IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S118 of 2011**

BETWEEN

SPORTSBET PTY LTD
ACN 088 326 612
Appellant

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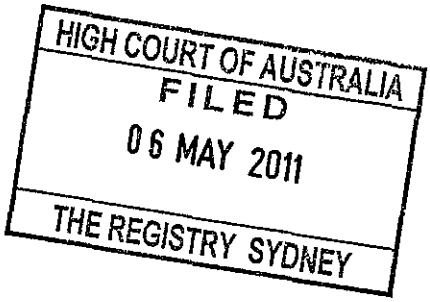
AND



STATE OF NEW SOUTH WALES
First Respondent

RACING NEW SOUTH WALES
ABN 86 281 604 417
Second Respondent

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HARNESS RACING NEW SOUTH WALES
ABN 16 962 976 373
Third Respondent

ATTORNEY GENERAL FOR SOUTH AUSTRALIA
Fourth Respondent

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SECOND AND THIRD RESPONDENTS' SUBMISSIONS

Date of Document: 6 May 2011

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Part I: Publication of Submissions

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

Part II: Issues Arising in the Appeal

2. The Statement of Issues provided by the appellant (**Sportsbet**) ventures beyond the limited basis upon which special leave to appeal was granted. In particular, none of issues (a), (c)(i), (c)(ii) and (d) arise on any of the grounds articulated in Sportsbet's Notice of Appeal filed 24 March 2011.[1]

3. Those grounds indicate that the true issues in this appeal are as follows:

   (a) Is it necessary for an applicant alleging a contravention of s 92 of the *Constitution*, or s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) (**the NT Act**) (operating in conjunction with s 109 of the *Constitution*), to establish that it has a pre-existing competitive advantage that derives from its place of origin in another State or Territory, and that the impugned measures impose a discriminatory burden that adversely affects that competitive advantage?

   (b) If it is proved (contrary to the findings of the Full Court and the position of the second and third respondents (**Racing NSW** and **Harness Racing NSW** respectively, and **the Regulators** collectively)) that arrangements were made by the parties to the "Racing Distribution Agreement" (**the RDA**), racing clubs and NSW on-course bookmakers to ensure that the fee conditions imposed by the Regulators on approvals to use NSW race fields information did not impose any economic burden on TAB or NSW bookmakers, were they in the nature of private contractual arrangements beyond the purview of s 92 of the *Constitution*, and by extension, s 49 of the NT Act?

   (c) If the answer to (b) is no, did the fee conditions imposed by the Regulators on approvals to use NSW race fields information and the arrangements referred to in (b) constitute or involve (i) an inseverable scheme, or (ii) merely the contemporaneous imposition of a uniform fee and the taking of steps partly to reduce pre-existing burdens faced by intrastate operators alone?

   (d) If the answer to (c)(i) is yes and (c)(ii) is no, did the fee conditions imposed by the Regulators constitute a contravention of s 92 of the *Constitution* and s 49 of the NT Act?

   (e) Do ss 33 and 33A of the *Racing Administration Act 1998* (NSW) and Part III of the *Racing Administration Regulations 2005* (NSW) contravene s 92 of the *Constitution* and s 49 of the NT Act?

4. So that the Court may have the benefit of full argument on all matters raised, and without prejudice to the objection stated at [2] above, the submissions that follow shall address the entirety of what is advanced in Sportsbet's written submissions.

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[1] In particular, the Court did not grant special leave to appeal in relation to the proposed grounds of appeal numbered 5, 10, 11 and 13 of Sportsbet's Draft Notice of Appeal.

Part III: Notices under Section 78B of the *Judiciary Act 1903*

5. Sportsbet has served notices under s 78B of the *Judiciary Act* 1903 (Cth). The second and third respondents do not consider that any additional notices are required.

Part IV: Material Facts

6. People all over Australia bet on horse races conducted in NSW. They place those bets with wagering operators both within and outside NSW. Providing the spectacle requires substantial funding. The most significant source of funds is the contribution from wagering operators that take bets on the races. Those wagering operators profit from that activity.

7. Before the imposition of the impugned fee, only local wagering operators contributed to the funding of the NSW racing industry. Wagering operators from outside the state therefore derived revenue and profit from NSW horse races, without making any contribution to their staging.

8. The growth of internet and telephone betting services (such as those provided by Sportsbet from the Northern Territory) meant that an increasing proportion of the money wagered on NSW horse races was bet with interstate wagering operators. The "Gentlemen's Agreement", under which no State taxed or levied wagering operators licensed in other States, began to break down.

9. In the case of NSW, there were two options available for dealing with the threat to the funding of the NSW racing industry. The first was to seek to increase the proportion of dollars wagered on NSW races with local wagering operators; and the second was to adopt a funding model that was disinterested as to the wagering operator with whom bets on NSW races were placed.

10. Sportsbet suggests that the race fields scheme falls into the first of those categories. The following statement of facts demonstrates that in fact it falls into the second.

Contributions by Wagering Operators before the Race Fields Scheme

11. It is necessary to understand the position existing before the implementation of the race fields scheme, when the only wagering operators who contributed to the funding of the NSW racing industry were TAB and local bookmakers.

TAB

12. Prior to the introduction of the race fields scheme, TAB paid substantial amounts in taxes and direct contributions to the NSW racing industry. These payments included contributions under the RDA amounting to about 4.7% of TAB's turnover (i.e., equating on average to $4.70 of every $100 bet).[2] The payments under the RDA were distributed between the various racing codes pursuant to the terms of an agreement known as the "Intercode Agreement" and Racing NSW in turn distributed its portion to race clubs pursuant to the terms of an agreement known as the "Intracode Agreement" (FCAB 276).

[2] See TB Vol 5, 4051. These contributions were in the form of a $12 million fixed payment as well as fees calculated as a proportion of various earnings: FCAB 596 - 602.

Local Bookmakers

13. The evidence disclosed that the two metropolitan thoroughbred racing clubs (the Australian Jockey Club and the Sydney Turf Club) charged a "stand levy" of 1% (i.e., $1 of every $100 bet) on the turnover of on-course bookmakers on all wagers (including on interstate races) accepted by those bookmakers while fielding at those clubs. There was no evidence as to what fees were charged by the harness racing clubs or provincial or country thoroughbred racing clubs.

