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 REPLY SUBMISSIONS

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Publication of Submissions

1. The Reply Submissions are in a form suitable for publication on the internet.

Material Facts

2. The statement of material facts of both the State and the Control Bodies contain tendentious statements that do not always reflect the evidence or findings of fact made by either the primary Judge or the Full Court. They should be read as part of the argument that the Respondents advance.

The Control Bodies Argument

3. The control bodies seek to decouple the imposition of the fee condition and the payment they made to TAB, the reduction in stand fees by Race Clubs and the imposition of a threshold, which the primary Judge had held were inseverable, by submitting that:
   (a) The findings were not supported by the evidence[1];
   (b) It is impermissible to take into account the purpose of the fee condition including to establish a connection between the fee condition and the TAB refund[2]; and
   (c) The arrangements reflected private arrangements that are irrelevant to s 92[3]; and
   (d) Alternatively, offsetting payments or adjustments, in the face of a neutral fee, do not offend s 92[4].
4. The State of NSW places emphasis on the last aspect[5]. This Reply addresses each matter in turn.

(A) The Findings of the Primary Judge were correct and supported by the evidence

5. The control bodies are wrong to submit that the evidence did not support the findings of the primary Judge. It is convenient to reply first to the position in relation to the TAB, then bookmakers and finally the issue of whether the arrangements were reciprocal.

(i) The findings in relation to the TAB

6. The control bodies, at para [30] and [31], seek to deny the existence of an intention or understanding that the race field regime would yield no net revenue from the TAB. The primary Judge held that this intention and understanding existed in June 2008.
7. None of the matters that occurred after August 2008, culminating in the Deed of Release made in November 2009, are inconsistent with the critical finding of the primary Judge concerning the relationship between the race fields fee and the payment which the control bodies always understood and intended would be made.

The post June 2008 conduct

8. The matters relied on by the control bodies to sever the imposition of the fee condition and the payments they made to TAB are listed in para [30] and start from a false

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[1] RNSW HRNSW Submissions at [45]-[[47] in relation to the TAB and [35]-[37] in relation to the thresholds and club stand fees
[2] RNSW HRNSW Submissions at [19]-[22] and [49]-[57]
[3] RNSW HRNSW Submissions at [58]-[60]
[4] RNSW HRNSW Submissions at [61]-[66]
[5] State of NSW Submissions at [34]-[35], [49]ff

premise[6] that the principal basis for the intention and understanding of the control bodies was the sensitivity analysis[7]. They reach the wrong conclusion that the analysis involved no more than an "assumption" on the part of the control bodies[8]. Once the full extent of the factual context is exposed, the matters occurring after August 2008 do not give rise to any cause to doubt the primary Judge's findings.

9. The factual history shows that notwithstanding that an avowed purpose of the scheme was the generation of revenue for the NSW racing industry, the control bodies always proceeded on the basis that no revenue would be obtained from the TAB under the scheme. Indeed, prior to *Betfair v Western Australia*[9], the material shows that the TAB was not even factored into the scheme as a participant. In each of the Reports considered by the RNSW Board from December 2006 to July 2007, there is no hint that TAB would pay a turnover fee in relation to its wagering on NSW races[10].

10. That understanding was shared by the relevant Departmental officers who in a Briefing Paper by the Manager, Racing Policy, NSW Office of Liquor, Gaming and Racing in October 2007 observed that *Tabcorp's existing payments to the NSW racing industry exceed the proposed fee and would not involve additional payments* by the TAB[11]. There was thus no reason to factor the TAB into estimated revenue derived from the race fields scheme.

11. On 27 March 2008, the Court delivered judgment in *Betfair v Western Australia*. After that date, the TAB was referred to in the analysis considered by the RNSW Board but the expected revenue from TAB was nil. In July 2008, the CEO Report advised the Board that no revenue would be derived from NSW TAB[12] on the basis that "*any fees imposed under race fields would be offset by compensation required under clause 8 of RDA*". In a discussion paper received by the Board at the same meeting, the Board was advised that "*the practical impact*" of the RDA in the context of the Race Fields regime was that there would be no additional fees payable by the TAB Group in respect of any totalizator wagering or fixed price betting under an Australian licence[13]. That conclusion applied not only to TAB's NSW wagering but also wagering on NSW races undertaken by TAB's related companies.

