence that enables one to understand whether a particular law has, or is likely to have, an effect that is protectionist.

24. A law which has, or is likely to have, such an effect will not be prohibited by s92 where it is reasonably appropriate and adapted to a legitimate end. The continuing relevance of this 'saving' test developed in *Cole v Whitfield* was affirmed in *Betfair*.[45]

II. In the past, protectionist measures found to offend against s92, have discriminated against interstate trade and protected intrastate trade, that is local trade carried on within state borders. How does the concept of protectionism apply to trade carried on in a national market without reference to state borders?

25. Where there is a national market for a good or service, a law will be protectionist when it operates so as to protect producers or service providers in a State or a part of a State from competition with goods produced or services provided from outside of the State.

26. For the purposes of s92 it will always be necessary to identify a group of producers (of goods or services) that are properly characterised as internal to a State, who are protected by the relevant law. If it is not possible to identify such a group, then it can not be shown that there is a segment of a market that is protected by a law: there is therefore no protectionism and s92 is not offended.

27. The relevant analysis is not to consider the effect on an individual producer or service provider, but is on trade in the market as a whole analysed by reference to effects on quantities and prices. It may be that an individual producer of provider is sufficiently large such that evidence of an effect on it will be relevant. But whether it is sufficient to prove an effect on the market as a whole is a matter of evidence.

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44 See footnotes 21 and 23 above with respect to the GATT and GATS.

45 *Betfair Ltd v WA* (2008) 234 CLR 418 at 478-480 ([106]-[112]).

28. A producer or service provider will necessarily have a nexus or connection to a particular State or Territory, which will be determined as a matter of fact in any particular case.[46]

29. This is not affected by the progression of technology by means of which exchange between buyers and sellers can be arranged or transacted, such as the semaphore, the telegraph, the mail-order catalogue,[47] the telephone and now the internet. Those means operate to ever reduce the costs of the interaction between buyer and seller, and the costs of a buyer or seller informing themselves about the proposed exchange. Those innovations simply mean that more markets are likely to operate interstate.[48] However they do not operate so as to necessarily alter the relevant location of a particular producer or service provider for the purposes of s92 analysis, or to imply that some service providers in particular may have no ascertainable location for the purposes of such analysis.

30. Where those producers or service providers which can properly be categorised (in fact) as 'internal' to a State are 'protected' by a law in the sense explained above, s92 will be enlivened. It may be that the producers or service providers in the protected market sell themselves interstate or simply sell intra-state. But that is not the relevant analysis. The relevant analysis examines the effect on trade in the protected segment of the market, as compared to that which might otherwise be expected to prevail.

31. An example of this analysis can be found in the judgment of Stevens J[49] in *West Lynn Creamery Inc v Healy*.[50] There a tax was imposed on all milk in Massachusetts, which was offset by a subsidy provided exclusively to Massachusetts producers. His Honour considered that the effect of the law "will almost certainly cause local goods to

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46 See, for example, the analysis undertaken in *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 in relation to the location of the place of publication for the purpose of defamation proceedings.

47 On the effect of the mail-order catalogue on interstate retailing between the 38 states of the United states wrought by Sears from about 1888 see:http://www.searsarchives.com/history/history1890s.htm. (Accessed on 29 September 2011).

48 Even without them, there was substantial 'national' trade carried out without concern for colonial boundaries pre-federation: *Linge, Industrial Awakening* (1979), ANU Press, Canberra. Particularly see the tables of external trade between the colonies, for example, for South Australia, p604-605.

49 With whom O'Connor, Kennedy, Souter and Ginsberg JJ joined.

50 512 US 186 (1994).

constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market".[51] He went on to say:[52]

> That is not to say that the Massachusetts dairy industry may not continue to shrink and that the market share of Massachusetts dairy producers may not continue its fall. It may be the case that Massachusetts producers' costs are so high that, even with the pricing order, many of them will be unable to compete. ***Nevertheless, the pricing order will certainly allow more Massachusetts dairy farmers to remain in business than would have had the pricing order not been imposed.***

10 **III. In the context of trade, carried on in a national market, does "absolutely free" in section 92 prohibit any measure creating a burden on interstate trade, which amounts to a competitive disadvantage on an interstate trader by comparison with other traders irrespective of whether those traders can be characterised as trading intrastate or interstate?**

32. No. Section 92 prohibits any law that is discriminatory *and* protectionist analysed by reference to the effect of that law on trade, by analysis of prices and quantities, in a protected sector of the market as compared to the market in the absence of the impugned measure. The question of whether a law is both discriminatory *and* protectionist is meaningfully one of characterisation of its operation and effect.[53]

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33. Not all competitive disadvantages will be relevant. It may be that a business model adopted by an interstate trader, for example, a model with a high labour/capital ratio, will be competitively disadvantaged by a law such as a payroll tax, as compared to other firms which choose to substitute labour with plant. But such a competitive disadvantage does not establish that the relevant law offends s92. Such a payroll tax is neither discriminatory nor protectionist in the relevant sense, unless it can be shown that its practical effect is to burden 'interstate' trade generally, in the sense explained.

34. Most taxes have an operation that directly, or indirectly, affects the trade in goods or
30 services. Taxes clearly have the practical effect of increasing the total costs borne by producers or service providers (as the case may be). Whether they can be passed on to consumers, in whole or in part, depends on the elasticity of supply. But other than in extreme cases, they are likely to have an effect on prices *and* quantities traded in the market for that good or service. It could be said sensibly that such a tax affects competition in the market, because it affects trade. But it does not follow that such a

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51 Ibid 196.

52 Ibid, fn 12 (emphasis added).

53 In this context, it should be noted that to answer whether a law is protectionist does not require an analysis of whether the purpose of those passing the law was to protect a producer (or its employees), albeit understanding the purpose might be relevant.

law is protectionist and contrary to s92, because a burden on trade in an interstate market is not the same thing as a burden on interstate trade.

35. Such a law will only be discriminatory and protectionist in the relevant sense where it can be shown to have the effect (or likely effect) of:

i. segmentation of a market which would otherwise geographically extend beyond State borders so as to create a 'protected' sub-market within (but not necessarily aligning precisely with) State borders;
ii. an increase in price of the good or service within that protected market (as compared to that which would otherwise prevail in the unprotected 'interstate' market);[54]
iii. a decrease in the overall quantity of the good or service traded in that protected market (as compared to the quantity which might be expected to be traded in the absence of the impugned law or measure);[55] and/or
iv. a decrease in the relative proportion of the good or service traded in that protected market by 'outsiders' (as compared to the relative proportion which might be expected to be traded by outsiders in the absence of the impugned law or measure).

54 The price increase arises in the following way. A good or service will be imported where the price prevailing in the national market is lower than the price prevailing in the state market. A protectionist law relating to that good or service has the effect of increasing the price of the imported good or service. This allows protected producers to sell at a price higher than would prevail if there was no protectionist measure.

55 The quantities traded of the good or service are effected by the changes in price discussed at footnote 3. If prices rise (compared to what would prevail in the absence of the protectionist measure) less of the good or service will be consumed in the protected part of the market.

36. These are the matters that a plaintiff in s92 proceedings would need to prove in order to meet the first step of the test identified in *Cole v Whitfield.* Proof of such effects is likely to require expert economic evidence, particularly in the case where the law does not discriminate against interstate producers or service providers on its face.

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