IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

No. S118 of 2011

BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 612)
Appellant

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

APPELLANT'S RESPONSE TO THE QUESTIONS OF THE COURT

1. These submissions are provided in response to the Senior Registrar's letter of 8 September 2011 and address the 3 questions asked of the parties.

2. Sportsbet's overall submission is that the answers to each of the questions can be found in *Betfair v Western Australia*.[1] Betfair applied

[1] (2008) 234 CLR 418

s 92, without difficulty, to invalidate Western Australian legislation that prohibited:

(a) customers in Western Australia placing bets with Betfair on any races or sporting events wherever they might be conducted; and

(b) Betfair using Western Australian race fields in its wagering operation, even in respect of transactions with customers who were located outside Western Australia.

3. The key consideration was that the effect of the legislation was "*to restrict what otherwise is the operation of competition in the stated national market by means dependent upon the geographical reach of its legislative power within and beyond State borders. This engages s 92 of the Constitution*": at 480 [116].

Question 1: How does the concept of free trade in s 92 apply in relation to a national market for services?

4. There is no difficulty in applying the concept of free trade in s 92 to a national market for services, as *Betfair v. WA* demonstrates.

5. *Betfair v Western Australia* confirmed that a purpose of s 92, and its surrounding provisions including s 90, is the creation and fostering of national markets in goods and services in aid of national unity[2]. In that context, the national economy and particular national markets can be contrasted with narrower economic centres or markets, or classes of transaction, that are "constrained by legislation based upon the

[2] (2008) 234 CLR 418 at [12]; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 274-275

geographical limits of the State"[3] or a State's long-arm territorial reach.[4].

6. Section 92 targets measures that interfere with trade and commerce among the States by preluding or restricting competition within the national economy. It is established that interstate trade and commerce includes intangibles as well as the movement of goods and persons[5]. In the modern economy, the nature of trade in services and intangibles is such that geographic boundaries have little or no practical significance for the conduct of the trade. As the capacity of the internet increases, services that previously required the provider and recipient to be co-located will increasingly be conducted online.

7. Free trade means the absence of measures that preclude or restrict competition amongst the States in the relevant market[6]. Measures caught by s 92 are not limited to barriers to entry but include measures that impede or restrict competition. Their impact may fall on the supply side, the demand side or both and it is to be assessed having regard to both the legal and practical operation of the measure[7].

8. Section 92 operates in national markets and has a continuing role in fostering and maintaining such markets. It would frustrate the purpose of s 92 for it to cease to apply once a particular national market has been established.

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[3] *Betfair* (2008) 234 CLR 418 at 452 [15] and 459-6 [33]-[35]
[4] *Betfair* (2008) 234 CLR 418 at 459-60 [34], 474 [90] and 480 [116]
[5] *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 628.
[6] *Betfair* (2008) 234 CLR 418 at 452 [15], 456 [25]
[7] *Betfair* (2008) 234 CLR 418 at 461 [39] and 463 [46]

Question 2: In the past, protectionist measures found to offend against s 92 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?

9. The protection of s 92 is not limited to overcoming burdens that are imposed at the border. Its ambit reflects its language ("among the States") and its purpose of promoting national markets, including markets for services that are oblivious to the geographic boundaries of States.

10. The phrase "intra state trade" is not present in s 92 and may not always be a meaningful concept in the protection of national markets to which s 92 is aimed.

11. To offend s 92, there must be an interference with trade or commerce among the States. In the ordinary case, a discriminatory burden must be imposed on interstate trade and commerce. Discrimination requires a differential burden within the market, either in legal form or practical effect, and it necessarily requires that a comparison be made. However, in looking at whether trade extends beyond the borders of a single State, and in assessing whether a discriminatory burden has been imposed, it is necessary to look at both the demand side and the supply side.