12. The sensitivity analysis of 10 June 2008, which was considered by the Board on 16 June 2008[14] when the Board approved the imposition of the 1.5% fee[15], does not raise any doubts about the proposition that there would be no net impact on TAB from the imposition of the fee[16].

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[6] Set out in para [25]
[7] AB1359
[8] RNSW HRNSW Submissions at [26]-[28]
[9] (2008) 234 CLR 418, decided 27 March 2008
[10] December 2006 (RNSW CEO Report) AB 819; April 2007 (RNSW CEO Report) AB 879,880; May 2007 (RNSW CEO Report) AB 940, 943, 944; and July 2007 (RNSW CEO Report) AB 1034-1036. See also Draft Circular Resolution 30 July 2007 AB 1086-1087 and RNSW Discussion paper AB 824
[11] AB 1124
[12] AB 1301
[13] AB 1318
[14] AB 1400
[15] AB1429
[16] AB 1402, AB 1409

13. It is not right to say, as the control bodies do at [26], that the sensitivity analysis was framed on the basis of "*cautious assumptions*" in relation to the net impact of the turnover fee on TAB. The impact on TAB was a critical matter, the conclusion was clear and unequivocal, and it was the basis on which the Board made its decision. The primary Judge was correct to so hold[17].

14. Ultimately, as the primary Judge found, the understanding and intention of the control bodies in June 2008 was that there would be a refund.

15. Contrary to para [33] of the Control Bodies submission, HRNSW was in a similar position. In a briefing in August 2007 it is noted that *HRNSW would set-off any payments made by Tabcorp under RDA from publishing fees payable under race fields legislation*[18]. Its analysis at August 2007 showed a "Tab proposal" which had either a nil payment of race fields fees or a decrease in the distribution[19].

The Deed of Release

16. The Deed of Release records a payment equal to the amount paid by the TAB under the race fields turnover condition for the period to 30 June 2009. The primary Judge accepted that this was a "template" for future dealings[20].

17. The clause of the Deed of Release which troubled the primary Judge[21] was clause 3(a)(5)[22] which provided that:

> Each of RNSW, HRNSW and GRNSW confirm and each of TAB, Tabcorp and Luxbet accept that:
>
> (1)....
>
> (5) the Payment Amount is not a refund or return of any part of Applicable NSW Race Fields Fees.

18. Three points are clear:

(a) The amount paid was exactly equal to the amounts levied on TAB under the Turnover Conditions;

(b) The Notice of Dispute served by TAB under cl 24.1(a) of the RDA[23] asserted that by reason of the imposition of the turnover condition, Racingcorp had failed to procure the grant to TAB of the royalty free licence in respect of the publication or other use by TAB of NSW race fields in breach of cl 6.1 and 8.2 of the RDA. It was said that the amount paid under the turnover condition was the loss suffered by reason of the breach and compensation was sought in that amount;

(c) The dispute was settled by letters date 24 June 2009 from Racingcorp[24] and 26 June 2009 from TAB[25]. The latter provide that the agreement would be superseded by a formal Deed of Settlement.

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[17] Perram J at [65], [69] and [101]
[18] AB 1051
[19] AB 1056
[20] Perram J at [66(g)]
[21] Perram J at [66(f)
[22] AB 2189
[23] AB 1887
[24] AB 2149

19. Clause 2 of the letter from Racingcorp which records the agreement provided that[26]:

> 2. Racing New South Wales ("RNSW"), Harness Racing New South Wales (HRNSW) and Greyhound Racing New South Wales ("GRNSW") will refund to TAB an amount equivalent to all fees (including those in respect of fixed-odds betting) paid to each of them by TAB in respect of the approvals granted to TAB by each of them under the Race Fields Legislation for the period, and Racingcorp will procure such funds.

20. It follows that whatever characterisation the parties to the Deed chose to place on the payment on 25 November 2009, the parties had earlier agreed that there would be a "refund". Indeed, cl 3(a)(5) was not in the draft Deed as at 28 October 2009[27] and the control bodies did not call any evidence as to the circumstances in which cl 3(a)(5) was inserted at some time between 28 October and 25 November 2009.

21. In any event, how the parties chose to characterise the payment was irrelevant to the assessment of the practical effect of the race fields fee on interstate trade. From the perspective of the participants, nothing turned on how it was characterised: the practical effect of the payment would have been no different had the Deed of Release acknowledged a refund, or clause 2 of the letter of 24 June been directly incorporated into the Deed of Release.