Contributions by Wagering Operators after the introduction of the Race Fields Scheme

14. The race fields scheme altered the way in which the NSW racing industry was funded in some, but not all, respects. The fee payable under the race fields scheme is facially neutral. All wagering operators (both local and interstate) granted a race field information use approval (**RFIU Approval**) pay the same fees subject to the same thresholds (see below).

TAB

15. Following the introduction of the race fields scheme, TAB continued to be liable to pay fees under the RDA (about 4.7% of its wagering turnover on New South Wales horse racing) and, in addition, the race fields fee of 1.5% of wagering turnover on New South Wales horse racing: FCAB 1925. TAB's net position will depend on the extent to which it can claim damages for the alleged breach of the RDA arising from the charging of the race fields fees (discussed below) but on any analysis, pays a percentage of its wagering turnover on NSW races that is at least three times higher than the percentage of NSW wagering turnover paid by Sportsbet (i.e., on average, $4.70 of every $100 bet with TAB compared to $1.50 of every $100 bet over $5 million with Sportsbet).

Local Bookmakers

16. Under the race fields scheme, local bookmakers became liable to pay fees for the use of NSW race field information:

    (a) to Racing NSW of 1.5% of wagering turnover over $5 million on New South Wales thoroughbred horse races; and

    (b) to Harness Racing NSW of 1.5% of wagering turnover on New South Wales harness horse races, provided that total turnover exceeded $2.5 million.

17. In addition to the fee paid to Racing NSW, the evidence disclosed that following the introduction of the race fields fees the Australian Jockey Club and the Sydney Turf Club reduced their "stand levies" to 0.33% of a bookmaker's first $5 million of turnover (Sportsbet and other interstate wagering operators, of course, do not pay any fee to the NSW racing industry on their first $5 million turnover on NSW thoroughbred races). The evidence did not reveal whether any other thoroughbred racing clubs, or any harness racing clubs, charged a fee, and if so, how it was calculated or in what amount.

Inter-State Wagering Operators

18. In contrast, under the race fields scheme, interstate wagering operators became liable to pay fees for the use of NSW race field information:

(a) to Racing NSW of 1.5% of wagering turnover over $5 million on New South Wales thoroughbred horse races (therefore, as with all local operators, interstate wagering operators including Sportsbet do not pay a fee on the first $5 million of turnover for the use of NSW race field information[3]); and

(b) to Harness Racing NSW of 1.5% of wagering turnover on New South Wales harness horse races, provided that total turnover exceeded $2.5 million.

General Assertions as to the "Purpose" of the Race Fields Scheme

19. Sportsbet asserts that the "overall aim of the [race fields] scheme was to avoid or reduce revenue leakage away from the local industry to interstate operators" (AS [26]). It is unclear whether the reference to "the local industry" in this assertion was intended to signify the local wagering industry or the local racing industry. If the former, then, as will become apparent from what follows, Sportsbet's assertion is incorrect. In any event, with one exception, Sportsbet does not identify in its submissions any matters additional to various alleged "intentions and understandings" of the Regulators (dealt with below) upon which it relies in support of this assertion.

20. However, the evidence can only be regarded as disclosing that the purpose of the impugned fee was to "catch free riders".[4] That is to say, the purpose was not to prevent revenue leaking away from TAB and local bookmakers to interstate wagering operators, but rather was to address any revenue leakage from the NSW racing industry by creating a fee that was indifferent to revenue leakage from local wagering operators.

21. The single additional matter is the "legislative choice to confer on the control bodies the discretionary power to approve the use of race fields and to impose fee conditions" (AS [29]). Sportsbet suggests that that discretion was inevitably to be used for a protectionist purpose because, essentially, the control bodies were "representatives of local industry and had a vested commercial interest in maximising and protecting the revenue of intrastate wagering operators including the TAB and NSW bookmakers" (AS [22(c)]; see also AS [29]).

22. Once again, this assertion finds no support in either logic or the evidence. This is so for two reasons. First, the Regulators are "representatives of local industry" only in the sense that politically, the local participants of the NSW racing, as distinct from wagering, industry are their constituents. That does not prevent or inhibit them from acting in a non-protectionist manner. The Regulators are not wagering operators or otherwise participants in the wagering industry. The Regulators are non-profit organisations, distributing all surpluses to the racing industry. And secondly, as will be developed below, it is simply wrong to say that the Regulators were "in a position to adjust the commercial arrangements under which the TAB operated" (AS [29]). In any event, even

[3] See further below at [37].

[4] This emerges clearly from the second reading speeches in both houses of the NSW Parliament. Those speeches also make clear that the object of the race fields scheme was consistent with the Government's policy to ensure that lawful gambling is conducted with integrity. Consequently, while the imposition of the fee itself may not be designed to promote integrity, other aspects of the scheme (such as the ability of the Regulators to require production of information from wagering operators, and to conduct audits of such wagering operators) clearly do have that purpose.

if the existence of a conflict of interest were to be accepted, there is no basis for suggesting that any decision of the Regulators was infected in any way by such conflict.

Contentions Regarding the Practical Effect or Operation of the Race Fields Scheme

23. Sportsbet makes various contentions as to the practical effect or operation of the race fields scheme. Those contentions focus upon what are said to be three measures adopted by the Regulators in conjunction with the imposition of the race fields fee. According to Sportsbet, these comprise, first, the effective refund to the TAB of its payment of that fee; secondly, the setting of thresholds on the levels of turnover at which the fee would be payable; and thirdly, a decision by Racing NSW to reimburse racing clubs for any revenue lost as a consequence of reductions, supposedly made at the behest of Racing NSW, in the levies imposed by them on on-course bookmakers: (AS [37]). For convenience, those measures will be referred to as "**the alleged Relief Measures**". As the discussion below makes clear, the evidence does not support Sportsbet's contentions in this regard.

Contentions Regarding Racing NSW's and Harness Racing NSW's Intentions/Understandings

24. Sportsbet contends that prior to the implementation of the race fields scheme, Racing NSW and Harness Racing NSW had various "intentions or understandings" relating to the practical effect of the scheme on local wagering operators. To the extent that this contention involves any assertion of "agreements, arrangements or understandings" at the time the fee was imposed between the Regulators on the one hand, and TAB, race clubs or local bookmakers on the other, or that the Deed of Release (as to which see [30] below) was a sham, it cannot be put in light of Sportsbet's concession before the Full Court that this was not alleged at trial.[5] What follows must be read subject to [2] and [4] above.