12. As Question 2 postulates, the comparator has traditionally been described by reference to an intra state trader. That reflects the nature of the cases that have been decided rather than the ambit of s 92. It is explicable because, to the extent that s 92 has been concerned with State legislation, and perhaps particularly so in relation to trade

involving goods or commodities, it is straightforward to describe the comparator as being involved in "intra state trade".

13. Historically, the limited geographic scope of State legislative powers has readily suggested a dichotomy between intra state traders, who fall within the geographic or legislative frame of the State, and those outside. The existence of the dichotomy is not surprising. As the analysis of the decisions from the United States in *Betfair*, at 459-464, demonstrates one of the targets of s 92 was parochial or provincial laws that sought to preserve sub-federal "economic centres". They are targeted by s 92 because they stand in the way of the integration of the Commonwealth into a free trade zone.

14. However, business operations and accompanying regulatory regimes have changed quite markedly. Wagering is a prime example. Wagering contracts can be made and settled instantaneously over the internet with punter and bookmaker located at either end of the Commonwealth. Wagering operators who traditionally operated entirely within the State can now more easily seek customers from interstate and, on the demand side, punters can readily place wagers with wagering operators throughout the Commonwealth. The free flow of information across the geographic divide is essential for the operation of the business.

15. One of the consequences of the developments in communication is that "*the inhibition to competition presented by geographic separation between rival suppliers and between supplier and customer is reduced*

by the omnipresence of the interest and the ease of its use"[8]. To put it another way, technological change has fostered the development of the national market in those services.

16. As the geographic boundaries of the States have receded in their commercial and competitive significance, State-based legislative and regulatory structures have adjusted their focus and reach. In *Betfair v. WA*, the joint judgment notes, in several places, that State legislatures are having increasing recourse to their long-arm territorial jurisdiction, and that a purely geographical approach to the application of s 92 will not encompass discriminatory or protectionist measures which are founded on that kind of exercise of legislative power: see 459-60 [33] and [34], 474 [89]-[90] and 480 [116]. At the same time, the joint judgment also identified the weaknesses of a purely geographical approach to the application of s 92 in the internet age: at 452 [14]-[15], 453 [18], 474 [89]-[90] and 475-476 [97].

17. In Sportsbet's submission, the critical question in relation to State legislation and administrative action is not whether it favours "intra state traders", identified geographically, but whether it is directed towards the advancement of narrow economic interests. Those interests might be those of the State itself, or those of corporations that have been licensed by the State, or are located principally within the State, or are otherwise associated with the State and its economic interests. Section 92 was designed to overcome the "inconvenient truth" that such legislators "*may be susceptible to pressures which*

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[8] *Betfair* (2008) 234 CLR 418 at 480 [114]

encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers"[9].

18. Thus, in determining whether a burden is discriminatory in a protectionist sense, the relevant field of inquiry is whether the impugned legislative or administrative measure burdens interstate trade in a way that seeks to create or preserve narrow economic interests or limited economic centres. That approach reflects s 92's purpose of invalidating measures that seek to carve out from the national market discrete "economic centres" that are erected or maintained for the perceived advancement of local interests[10].

19. A protectionist measure is one which imposes a discriminatory burden that restricts or precludes trade or commerce among the States. Classic examples of "protectionism" may have been geographically defined, but there is no reason why the concept of protectionism should not be applied as an economic concept that is more equipped to deal with the nature and effect of protectionist measures in the modern economy.

20. In the modern age, it is no longer necessary to retain any rigid geographical distinction between interstate trade and intrastate trade. If those descriptions are to be retained, their content should be determined by reference to economic analysis rather than geographical concepts. Any application of those terms also needs to take account of the way in which regulatory frameworks are now being used to achieve protectionist objectives in ways that are not solely dependent upon

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[9] *Betfair* (2008) 234 CLR 418 at 459 [34]
[10] *Betfair* (2008) 234 CLR 418 at 452 [15] and 453 [18] and 461 [39]

geographic criteria. The nature and object of the relevant legislative or regulatory measures will assist in recognising and defining any intra state traders who are being protected

21. As was observed in *Betfair,* all Australia States licence bookmakers and totalisators and collect fees and taxes from wagering operators they have licensed[11]. Historically those services were provided exclusively or overwhelming within the State. In New South Wales as a condition of its licence, TAB was required to enter into commercial arrangements with the NSW racing industry. By reason of that regulatory and commercial framework, under which wagering operators are given permission to operate within New South Wales and agree or are obliged to fund NSW racing, those wagering operators are properly seen as being engaged in, and are representatives of, NSW "intra state trade".