22. The immateriality of the Deed explains why Perram J prefaced his findings in relation to the Deed with the words of para [69]: "Be that as it may..."

23. On the other hand, the emphasis that the Respondents attach to the words of cl 3(a)(5) would allow *"drafting devices"* to control the assessment of the practical effect of the turnover condition in a way that is incompatible with authority and the substantive protection of s 92[28].

24. For the same reason, characterising the payment as compensation under the RDA[29] does not address the practical effect of the payment on the interstate trade. The critical feature of the payment was that TAB would be required to make no net payment under the turnover condition. The same is true of local bookmakers: no NSW bookmaker would be required to make any contribution under the HRNSW turnover condition and 95% of local bookmakers would be exempt under the condition imposed by RNSW.

25. Focusing on the question whether the payment could be justified by reference to terms of the RDA the Respondents divert attention from the true question of whether the practical effect of the race fields fee is to impose a burden on Sportsbet of a discriminatory and protectionist kind.

(ii) The findings in relation to Bookmakers: thresholds and stand fees

26. New South Wales bookmakers were protected from the impact of the fee by two means: the fee free threshold and the rebate of club fees. The findings of the primary judge that these reflected the understanding and arrangements of the control bodies were correctly made.

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[25] AB 2151
[26] AB 2149
[27] AB 2169
[28] eg *Ha v New South Wales* (1997) 189 CLR 465 at 498
[29] RNSW HRNSW Submissions at [29] and [31] NSW Submissions at [50]

27. The control bodies submit that there was no evidence that RNSW knew or intended that the Clubs would reduce their stand fees[30], but rather RNSW and HRNSW knew or intended that the thresholds would "*apply equally for the potential benefit of all wagering operators, wherever located*"[31]. That submission is directly counter to the evidence. Perram J's analysis at [79] to [88] is correct.

28. Before the judgment in *Betfair v Western Australia*, the Board of RNSW considered a fee model that exempted face to face betting[32]. In other words, NSW bookmakers would have enjoyed an express exemption for on course betting. Although it was intended to charge a fee for telephone and internet betting it was expected by RNSW that only 6 NSW bookmakers would be caught by the fee on telephone and internet betting and that the remainder of bookmakers would benefit. Telephone and internet betting was targeted because such betting was "across state borders"[33].

29. Under these proposals, it was expected that there would be a net payment of $1.3 million by RNSW in favour of NSW bookmakers compared with revenue obtained from corporate bookmakers (all of whom were interstate) of $8.1 million[34]. It was clear to RNSW that the clubs would abolish stand fees and that revenue derived from Race Fields would be distributed first to reimbursing race clubs for the loss of revenue previously generated from stand fees[35].

30. The rationale for the treatment of NSW bookmakers was to ensure that NSW bookmakers "*are not double taxed and that NSW race clubs are not adversely affected*"[36].

31. In direct response to *Betfair v Western Australia*, Racing NSW removed the exemption for face to face betting and replaced it with a threshold of $5 million[37]. Under that revised model, no net revenue was predicted to come from NSW bookmakers; rather a payment would be made in their favour of $675,000[38]. That figure assumed that the race club turnover fee charged by NSW race clubs would be removed[39]. According to the June 2008 Board paper[40], the RNSW fee structure:

> ..is predicated on the assumption that NSW thoroughbred racing clubs will rebate or eliminate their turnover fee to NSW bookmakers who pay the race field levy to Racing NSW. This will require agreement with the clubs. It is understood that the clubs have indicated that they would agree to such a reduction but that agreement has not yet been documented.

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[30] RNSW HRNSW Submissions at [35]-[36]
[31] RNSW HRNSW Submissions at [37]
[32] (eg AB December 2006 AB 819, 822; April 2007 AB 879,880; May 2007 AB 940, 943, 944; July 2007 AB 1034-1036, Draft Circular Resolution 30 July 2007 AB 1086-1087
[33] eg AB 1035, July 2007
[34] AB 1036
[35] AB 1039
[36] AB 817
[37] AB 1298, May 2008
[38] AB 1301
[39] AB 1402
[40] AB 1398

32. On 10 June 2008, Mr V'Landys met with representatives of the AJC, STC and Provincial Association and Racing NSW Country[41] and advised them that as the fee would be imposed on NSW Bookmakers "*it would be necessary for the race clubs to remove the fee they currently levy on bookmakers operating on NSW racing events*"[42].