Contentions Regarding Intentions or Understandings Relevant to TAB

25. It is Sportsbet's contention that the Regulators each "intended and understood that the TAB would be economically insulated from the fee because Racing NSW would refund any fees paid by the TAB pursuant to the fee condition back to it" (AS [32(a)]). The principal basis for this contention appears to be an analysis of the revenue impact that the proposed race fields fee would have that was tabled at a board meeting of Racing NSW on 18 June 2008 (**the Sensitivity Analysis**).

26. For the reasons given below, a fair consideration of that document in context does not permit the conclusion for which Sportsbet contends, or indeed the findings of the trial judge. The document contained various conservative, cautious *assumptions* about the impact of the fee for the unsurprising purpose of Racing NSW assessing the net financial benefit to the racing industry from the fee; not *statements* of Racing NSW's intentions or understandings. The document demonstrates that in assessing the impact of the fee, Racing NSW proceeded on a "worst case" basis.

27. The Sensitivity Analysis included the following assumption in relation to revenue received from TAB:

[5] Reasons of the Full Court at [73].

"No net impact as any fees imposed under race fields would be offset by compensation required to be paid to NSW TAB by the racing industry under clause 8 of the RDA and under the Inter-Code Racing NSW could carry the cost of compensation related to race fields fees on NSW thoroughbreds."

28. The document also observed that because the RDA applied to "all Australian wagering operations of TAB and its related body corporates", the "position for Victoria is therefore the same as for NSW" (i.e., an expectation that the TAB entities would claim damages under the RDA for their wagering operations in NSW and Victoria).

29. The claim for damages that was anticipated in those passages was a claim for breach of the RDA. The RDA provided that TAB would pay various fees "in consideration of all the services to be provided ... under this Agreement" (see cl. 9.1(a)). One of those services was procuring the supply of NSW race field information (see cl. 6.1). Clause 8.2 then provided that TAB was entitled to use that race field information in certain ways. It could thus reasonably be expected that TAB would claim that its contractual right to be provided with, and to use, race field information had been infringed, and that it was entitled to damages. It may thus be observed that Sportsbet's case that the Regulators intended to protect TAB by refunding, as payment of damages under the RDA, the amount of the race fields fee involves an implicit assertion that the relevant intention or understanding had its origins in 1997, with the execution of the RDA, and with people completely unconnected to the much later decision to impose a race fields fee.

30. The following summary of events subsequent to the creation of the Sensitivity Analysis makes clear that that document cannot be read as indicating an intention or understanding on the part of Racing NSW that the race fields scheme would yield no net revenue from TAB's NSW or Victorian operations. In particular:

(a) On 27 August 2008, after TAB and various related entities had in fact asserted that the imposition of race fields fees upon them involved a breach of the RDA, the Board of Racing NSW resolved to obtain the advice of Senior Counsel in relation to TAB's claims: FCAB 1804.

(b) At the September 2008 board meeting, the board was provided with a copy of a letter from TAB alleging that the Regulators had breached the RDA and that the TAB entities were entitled to damages.

(c) The board papers for the 20 October 2008 meeting of the board of Racing NSW included a significant report (to which the primary judge did not refer, and which Sportsbet ignores) stating, in relation to the Sensitivity Analysis, that (FCAB 1828):

"the assessments of the net financial benefit from race fields previously provided to the Board assumed no net increase in income from TABCORP's NSW or Victorian operations as it was considered prudent to adopt a conservative approach in Racing NSW's internal consideration of the potential financial benefit to the industry from race fields legislation."

It was also stated that advice from Senior Counsel had been obtained, and would be considered at the meeting. This document thus confirms the purpose of the Sensitivity Analysis as demonstrated above, and makes it clear that the contention that Racing NSW had an intention from 18 June 2008 merely to concede TAB's claims has no factual basis.

(d) At the 20 October 2008 board meeting (and following the board noting the above report), it was resolved that "the Chief Executive should commence negotiations with Tabcorp" in relation to the claims for damages: FC AB1842.

(e) On 27 November 2008 the TAB entities issued notices of dispute under the RDA: FCAB 1887-1892. It was alleged that the Regulators had breached the RDA by charging the race fields fee to the TAB entities' NSW and Victorian wagering operations. The TAB entities identified their loss as the amount of the race fields fees required to be paid, and sought damages for that loss.

(f) Vigorous negotiations ensued. A Deed of Release was executed on 25 November 2009. Around 40 board members, executives, lawyers (including Senior Counsel), and others were involved in bringing about the settlement that was finally reached.[6] The evidence also disclosed a significant number of documents demonstrating the negotiations which preceded the Deed of Release covering the period from 22 August 2008 (FCAB 1804) to 25 November 2009 (FCAB 2184). It is fanciful to suggest that all of those people were involved in an attempt to conceal the fact that Racing NSW had always intended to refund race field fees to TAB, and that all of those documents were created in furtherance of that objective. A new board was appointed to Racing NSW in December 2008. Again, it cannot seriously be suggested that that new board continued to conceal the alleged pre-existing intentions or understandings of the old board, and to approve the settlement reflected in the Deed of Release with that understanding. Indeed, any suggestion that the race fields scheme may be characterised as an arrangement to discriminate in favour of the TAB is comprehensively disproved by the fact that, even if the race fields fee was completely refunded to TAB and its related entities (Tabcorp and Luxbet) (which has not occurred), it would still pay a substantially higher percentage (over three times) of its NSW racing wagering turnover than interstate wagering operators (as detailed at [15] above).

(g) The settlement embodied in the Deed of Release was stated to be for the period up to 30 June 2009 (see cll. 7 and 8). The position from 1 July 2009 remains unresolved.

(h) The settlement contained in the Deed of Release achieved a significantly better outcome (in the order of $12 million) than had been predicted in the Sensitivity Analysis (which predicted $0 net income from Tabcorp's Victorian operations). Under the Deed of Release, the Regulators (along with Greyhound Racing NSW)

[6] See FCAB 1753, 1790, 1804, 1807, 1817, 1828, 1838, 1842, 1844, 1889, 2037, 2041, 2045, 2053, 2057, 2058, 2072, 2103, 2104, 2114, 2121, 2122, 2123, 2135, 2146, 2149, 2151, 2154, 2184.

agreed to pay an amount equal to the race fields fees paid between 1 September 2008 and 30 June 2009 in respect of the TAB entities' NSW operations (being $19,825,609), which meant they were entitled to keep an amount of about $12 million in respect of their Victorian operations (Tabcorp) which had also been the subject of the claim.[7]

31. The alleged intentions and understandings for which Sportsbet contends (and which were found by the trial judge) simply cannot survive the acceptance (as Sportsbet clearly did before the Full Court) that the Deed of Release is a genuine document reflecting a genuine commercial settlement. The Deed of Release cannot be dismissed as a peripheral event. It demonstrates conclusively that there can be no suggestion that Racing NSW had any intention or understanding, prior to the introduction of the race fields scheme, that any amount would be paid to TAB as damages for breaches of the RDA in respect of the introduction of the race fields scheme.

