

SPORTSBET PTY LTD v STATE OF NEW SOUTH WALES & ORS
(S118/2011)

Court appealed from: Full Court of the Federal Court of Australia
[2010] FCAFC 132

Date of judgment: 17 November 2010

Date of grant of special leave: 11 March 2011

Sportsbet Pty Limited ("Sportsbet") is a Northern Territory-based bookmaker which operates via the internet and telephone. It takes bets on the outcome of horse and harness races in New South Wales. Racing New South Wales and Harness Racing New South Wales (collectively known as the "NSW Racing Authorities") are the regulators of such races in New South Wales.

In 2006 amendments were made to the *Racing Administration Act 1998* (NSW) ("the RA Act") and the *Racing Administration Regulation 2005* ("the Regulations"). Those amendments established a scheme ("the Scheme") whereby the NSW Racing Authorities were authorised to grant approvals to wagering operators to use "race field information". (This included the names of the entrants in horse and harness races in New South Wales.) Without such approval, operators were prohibited from using race field information in their wagering operations.

The NSW Racing Authorities were also authorised to impose a fee as a condition of the grant of the necessary approval. They then imposed a fee of 1.5% of the total of all bets placed with any wagering operator on New South Wales horse and harness races. That fee was payable regardless of the domicile of the operator. Sportsbet paid it under protest.

Sportsbet commenced proceedings, challenging the validity of the Scheme. It submitted that that fee placed a burden on interstate trade from which almost all New South Wales based wagering operators were effectively exempted. Sportsbet claimed that that fee was protectionist and was therefore incompatible with section 49 of the *Northern Territory (Self Government) Act 1978* (Cth) ("the NT Act"). That section follows the provisions of section 92 of the Constitution by providing that "trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The primary judge, Justice Perram, found that Sportsbet's submission was well-founded. His Honour held that the fee was an unlawful protectionist burden which discriminated against Northern Territory based operators. Justice Perram also found that Sportsbet was entitled to a refund of the money it had paid under protest.

Upon appeal, the NSW Racing Authorities submitted that Justice Perram had erred in making findings as to the existence of "agreements, arrangements or understandings" upon which his conclusion of invalidity depended. Sportsbet however argued that his Honour's decision could be maintained on the basis of the Scheme's fundamentally protectionist nature. Sportsbet also filed its

own appeal, seeking declarations that sections 33 and 33A of the RA Act and Part III of the Regulations were invalid. It also sought leave to appeal from an interlocutory decision of Justice Perram whereby his Honour refused to vary the orders in his primary judgment or to permit Sportsbet to amend its pleadings.

On 17 November 2010 the Full Federal Court (Keane CJ, Lander and Buchanan JJ) allowed the NSW Racing Authorities' appeal and set aside the judgment below. Their Honours also dismissed Sportbet's appeal and notice of motion.

The grounds of appeal include:

- The Full Court erred by failing to hold that the legal and practical effect of sections 33 and 33A of the RA Act and Part III of the Regulations (the impugned provisions) was to impose a discriminatory burden of a protectionist kind on Sportsbet and other interstate wagering operators by prohibiting Sportsbet from using an essential element of its interstate trade and commerce, namely NSW race field information, and making that prohibition subject to an unfettered discretion that was vested in the relevant racing control body.

On 7 April 2011 the NSW Racing Authorities filed a summons, seeking leave to file a notice of contention out of time. The grounds in that proposed notice include:

- To the extent that the arrangements relied on by the Appellant consisted of, or were consequential upon, contractual arrangements involving private parties, they were outside the purview of section 49 of the NT Act.

On 19 April 2011 a notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) was filed in this matter. The Attorneys-General for Victoria, Queensland and Western Australia have advised the Court they will be intervening, while TAB Limited and Tabcorp Holdings Limited have filed a summons seeking leave to intervene.