33. There was a further meeting between RNSW and the Race Clubs on 1 July 2008. In his Report to the Board of 25 July 2008, Mr V'Landys referred again to the assumption that the clubs would waive their stand fees[43]. On 6 August 2008, the STC confirmed that it would reduce its fees from 1% to 0.33% for all turnover up to a net $5 million and to 0.0% above that threshold[44]. The bookmakers with a turnover of less than $5 million would be financially better off. In August 2008, the Minister, the Acting Director, the Manager of Racing, the Commissioner and the Director-General noted its understanding that *both the AJC and STC Boards have taken decisions which address the concerns of NSW bookmakers"* and that "*the fundamental basics of the resolution is that NSW Bookmakers will not, in respect of Race Fields, be disadvantaged..."*[45].

34. In the light of that evidence, the primary Judge was entitled and correct to infer an arrangement and understanding between the control bodies and the NSW race clubs[46].

35. The foregoing arrangement only affected those bookmakers who had a turnover of greater than $5 million. As Mr V'Landys pointed out, although *Betfair v Western Australia* had prevented the intended exemption of NSW bookmakers from proceeding, the threshold meant that "*the vast majority of NSW bookmakers*" would be "*absolutely unaffected*" by the race fields fee[47].

(iii) Reciprocal Arrangements

36. Nothing turned on whether TAB was, or was not, a party to the intention or understanding of the control bodies to refund payments made by the TAB under the turnover condition[48]. Certainly TAB had been a proponent of the scheme and saw it as a means to overcome revenue leakage[49]. Representatives of TAB, RNSW and HRNSW participated in confidential Business and Strategy Committee meetings under the RDA at which Mr Nason of TAB stated that "*revenue leakage was the single biggest issue facing racing in New South Wales"*[50]. It would not have continued to champion the scheme if it increased its own costs. Given the ability of the control bodies to repay to TAB out of the proceeds of the race fields fees an amount equivalent to that which the TAB paid under the turnover condition, and their mutual

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[41] RNSW dealt directly with the AJC and STC. Provincial Association of NSW was recognised by RNSW as the representative body for the five provincial racing clubs and Racing NSW Country the representative of the country thoroughbred clubs AB 1575

[42] AB 1572

[43] AB 1592

[44] AB 1689

[45] AB 1691

[46] Perram J at [84], [90] and [91]

[47] Letter from RNSW to NSW Bookmakers Co-operative 23 July 2008, AB 1588. See also AB 880, (April 2007)

[48] cf Full Court at [83] RNSW HRNSW Submissions at [46]

[49] Tabcorp Letter to Premier NSW AB 1181, 1184 and Tabcorp Presentation November 2007 AB 1143, see at 1151 and 1152

[50] Minutes of Business Strategy Committee AB 1193, 1251

interest in maximising TAB revenue, the control bodies did not need to finalise any reciprocal agreement or arrangement with the TAB. The control bodies had never expected to gain any revenue from the TAB.

(B) Protectionist Purpose

37. The control bodies next seek to answer the findings of the primary Judge in relation to purpose at two levels: first, by denying that there was a protectionist purpose [19]-[22] and [54]; and secondly, by their submission that purpose is entirely irrelevant [55] to [57]. Neither submission is correct.

(i) Protectionist purpose

38. The scheme was introduced to obtain a new financial impost from interstate wagering operators, so-called "free riders", in order to stem revenue leakage from the TAB to interstate wagering operators[51].

39. The context in which the fees were imposed included that corporate bookmakers were making heavy inroads into the position of the TAB and NSW bookmakers in large part due to the advantage of their lower regulatory costs, which gave corporate bookmakers a competitive advantage[52]. The implementation of the scheme directly imposed a financial burden in the form of costs on corporate bookmakers and betting exchanges[53]. The Board of RNSW appreciated that the fee would force corporate bookmakers either to take a 25% reduction in their margins (on the assumption of a 6% margin) or seek to mitigate the impact by increasing their prices and managing the potential decline in their turnover[54]. Those costs were not to be borne by local bookmakers or the TAB[55].