32. While Sportsbet indicates acceptance that the Deed of Release was not a sham (see AS [71]-[75]), other parts of Sportsbet's submissions suggest that there was no legitimate basis upon which damages would have been payable for a breach of the RDA by reason of the imposition of race fields fees on TAB (see, e.g., AS [51]-[52]). That suggestion should be rejected for three reasons. First, it is directly contrary to the position taken by Sportsbet below, where it was contended that TAB's entitlement to damages was so obvious that it would have been perceived by a "first year law student".[8] Secondly, given what is said at [29] above, there was at least a sound basis for TAB's claim. And thirdly, Sportsbet's assertion that "the substantial fees paid by TAB under the RDA related generally to the exclusive rights it was granted under the legislation and the RDA" is wrong. The RDA does not confer any exclusivity rights on TAB. Those rights are conferred on TAB by the *Totalisator Act* 1997 (NSW), ss 14 and 15A and expire in 2013. The amount paid for those rights was the $308 million paid to the NSW government (not the NSW racing industry) for the license granted to TAB to conduct the totalisator in NSW: Court Book Section 2, at 125.

33. Another critical matter to be observed from the above discussion is, of course, the complete absence of any reference to Harness Racing NSW. There is absolutely no evidence to support Sportsbet's contention that Harness Racing NSW had any intention or understanding that TAB would be "economically insulated from the fee".

Intentions or Understandings Relevant to Bookmakers

34. Sportsbet contends that the Regulators intended and understood that local bookmakers would be "economically insulated" from the race fields fees:

(a) in the case of Racing NSW:

(i) by setting a $5 million turnover threshold under which no fee would be charged; and

[7] See e.g., FCAB 1777; 2122; 2189. The precise amounts retained, particularly as they related to Racing NSW and Harness Racing NSW, were not in evidence because there was no issue before the Court to which it was relevant.
[8] Trans. 272/38 (FCAB 2563). See also Trans. 20/22 (FCAB 2311). See also the Reasons of the Full Court at [83].

(ii) by procuring racing clubs to reduce stand levies charged to bookmakers on the basis that Racing NSW would make good the resulting shortfall in funding to clubs; and

(b) in the case of Harness Racing NSW, by charging a fee only to those bookmakers whose turnover exceeded a $2.5 million threshold.

35. Insofar as the alleged intention or understanding on the part of Racing NSW that clubs would reduce their stand levies is concerned, the following matters should be noted:

(a) There was no evidence of the amount of stand levies, or the way in which they were calculated, prior to or after the introduction of the race fields scheme (except in relation to the AJC and the STC).

(b) There was no evidence at all that Racing NSW intended or understood that the racing clubs would reduce their stand levies, let alone that it "procured" them to do so. In fact:

(i) The Sensitivity Analysis was prepared on the basis of an "assumption" that clubs would remove the stand levies currently charged to bookmakers. However, in the papers presented to the board at the 25 July 2008 meeting, reference was made to that assumption, and the following statement appeared (FCAB 1596):

"These assumptions were appropriately conservative. Decisions on any changes to the turnover-based fees currently charged to NSW bookmakers rest with the racing clubs – not Racing NSW – and it was therefore considered prudent to review the overall financial impact of race fields on the most conservative assumption – that all of that revenue disappeared.

There have been a number of discussions with the metropolitan clubs in relation to their options and it is understood that the clubs are currently considering a number of alternatives ranging from eliminating all turnover-based fees ... (which was as assumed in the financial estimates provided to the Board) to maintaining all current turnover-based fees, as well as intermediate options ...."

It is thus clear that there was no pre-existing intention or understanding that the clubs would reduce their stand levies: quite the contrary. In the case of the AJC and the STC, the stand levies were not, contrary to Racing NSW's assumption, removed, but were reduced to 0.33% of turnover up to $5 million: FCAB 2035.

(ii) The fact that Racing NSW subsequently distributed a portion of the proceeds from the race fields fee to the clubs does not point to the existence of a prior intention or understanding to compensate the clubs for the loss of their stand fees. In particular:

(A) Racing NSW had provided funding to racing clubs before the introduction of the race fields scheme.[9] The whole purpose of the race fields scheme was to provide a source of funding that "would be fed straight back into the industry"[10] (being the NSW racing industry, not the wagering industry);

(B) The letter dated 6 January 2009 from the STC to Racing NSW requesting damages for the loss of stand levies was never acceded to by Racing NSW (contrary to the findings of the primary judge at [88]). The final two paragraphs of Racing NSW's letter of 18 March 2009 (not quoted by the primary judge) make clear that the amount being distributed to the STC was calculated by reference to the proportion of race field fees expected to be earned annually from races held at the STC (including off-course wagering on those events with local or inter-State totalisators, bookmakers, and betting exchanges). It was not an amount calculated by reference to the club's claimed loss of stand levies.

36. It follows that there is simply no support for a finding that Racing NSW intended or understood that the clubs would reduce their stand levies on the basis that they would be compensated for their resulting loss.

37. Insofar as the fee-free thresholds are concerned, there is nothing to suggest that Racing NSW or Harness Racing NSW could have intended or understood anything other than that those thresholds would apply equally for the potential benefit of all wagering operators, wherever located. The evidence established clearly:

(a) In the case of Racing NSW:

(i) the fee would be payable on approximately the same percentage of wagering turnover on NSW races within and without NSW (88.0% to 86.8%): FCAB 2204; and

(ii) the fee would exclude approximately the same percentage of NSW and inter-State wagering operators (either 90.7% to 88.3% on Racing NSW's numbers or 92% to 86.4% on Sportsbet's numbers): FCAB 2204. In relation to the competing numbers it may be observed that:

(A) the parties agree that there are 17 local wagering operators (one totalizator and 16 on-course bookmakers) and 22 inter-State wagering operators (seven totalizator operators, 10 corporate bookmakers, one betting exchange and four on-course bookmakers) who have turnover on NSW thoroughbred racing in excess of $5 million, and thus pay the fee (FCAB 2204);

[9] See the diagram at FCAB 1925. Contrary to AS 22(b), the Regulators have never distributed funds to TAB, and they do not do so under the race fields scheme.