22. As such, they are in a position to benefit from any protectionist measures introduced by the State. Moreover, the State is in a position to benefit from the protection it affords to wagering operations who are licensed by NSW through the revenue and other benefits it derives directly from the wagering providers and indirectly from the fact that those wagering operators fund the NSW racing industry[12].

23. That conclusion accords with the substance of the situation. The organizing princple of s 92 is the advancement of competitive markets. Distortions in a market will arise where State laws discriminate in order to protect local interests. Those local interests are often described as

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[11] *Betfair* (2008) 234 CLR 418 at 465 [53], 470 [69],
[12] *Betfair* (2008) 234 CLR 418 at 479 [108]

the domestic or local industry. In the context of a national market that retains State based regulation and prescription, the local industry is best defined by reference to the regulatory framework.

24. The business of wagering providers has long been constrained by State legislation based on geographical limits and more recently, in response to the development of the national market, the "long-arm" territorial reach of State legislation. The development of the national market does not mean that those entities that are licensed and which provide funding towards the NSW racing industry are not engaged in intra state trade. As a matter of economic substance, they are the NSW wagering industry and they are symbiotically tied to the NSW racing industry.

25. Section 92 is not just concerned with the immediate protection of local traders but also with broader considerations including the protection of State revenues or other parochial social or economic interests. The question of whether a trader is seen as an intra state trader cannot be divorced from the alignment of interests between that trader and the State. To exclude measures that protect the TAB from the operation of s 92 on the basis that it also operates in a national market would not advance the purpose of s 92. Rather, it would mean that once s 92 has worked to create a national market, it is spent and cannot continue to ensure that the national competition is enhanced. It would enable States to protect their revenue, or the economic interests of their licencees, or other economic centres promoted by the State, by aligning themselves with national players and then arming those

players with competitive or commercial advantages that other participants in the national market do not enjoy. Conversely, they could use their long arm reach to burden those who are licensed outside of the State but relieve the local traders from that burden.

Question 3: 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 (if such is demonstrated) on an interstate trader by comparison with other traders irrespective of whether those other traders can be characterised as trading intra state or interstate?

26. The dichotomy between inter state and intra state trade on which s 92 jurisprudence has proceeded is a product of the fact that the impugned legislation has usually been State legislation designed to protect State markets within the Commonwealth.

27. However, the existence of that dichotomy is not a necessary element of s 92. It is sufficient if there is a discriminatory burden on interstate trade that burdens or restricts competition in the national market or among the States. The imposition of such a burden is antithetical to a competitive national economy and offends s 92. There is no requirement that the burden must fall strictly along State lines.

28. That conclusion follows from a number of propositions. First, the purpose of s 92 in creating and fostering an open and competitive national economy. Second, the application of s 92 to the Commonwealth, which may act in a way that is anti-competitive but which may not be moved to act by reason of State-based concerns.

Third, it takes into account the changes that were regarded as important by the plurality in Betfair: the development of the new economy; the adoption of new State regulatory regimes which aim to regulate aspects of the national economy in the interests of the State or to advance narrow economic interests identified or supported by the State; and the emergence of a National Competition Policy[13].

29. While there is no requirement that the burden must fall strictly along State lines to attract the operation of s 92, it is necessary to establish that the burden is discriminatory in the sense described above and therefore interferes with the free flow of trade and commerce among the States.

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[13] *Betfair* (2008) 234 CLR 418 at 452 [13]-[16]