40. TAB promoted the scheme as a means to overcome revenue leakage[56]. The scheme was directed to that target and was not a neutral regulatory exercise. The submission of the control bodies that they are not wagering operators "or otherwise participants in the wagering industry"[57] is hollow when their interests in the RDA are considered. The primary Judge, at [37], was right to describe the contention that the bodies were merely independent or indifferent regulators as untenable.

41. The centrepiece of the legislative scheme was the NSW racing industry, which was financially dependent on NSW wagering operators. The purpose of the scheme was to protect that industry. The identification of the NSW racing industry as a discrete unit

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[51] AB 784- Ministers Second Reading Speech and AB 1127- Ministers Press Release of 7 October 2006

[52] Cameron Report AB 1927; Boston Consulting Group Report (commissioned by RNSW) at AB 1624. Cf State of Victoria Submissions at [17]; RNSW Board paper June 2008 at 90-91 AB 1339

[53] 18 June 2008 RNSW Board Paper AB 1398

[54] 18 June 2008 Board paper at 43-44 AB 1398; Boston Consulting Group at 17 observed that a 1.5% fee would reduce a corporate bookmakers EBIDTA by 20%: at AB 1628

[55] 18 June 2008 RNSW Board Paper AB 1398 which noted that TAB's fees would be offset and that as 95% of NSW bookmakers have a turnover of less than $5million they would not pay the fee

[56] Tabcorp Letter to Premier NSW AB 1181, 1184 and Tabcorp Presentation November 2007 AB 1143, see at 1151 and 1152

[57] RNSW HRNSW Submissions at [22]

and the steps embodied in the race fields Scheme to maintain it are inherently protectionist and ignore the effect of the judgment of the Court in *Betfair v Western Australia*. There, the plurality emphasized the role that s 92 plays in fostering national markets. Legislative attempts to maintain or insulate State-based economic centres in the face of the national economy, especially in markets where the role of interstate internet commence is important, are antithetical to the preservation of national unity and inconsistent with s 92.

42. The control bodies are wrong to submit that the "funding model" was indifferent to revenue leakage[58]. From the perspective of the control bodies, their return was greater from each dollar bet with the TAB as opposed to a bet with a Northern Territory bookmaker. For that reason alone, the control bodies had a vested interest in directing revenue to the TAB and the overall funding model was skewed in favour of directing revenue through the TAB.

(ii) The role of purpose

43. For the reasons given in Sportsbet's principal submissions, the question of purpose is relevant to the characterisation of the law as protectionist[59]. In *Castlemaine Tooheys*, the Court had regard to the existence of a discriminatory purpose in determining whether the extent of the burden imposed upon interstate commerce is such as to warrant an inference that the law is protectionist[60]. Purpose is also relevant to the question whether a law which imposes a burden on interstate trade is appropriate and adapted[61]. A law which imposes a discriminatory burden on interstate trade is not saved by the presence of other objectives if it has a protectionist purpose[62].

44. Paragraph [49] of the control bodies' submissions is contrary to authority[63]. In *Castlemaine Tooheys*, the court had regard to the purpose in assessing the practical effect of the three separate measures on the market share of the Bond Group of companies. *Betfair* is an example of a discriminatory law not being saved by the presence of other purposes. Logically, there is no reason to exclude the purpose or object of the law or regulatory impost from the characterisation test. It is regarded as very relevant in the US cases[64].

(C) *Private Arrangements*

45. The third argument of the control bodies is that s 92 does not attach to private arrangements.

46. The discriminatory burdens that Sportsbet attack are the prohibition on using race fields, an essential ingredient of its business, and the fee imposed on its turnover. Those burdens are imposed under the *Racing Administration Act*, which, amongst

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[58] RNSW HRNSW Submissions at [9] and [20]

[59] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471.

[60] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471.

[61] *Betfair v WA* (2008) 234 CLR 418 at [48].

[62] *Betfair v WA* (2008) 234 CLR 418 at [48].

[63] See *Cole v Whitfield* (1988) 165 CLR 360 at 409; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471.

[64] *Baldwin v G.A.F. Seelig, Inc.* 294 US 511 (1935) referred to with approval in Betfair v WA (2008) 234 CLR 411 at 460-461 and in Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 471.

other things, creates a debt in favour of the controlling bodies[65]. Those burdens are imposed by statute and are not in any sense private in nature. Perram J was correct to so hold at [137]-[139].

47. The ability of the control bodies to ameliorate the impact of those fees on the TAB and local bookmakers was a function of their statutory position as regulators of wagering in New South Wales, and their asserted power to apply the proceeds of the race field fees as they saw fit.