[10] Legislative Assembly Second Reading Speech (20 October 2006) at 2.

(B) the disagreement between the parties as to the number of local and inter-State wagering operators who have turnover of less than $5 million on NSW thoroughbred racing, and thus do not pay the fee, is attributable to marginal issues such as whether wagering operators who are licensed in NSW but predominantly operate in another jurisdiction should be regarded as local or interstate traders (FCAB 2204);

(C) the ultimate difference, in percentage terms, between the two sets of numbers is minor, and need not trouble this Court.[11]

(b) In the case of Harness Racing NSW:

(i) the fee would be payable on approximately the same percentage of wagering turnover on harness racing within and without NSW (95.9% to 98.7%): FCAB 2205; and

(ii) the apparent discrepancy between the percentage of local and interstate wagering operators subject to the fee (38.9% to 98.7%) is explained on the different makeup of the local wagering industry on harness racing, where TAB is the dominant participant (and thus the only operator who pays the fee) (FCAB 2205).

38. The analysis in the preceding paragraph reveals there is no basis for Sportsbet's assertions (AS 11(a), 26, 29, 31, 32(a), 34, 38, 46, 50, 54) that NSW on-course bookmakers were insulated from the economic burden of the fee or otherwise protected as a result of the threshold. The overwhelming majority of wagering turnover is subject to the fee both within and without NSW, and, in the case of thoroughbred wagering operators, the overwhelming majority of both local and interstate wagering operators (approximately the same percentage of each) do not pay the fee.

39. The selection of the thresholds served a legitimate purpose. They foster competition by ensuring that the race fields fee does not operate as a barrier to entry into the market for wagering services, particularly from the perspective of low-turnover operators.[12] Furthermore, as was conceded by Mr Tyshing who gave evidence for Sportsbet, the presence of such operators at a racing event contributes – indeed, is essential – to its "colour and vibrancy",[13] upon which the success of such an event may turn.

Conclusion on factual matters

40. When the whole state of affairs following the imposition of the fees is examined (including the alleged Relief Measures), there is nothing that precludes or suppresses interstate competition. It is simply not possible to say, as Sportsbet does, that local wagering operators were insulated or otherwise protected from the fee. All wagering

[11] These differences were fully ventilated before the Full Court: see, eg, Regulators' written submissions to the Full Court at [97]-[98]; Sportsbet's written submissions at [99]; Regulators' submissions in reply at [61]-[62].
[12] Transcript, 15/2/2010, p 476.5-9 (FCAB 2767).
[13] Transcript, 5/2/2010, p 159.33-40 (FCAB 2451).

operators pay a 1.5% fee subject to the same thresholds, and the thresholds do not reflect even a rough proxy for "interstatedness".

41. Sportsbet made no attempt to prove that the regime as a whole had a tendency to place any discriminatory burden, however slight, on Sportsbet's ability to compete.[14]

Part V: Applicable legislation

42. Subject to the additions contained in Part V of the State of NSW's submissions, Sportbet's statement of applicable constitutional provisions, statutes and regulations is accepted.

Part VI: Second and Third Respondents' Argument

The respective positions of the parties

43. At the heart of Sportsbet's case is an assertion that the primary judge made a series of findings, left undisturbed by the Full Court (AS [32]-[33]), supportive of the proposition that the alleged Relief Measures were part of an inseverable package intended to quarantine NSW wagering operators from the effects of the race fields fee. The race fields scheme thus operated, in substance, as an equalising measure of the sort held to be offensive to s 92 of the *Constitution* in *Bath v Alston Holdings Pty Ltd.*[15]

44. In contrast, the position of the Regulators is that if such measures were adopted (which is not conceded), then, at most, they involved, in relation to the TAB, the partial settlement of a genuine commercial dispute, and in relation to NSW bookmakers, the taking of steps by metropolitan racing clubs to relieve them of pre-existing burdens to which they alone were subject. The circumstance that those measures may have been adopted contemporaneously with the introduction of the race fields scheme discloses no contravention of either s 92 of the *Constitution* or s 49 of the NT Act.

Sportsbet's case is not supported by the evidence

45. Sportsbet characterises the factual findings said to indicate the inseverability of the Relief Measures as having been framed by the primary judge in terms of the intentions or understandings of the Regulators (AS [49]). This is incorrect. Those findings were framed in terms of agreements, arrangements or understandings supposedly entered into by the Regulators with the TAB and with NSW racing clubs. Once this is appreciated, it should be apparent that his Honour's findings in this regard were comprehensively rejected by the Full Court, contrary to what is put on behalf of Sportsbet.

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[14] Such evidence as there was, far from indicating that Sportsbet's ability to compete was being impeded, indicated that Sportsbet was on an impressive 'growth path' and its turnover, customers and profit has continued to increase significantly since the imposition of the fees. Sportsbet's business, even subject to the fee, is plainly an attractive one, having been acquired (as to 51%) by Paddy Power PLC in May 2009 on a basis that valued the company at over $100 million: FCAB 2452. Sportsbet's turnover on NSW thoroughbred racing in the year ended 30 June 2008 was approximately $137 million (FCAB 1695), and this increased to $180 million in the year ended 30 June 2009 (i.e., the year in which the fee was introduced) (FCAB 2259). Sportsbet's turnover on NSW harness racing has also grown in the same period with an increase in 'margin' from 2% to 15% in the year of the imposition of the fee (FCAB 2464).

[15] (1988) 165 CLR 411.

46. Indeed, their Honours were emphatic in stating that "the primary judge's findings as to agreements, arrangements and understandings cannot be sustained".[16] The use of the plural in the phrase "agreements, arrangements and understandings" makes abundantly clear that their Honours' rejection of the primary judge's findings was not confined merely to his conclusion that the Deed of Release was a sham.

47. Moreover, given what is said at Part III above, the Court has no basis for concluding that the introduction of the race fields fee and the alleged Relief Measures (if indeed adopted) were so intimately connected as to constitute a single scheme intended to target inter-State wagering operators.