48. Section 11 of the *Thoroughbred Act* imposes a duty on each appointed member of RNSW to act in the public interest and in the interests of the horse racing industry as a whole in NSW. Its functions[66] include:

(a) the control, supervision and regulation of horse racing in NSW; and

(b) the development and implementation of policies for the promotion, strategic development and welfare of the horse racing industry in NSW;

49. Its powers, set out in s 14, include:

(a) registering and licensing race clubs and bookmakers;

(b) supervision of the activities of race clubs;

(c) allocating to registered race clubs the dates on which they may conduct racing;

(d) requiring registered race clubs to pay to it such fees an charges as are required for the proper performance of it functions;

(e) entering into contracts;

(f) taking such steps and doing such acts and things as are incidental or conducive to the exercise of tis powers and performance of its functions.

50. Similar provisions are found in the *Harness Racing Act* 2009[67].

51. That statutory context is inconsistent with the submission that the arrangements were merely private compacts. Even if the characterisation of the steps taken by the control bodies to mitigate the impact of the turnover condition were properly characterised as private, they would not, for that reason, be irrelevant to the practical impact of the turnover condition. The protection conferred by s 92, and mirrored in s 49, is to be approached as a matter of substance and not form and is not to be circumvented by circuitous means or drafting devices. The provision of discriminatory protection through ostensibly private arrangements, using funds raised through statutory imposts, qualifies as a circuitous means. The protection would be neutered if a State could use the device of discretions conferred on a statutory corporation to provide relief from a tax or other statutory imposts to intrastate traders but then escape scrutiny on the basis that the arrangements are merely private.

(D) Offsetting

52. Both the State and the control bodies argue that adjustment of existing burdens is legitimate on two basis: first, the contrary conclusion impermissibly entrenches the status quo; and secondly, if it is possible to undertake the two steps separately it must be possible to do so contemporaneously. The State places significant emphasis on the holding of the Full Court at [109]. To similar effect see State of Victoria Submissions at [18].

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[65] s 33A(3) *Racing Administration Act*

[66] s 13 *Thoroughbred Act*

[67] s 10 (powers) and s 11 (functions)

53. The proposition embraced by the Full Court that it is permissible to relieve intrastate trade of burdens which do not apply to interstate trade requires some explanation in the present context. TAB and bookmakers paid the existing fees in return for valuable rights and benefits. If the reduction in those fees was not accompanied by any reduction in those rights or benefits (totalisator exclusivity and the right to stand), the changes would be to the benefit of the TAB and bookmakers and to the detriment of the control bodies and race clubs who would suffer a loss of revenue. In isolation, no purpose would have been achieved by those moves and they would never have been undertaken.

54. The picture is entirely different when those measures are combined with the new race fields fee. From the perspective of the control bodies, the adjustment of the TAB fees and the rebate to the clubs means that as between them and the local wagering operators no net revenue is to be derived under the race fields scheme. Indeed, RNSW forecasted a net payment in favour of NSW bookmakers. Likewise, the impact on the benefits enjoyed by the local operators and the fees they pay in return will be entirely neutral[68]. But interstate wagering operators will carry the real burden of the race fields fee. Their costs of business will increase and their competitive position vis-à-vis intrastate traders will be harmed[69]. These outcomes do not suggest that the statutory purpose has failed because it was always intended that the revenue would only be obtained from the "free riders" all of whom were interstate traders.

55. It follows that to see the events in a disjointed way is to mischaracterise what occurred and provides a misleading picture. The control bodies did not use the Race Field Regime to replace a local regime with a regime that applied equally to both interstate and intrastate wagering operators[70]. Accordingly, whether it is permissible in principle to do so, does not assist in analysing what occurred.

56. Sportsbet's submissions do not involve any impermissible entrenchment of a statutory position. Section 92 (and s 49) involve limitations on the statutory powers of the States. The limits are the same regardless of whether the legislative act is an original Act or an amendment, as they preclude laws and executive action that have the practical effect of imposing a discriminatory burden on interstate trade, commerce and intercourse.

57. The suggestion by the State, at [40], that Sportsbet's submission are inconsistent with the demand side concern of s 92 is untenable. The effect of the turnover condition was to increase the costs of business for Sportsbet and diminish the benefits of the low cost regulatory regime of the Northern Territory[71].