48. In any event, Sportsbet's case is attended by more fundamental difficulties. First, it proceeds upon the erroneous notion that an inquiry involving the application of s 92 of the *Constitution* or s 49 of the NT Act permits recourse to the subjective state of mind or intentions of the person adopting the impugned measure. And secondly, it is directed wholly towards matters beyond the reach of s 92, namely, the private commercial arrangements of the Regulators and independent parties such as the metropolitan racing clubs.

The improper injection of purpose into a s 92 inquiry

49. Sportsbet would have this Court inject notions of intent into a s 92 inquiry at two levels. First, it seeks the affirmation of the primary judge's conclusion that the alleged Relief Measures were inseverable because their adoption was motivated by a protectionist intent. And secondly, it is said that the mere presence of a protectionist intent is relevant to the characterisation of an impugned measure as being discriminatory in a protectionist sense. Neither proposition should now be accepted.

Purpose is not an aid in discerning inseverability

50. Whether measures are inseverable depends upon whether they operate in such a way that the absence or failure of one would frustrate or impair the object of all. It is not to be determined by asking whether the measures were intended to serve a larger protectionist end. The true criterion is thus interdependence,[17] rather than commonality of object. And yet the primary judge's approach to the issue of inseverability proceeded upon little more than identifying a larger protectionist objective in the adoption of the alleged Relief Measures.[18] This approach distorted his Honour's analysis of the practical operation of those measures. Just how extensive this distortion was may be apprehended by reference to Sportsbet's position in relation to the fee-free thresholds.

51. It is convenient to focus upon the threshold determined by Racing NSW. As noted at [37] above, this threshold applies universally – that is, all wagering operators (including those interstate) pay no fee in respect of the first $5 million of their turnover – and applies to the same proportion of wagering operators and wagering revenue within and outside NSW. Accordingly, the threshold was competitively neutral as between inter- and intrastate operators.

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[16] Reasons of the Full Court at [83].
[17] In a different context, see *Bank Nationalisation Case* (1948) 76 CLR 1 at 370 per Dixon J.
[18] Reasons of the primary judge at [152].

52. This circumstance is, however, insufficiently recognised by Sportsbet, and indeed was not given sufficient consideration by the primary judge, whose rejoinder to arguments directed towards establishing the competitive neutrality of the threshold was to say that they were "detached from the documentary record which shows, rather, an anxiety to protect the position of New South Wales bookmakers".[19] Thus, not only did his Honour err in thinking that a shared protectionist purpose was sufficient to render otherwise disparate measures inseverable, he also erred in suggesting that that purpose was a complete answer to a contention concerning the practical effect of one of those measures.

53. Furthermore, by urging the adoption of the primary judge's findings as to inseverability, Sportsbet would have this Court ask whether the alleged Relief Measures as a whole are reasonably necessary for the attainment of a legitimate objective. Such an inquiry would proceed upon what, for the reasons already given, is a false premise. The correct approach would involve testing the reasonable necessity of the fee-free threshold itself. Given what is said at [39], that reasonable necessity was established on the evidence.

Purpose is irrelevant to characterising a measure as protectionist

54. The purpose of the race fields scheme was not to prevent revenue leakage from local wagering operators but rather to introduce a fee that was indifferent to it. A stated intention of "catching free-riders" was thus not protectionist, even though such free-riders were all interstate traders. Accordingly, the question whether a protectionist intent is relevant to characterisation of a measure as protectionist does not arise in this appeal. But even if it did, the Court should answer that question in the negative.

55. As this Court explained in *Cole v Whitfield*,[20] s 92 achieves its object by prohibiting measures that burden interstate trade "and which also have the *effect* of conferring protection on intrastate trade and commerce of the same kind" (emphasis added). Inquiry into the effect of legislation, as distinct from the subjective intentions of legislators, was also how the Court approached the "object" of such legislation in s 92 inquiries before *Cole*.[21]

56. Indeed, where consideration is given in the modern cases to the object or purpose of a measure,[22] they make no reference to a "protectionist purpose" or a "protectionist object". Rather, they hold that if a law discriminates in effect against interstate trade, then it may nevertheless be inoffensive if it is appropriate and adapted to a legitimate object. This inquiry adequately covers the ground that Sportsbet would cover by introducing a separate purpose inquiry. A measure whose sole purpose is protection of local traders would certainly fail this test. By contrast, it is difficult to see why s 92 would strike down a measure that was passed in the hope of protecting local traders, but where on proper

[19] Reasons of the primary judge at [91].
[20] (1988) 165 CLR 360.
[21] See, eg, *NEDCO v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 624 per Jacobs J; *SOS (Mowbray) v Mead* (1972) 124 CLR 529 at 573-574 per Windeyer J; *Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 637. While the Privy Council in *James v Cowan* (1932) 47 CLR 386 referred to the "object and intention" of a ministerial decision in this context, there is nothing to suggest that the "object and intention" was determined in any other way that by reference to the legal and practical effect of the decision.
[22] *Cole* (1988) 165 CLR 360 at 394; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-477.

analysis, there is no relevant discrimination, or where any discrimination is appropriate and adapted to a legitimate object.

57. Finally, contrary to AS[85], the role of purpose is an area where US jurisprudence is of the least assistance. The application of the dormant Commerce Clause involves varying standards of scrutiny, requiring differing levels of governmental interest in order to uphold the validity of a measure.[23] Questions of purpose inform the standard of scrutiny to be applied.[24] By contrast, s 92 is concerned with a single inquiry,[25] where governmental interest is considered in the specific context of asking whether the measure is appropriate and adapted to a legitimate object. The use of purpose in the US jurisprudence does not translate clearly into this inquiry and, for the reasons set out above, this Court should not endeavour to create a role for it.

The alleged Relief Measures were beyond the purview of s 92 (and s 49 of the NT Act)

58. The errors in Sportsbet's attempt to deploy notions of intent are compounded by the circumstance that such deployment is directed at matters beyond the reach of s 92. It is true that both Racing NSW and Harness Racing NSW are constituted pursuant to statutes,[26] which in turn confer upon them the power to enter into contracts. However, those same statutes also provide that both bodies are independent of the NSW Government.[27] To hold that their contracts are executive acts capable of attracting the application of s 92, and by extension, s 49 of the NT Act, would deprive the provisions referred to in the preceding sentence of all meaning, contrary to the accepted canons of statutory construction.[28]

59. Still, much is made by Sportbet of the fact that the existence of, and continued compliance with, the RDA are conditions of TAB's totalizator licence.[29] This ignores, however, the circumstance that the terms of the RDA are not subject to ministerial approval. Nor are they given the force of law. Their enforcement would be a matter entirely for the Regulators, which would, for that purpose, have recourse to sanctions available under the general law of contract.

60. Furthermore, whereas entry into the RDA was mandated by statute, the same cannot be said of the Deed of Release, which for present purposes is the more relevant document, because it was in pursuance of that deed that Racing NSW made payments to TAB in commercial settlement of a claim for damages following the introduction of the race fields fee for a limited period of 9 months. And, as for any arrangements or understandings between the Regulators and the racing clubs, these are even further removed from the statutory setting in which this litigation arises. Even if they existed (which is denied), they are wholly private in nature, and thus utterly incapable of engaging s 92 of the *Constitution*, or s 49 of the NT Act.

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[23] See, eg, *Pike v Bruce Church*, 397 US 137 (1970); *Philadelphia v New Jersey*, 437 US 617 (1978).
[24] *Baldwin v Seelig*, 294 US 511 (1934).
[25] *Castlemaine* (1990) 169 CLR 436 at 471.
[26] *Thoroughbred Racing Act 1996* (NSW), s 4; *Harness Racing Act 2009* (NSW), s 4.
[27] *Thoroughbred Racing Act 1996* (NSW), s 5; *Harness Racing Act 2009* (NSW), s 5.
[28] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].
[29] *Totalizator Act 1997* (NSW), ss 21A and 43(2).

So-called "off-setting reductions" in respect of existing burdens

61. It follows then that even if the alleged Relief Measures had been adopted, and adopted contemporaneously with the introduction of the race fields scheme (which, for the reasons set out at [45] to [47] above, is denied), this involved, at the highest, the imposition of a universal impost occurring simultaneously with the taking of steps to relieve intra-State traders of pre-existing burdens to which they alone were subject. If this is correct, then the only avenue to success available to Sportsbet is to argue that a holistic suite of governmental measures cannot at the same time impose a uniform impost on all traders in a national market and relieve local traders of burdens previously faced by them alone.

10 62. That argument should be rejected. It poses the wrong question to ask who is "worse off" under the impugned regime as compared with the state of affairs beforehand. Rather, the question must be whether the new regime itself imposes a discriminatory burden on interstate trade of a protectionist kind. Were it otherwise, it would be impossible for a State to enact a single piece of legislation moving from a regime that places a burden on local traders only to a regime that places a burden on local and inter-State traders alike.

63. The decision in *Bath v Alston Pty Ltd*[30] does not require a different outcome. In *Bath*, the pre-existing burden was a licence fee imposed on tobacco wholesalers. Such a burden could not be imposed on inter-State wholesalers, as it would be an attempt by Victoria to require licences for persons to conduct their businesses interstate. The new impugned
20 burden was a licence fee on tobacco retailers. It was expressly payable only in respect of interstate tobacco. The majority explained that it is important to focus on the kind of transaction that attracts liability – that is, if the burden is on transactions in a particular market, then the inquiry must be into transactions into that market,[31] such that "[t]he effect of an equivalent tax on transactions at another stage in the chain of distribution of the same goods or goods of the same kind is immaterial".[32] In other words, the discriminatory interstate burden was not a true equivalent to the pre-existing local burden. That is why it offended s 92.[33] *Bath* thus says nothing about a different hypothetical situation in which a single retail licence fee is imposed at the same time that Victorian wholesalers are relieved from their wholesale fee.

30 64. That such a situation would be inoffensive is clearly supported by Dixon CJ's reasoning in *Boardman v Duddington*.[34] As the Full Court explained,[35] this reasoning had nothing to do with the "criterion of operation" approach that was abandoned by this Court in *Cole v Whitfield*. It thus remains persuasive as curial recognition of the notion that the introduction of a universal and uniform impost by a State does not oblige it to preserve pre-existing burdens faced by intrastate traders.

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[30] (1988) 165 CLR 411.
[31] (1988) 165 CLR 411 at 428.
[32] (1988) 165 CLR 411 at 428-429.
[33] The US Supreme Court came to a similar conclusion, in considering its compensatory tax doctrine under the so-called dormant Commerce Clause in *Armco v Hardesty*, 467 US 638 (1984) – a tax on interstate traders at the wholesale level is not a true equivalent to a tax on local traders at the manufacturing level.
[34] (1959) 104 CLR 546 at 469-470.
[35] Reasons of the Full Court at [106].

65. Crucially, the Full Court's reasoning implicitly assumed that there was the alleged nexus between the imposition of a uniform fee (that is, the race fields fee) and the expectation (accepted for the sake of argument only) that local traders would be relieved of their pre-existing burdens.[36] And yet their Honours found nothing surprising, let alone sinister (or, the Respondents add, protectionist), in such an arrangement.[37] In substance, then, TAB and the local bookmakers faced the economic effect of the new fee in the same way and to the same extent as interstate wagering operators.

66. It is important to stress that Sportsbet's case is not a case about subsidies. Sportsbet has neither pleaded nor proved that the pre-existing burdens faced by local traders were consideration for valuable benefits that are now provided below cost, or in some other way that could possibly be described as a protectionist subsidy. This Court must accordingly accept that they were simply pre-existing burdens that have been partly relieved. If that is so, then there is a crucial distinction between the present case and the US Supreme Court's decision in *West Lynn Creamery v Healy*.[38] That case concerned a combined tax and subsidy that was no different in effect from a simple tax imposed on interstate traders alone. The US Supreme Court was thus focused upon a pure subsidy, as distinct from relief from pre-existing local burdens.

Competitive advantage derived from a place of origin

67. Neither the Full Court's decision nor the Regulators' primary defence in this appeal depends on the notion that the existence of a competitive advantage derived from an interstate trader's place of origin is an additional element required to be established in order to support a conclusion of invalidity on s 92 grounds.

68. What was said in their Honours' reasons concerning competitive advantage must be read in conjunction with their suggestion that *Bath* should be seen to stand for the proposition that s 92 does not permit governments to impose on interstate trade *higher* burdens than are borne by intrastate operators "in an attempt to neutralize a competitive advantage that interstate trade would otherwise enjoy but for the government measure" (emphasis added).[39] Thus, that competitive advantage need not be shown to exist by reason of the place of origin of the relevant interstate trade.