Bath v Alston

58. *Bath v Alston* was a case of facial discrimination. The majority observed, at 424-425, that a facially neutral tax on all retail sales would not have infringed s 92. However, the Court was not addressing the situation where discrimination arises as a matter of substance from the practical effect of a facially neutral law. It is clear that this can give rise to a contravention of s 92.

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[68] Perram J at [76]

[69] Perram J at [126]

[70] Control Bodies submissions para 62

[71] Cameron Report at 109 AB 2015; letter from the Northern Territory Minister to NSW Minister 22 October 2008 AB 1834; Boston Consulting Group Report at AB 1624; RNSW Board paper 18 June 2008 AB 1398 at 43-44

59. For present purposes the critical feature of *Bath v Alston* is the proposition that it is impermissible to impose a discriminatory burden, either directly or indirectly, for the purpose of placing interstate traders in the same position as local traders. It is no answer to a discriminatory burden, that it is imposed to ensure that the position of local and interstate traders has been equalised. That is because the effect of such a burden would be to deny or impair the ability of the interstate traders to operate competitively in the domestic market. As the State of Victoria submits, at [22]-[23], the existence and effect of a discriminatory burden may only be appreciated once all of the statutory provisions are taken into account. So too, where the burdens are imposed administratively, the effect may be seen once regard is had to all of the relevant arrangements. In the context of a national market in which statutory powers and State commercial interests are intertwined no narrow approach should be taken to the matters that are relevant.

60. The State of NSW also seeks to justify the offset as a means of avoiding the TAB paying twice for the same information[72]. However, that is not what occurred. The starting point is the RDA in its context.

61. By s 14 of the *Totalisator Act*, TAB was entitled to be granted a licence to conduct an exclusive off-course totalizator during the exclusivity period in respect of betting on races (harness, greyhound and thoroughbred) and declared events. In order to secure the totalisator exclusive licence, the TAB was required to enter into commercial arrangements with the NSW racing industry and the TAB was obliged by force of law to comply with the arrangements by reason of its licence conditions[73].

62. It is impossible to divorce the commercial arrangements embodied in the RDA from the benefits that accrued to TAB under its exclusive licence[74]. The TAB would not have entered those arrangements without the benefits of the licence.

63. Clause 6 of the RDA provides that New South Wales Racing Ltd (later Racingcorp) must procure the supply to TAB of NSW racing information and, by cl 8.2, TAB is entitled to disclose, use, copy and transit to the public NSW racing information on a non-exclusive royalty free basis.

64. That obligation had a counterpart in the Intra-Code Agreement[75], cl 10 of which provided that each Race Club would give NSW Racing a non-exclusive royalty free licence to disclose and use NSW racing information on the conditions set out in cl 8.2 of the RDA. In other words, as part of the suite of agreements, the Race Clubs agreed to supply NSW race information to Racingcorp on a royalty free basis and Racingcorp agreed to supply it to the TAB.

65. The context for the RDA and the Intra-Code Agreement was that race fields information was in the public domain and it was in the interests of all participants to disseminate that information as widely and freely as possible. Further, there was no suggestion at the time of the RDA that any body was making or likely to make a claim for a royalty for the supply and use of that information.

66. No part of the consideration paid by TAB either under the RDA or under the licence payment was directly attributable to the supply and use of the NSW race information. Nor can it be concluded that the parties ascribed any particular value to the rights

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[72] State of NSW Submissions at [33] and [51]

[73] Perram J at [33]

[74] Perram J at [34]-[36]

[75] AB 276

conferred by cl 6 and 8: the information was freely available in the public domain, and not subject to any intellectual property rights.

67. On a fair reading, it is not correct to say that TAB paid under the RDA for the supply and use of NSW racing information. Certainly, TAB did not prosecute the dispute between the TAB and the control bodies on the basis that the turnover condition meant that it was paying twice for the information. Its claim was that it should not pay at all.

68. In any event, the context in which the RDA and Intra-Code Agreement was made was altered by State legislation that prohibited any use of race fields information without approval.

West Lynn Creamery

69. The State's attempt to distinguish the decision of the United States Supreme Court in *West Lynn* should not be accepted. In that case, the scheme protected the local milk producers through a levy imposed on milk dealers and paid to the producers. There is no significance that the scheme under consideration imposed a fee at one stage of production for the protection of participants at another point.

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