69. This indicates that the Full Court's invocation of the concept of place of origin was intended merely to describe a competitive advantage not enjoyed by intrastate traders. Of course, to focus too heavily upon that concept or upon the notion of protectionism in the abstract is to assume the existence of a state of affairs which s 92 was designed to undo – namely, a conception of the States as self-contained economies with parochial markets or industries to protect. However, the insight, given expression in *Betfair Pty Ltd v Western Australia*,[40] that s 92 proscribes restrictions on the operation of competition in national markets by means dependent upon the geographical reach of a State's legislative or executive power, should not be permitted to obscure the circumstance that there may be

[36] Reasons of the Full Court at [86].
[37] Ibid.
[38] 512 US 186 (1994).
[39] Reasons of the Full Court at [102].
[40] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 480 [116].

occasions when economic analysis may have less of a role to play in a s 92 inquiry. For instance, an ex facie discriminatory measure which imposes a relatively trivial burden on interstate trade might nonetheless infringe s 92, notwithstanding that the burden is so trivial as to have only the most minimal effect upon competition in a national market. The relevant trade must be *absolutely* free.

70. However, the hypothetical posited above may be distinguished from this case. Here, Sportsbet's contention is that the race fields scheme operates, in substance, as an equalising measure of the sort considered in *Bath*. This prompts the question what precisely is sought to be rendered equal. It follows from the insight in *Betfair v WA* to which reference is made above that to speak of an equalising measure must be to direct attention to the imposition, by a discriminatory burden, of an artificial state of equality as between intra- and interstate traders with otherwise varying levels of ability to compete in a national market. The term "artificial" in this context is intended to denote a market outcome arising otherwise than by the operation of competitive forces.

71. Seen in this light, the Full Court's reasoning on the issue of competitive advantage is not only orthodox, but also apt to expose one of the central flaws in Sportsbet's case. That is, once notions of intent are dispensed with in a s 92 inquiry, it becomes clear that the imposition of a universal and uniform impost does nothing to create an artificial state of equality. Far from imposing equality by artifice, the simultaneous relieving of pre-existing burdens faced by intrastate traders alone serves, in fact, to ameliorate an artificial state of *inequality* as between those and interstate traders.

Appropriate and adapted to a legitimate purpose

72. Issue (c)(iii) in Sportsbet's Statement of Issues also appears to raise questions about whether the impugned fee is appropriate and adapted to a legitimate purpose. To the extent necessary, this Court should find that it was. As noted above, the core purpose of the fee was to ensure that all wagering operators who used NSW racing events in the course of a wagering business contributed to the costs of producing those events in a manner proportionate to the extent of their betting activity. That purpose was appropriately served by a uniform fee requiring wagering operators to contribute $1.50 for every $100 bet (subject to the thresholds).

The alleged Relief Measures are the proper target, not the uniform fee

73. Nonetheless, even if it were assumed, contrary to the evidence and the findings of the Full Court, that the imposition of the race fields fee was accompanied by the alleged Relief Measures, Sportsbet's case must still fail.

74. In those circumstances, and given that the fee applies universally, the only matters which could be said to offend s 92 of the *Constitution* would be the alleged Relief Measures themselves. So much is apparent from Sportsbet's own description of the alleged Relief Measures as "the three measures that protected local industry" (AS [38]), the implication being that the fee alone did not have such a prophylactic effect.

75. Contrary to what was held by the primary judge (at [141]), this conclusion would not permit the survival of a protectionist scheme, the constituent parts of which could not

successfully be challenged, in isolation, for contravening s 92. Accordingly, if findings of fact contended for by Sportsbet were made, then either:

(a) on the assumption that the alleged Relief Measures may be severed from the fee, those measures would be invalid, preserving the operation of the fee; or

(b) on the assumption that no such severance is possible, both the fee and the alleged Relief Measures would be invalid together.

76. Problematically, for the Court so to order, the other parties to the arrangements or understandings said to have given rise to the alleged Relief Measures – namely, the TAB, Racingcorp Pty Ltd, Greyhound Racing NSW and the racing clubs – should have been joined as parties to the action. No such joinder occurred.

77. It follows that success in establishing Sportsbet's factual case would not, on any view of the relationship between the race fields fee and the alleged Relief Measures, provide a basis for granting the relief sought by Sportsbet.

Statutory prohibition coupled with an administrative discretion

78. To the extent that the fourth matter identified in Sportsbet's Statement of Issues raises questions of intention, it is addressed in these submissions at [54] to [57] above. To the extent that the fourth issue raises questions concerning the validity of the Act itself, it should be determined adversely to Sportsbet in any event. Both the trial judge and the Full Court so held, finding that the Act and Regulations were perfectly capable of operating consistently with s 92.[41]

79. Sportsbet's submissions assume that laws conferring broad administrative discretions in relation to the conduct of trade and commerce are either regulatory, and thus inoffensive to s 92, or not properly regulatory, in which case they infringe s 92. That this distinction is unstable is readily apparent. To the extent then that the Full Court relied upon *Miller v TCN Channel Nine Pty Ltd*,[42] in which that distinction was discussed, it was merely to emphasise, first, the significance to a s 92 inquiry of the scope of the discretion conferred, regardless of whether the law be regulatory or not, and secondly, the proposition that even broad conferrals of discretion are ordinarily to be read subject to s 92.

80. In this case, it is telling that Sportsbet's assertion of an infringement of s 92 (or rather, of s 49 of the NT Act) is grounded almost entirely upon matters extraneous to the exercise of the Regulators' discretion to grant Sportsbet approval to use race field information, namely, the alleged Relief Measures and other matters alleged to have compromised the disinterestedness of the Regulators (as stated in [22] above, it cannot be suggested that even if a theoretical conflict of interest existed, it affected any decision of the Regulators in any way whatsoever). It is thus not the breadth of the discretion conferred under the Act of which Sportsbet complains; it is the context in which that discretion was said to have been conferred and exercised. However, it is one thing to say that a conferral of administrative power is so broad as potentially to authorise decisions infringing s 92 of

[41] See Reasons of the primary judge at [155]-[156]; Reasons of the Full Court at [133]-[144].
[42] (1986) 161 CLR 556.

the *Constitution*; it is another to say that by reason of extraneous matters suggestive of a subjective protectionist intent, the conferral of power is bad, notwithstanding that the relevant discretion is to be read as being subject to s 92.

81. The first of these propositions establishes the invalidity of the conferral; the second does not. To the extent that Sportsbet's submissions on this issue go any further, the Regulators adopt what is put on behalf of the State of New South Wales.

Part VII: Conclusion

82. The appeal should be dismissed with costs.

10 **Date: 6 May 2011**

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