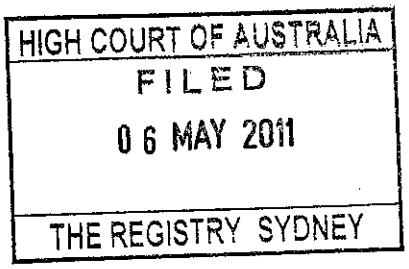
IN THE HIGH COURT OF AUSTRALIA **No. S118 of 2011**
~~ADELAIDE~~ REGISTRY
SYDNEY
BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 612)
Appellant

and

STATE OF NEW SOUTH WALES
First Respondent



RACING NEW SOUTH WALES
(ABN 86 281 604 417)
Second Respondent

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

STATE OF SOUTH AUSTRALIA
Fourth Respondent

WRITTEN SUBMISSIONS OF THE FOURTH RESPONDENT

Part I: SUITABILITY FOR PUBLICATION

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

Part II: CONCISE STATEMENT OF THE ISSUES

2. South Australia adopts the First Respondent's concise statement of the issues.

Part III: IS A S78B NOTICE REQUIRED?

3. The Appellant has issued notices under s78B of the *Judiciary Act 1903* (Cth).

Part IV: MATERIAL FACTS

4. The material facts are set out in the judgment of the Full Court at paragraphs [15]-[41].[1] Those facts are supplemented by the Appellant and other Respondents in their written

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1 *Sportsbet Pty Ltd v New South Wales and Others* [2010] FCFCA 312; (2010) 274 ALR 12.

submissions. South Australia does not seek to add to this material.

Part V: APPLICABLE STATUTORY PROVISIONS

5. South Australia accepts the Appellant's identification of the relevant applicable statutory provisions as supplemented by the First Respondent.

Part VI: THE FOURTH RESPONDENT'S ARGUMENT

i. South Australia's Interest and Summary of Contentions:

6. The Attorney-General for South Australia intervened in the Full Court pursuant to s78A of the *Judiciary Act 1903* (Cth) because there are in place in South Australia legislative and administrative arrangements which, while different from the New South Wales arrangements in important respects, share one point of similarity with those arrangements.

7. In South Australia, all wagering operators (including local bookmakers, but subject to an exception for local racing clubs which is not relevant to the present proceedings[2]) are required to make a contribution to the South Australian racing industry, calculated by reference to the revenue earned from wagering on races conducted by South Australian racing clubs.[3] The local licensed Totalizator, SA TAB, is subject (under the terms of a Racing Distribution Agreement) to a pre-existing obligation to make a contribution to the racing industry. The contribution required of SA TAB by the Racing Distribution Agreement is much greater in substance than the contribution imposed on other wagering operators. The legislation in South Australia explicitly (i.e., on the face of the legislation) treats the existing obligation under the Racing Distribution Agreement as satisfying the requirement for SA TAB to make a contribution. The point of similarity between the New South Wales and South Australian positions is that, in substance, all wagering operators other than SA TAB are required to make a "new" contribution while SA TAB continues to be subject to the pre-existing obligation to make a contribution which is much greater than the new contribution imposed on other wagering operators.

8. Thus in the Full Court, as in this Court, South Australia's primary concern was and is with the second issue identified by the First Respondent, namely:

> In circumstances where all race field information use approvals respectively granted under the Act by the second and third respondents (collectively, "the Authorities") are subject to a uniform fee condition, can adjustments made to pre-existing burdens borne by intrastate wagering operators alone operate to invalidate approvals granted to interstate wagering operators on the basis that they conflict with s49 of the Self-Government Act or s92 of the Constitution?[4]

9. In sum South Australia contends:

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2 *Authorised Betting Operations Act 2000* (SA), s62E(2)(b).
3 *Authorised Betting Operations Act 2000* (SA), s62E(1), in conjunction with the terms of each "contribution agreement" entered into under that section.
4 First Respondent's submissions, [3].

i. if the impugned New South Welsh scheme offends s92 it will be inconsistent with s49 of the *Northern Territory (Self-Government) Act* 1978 (Cth). To the extent of the inconsistency the New South Wales scheme will be inoperative by reason of s109 of the Constitution;

ii. in determining whether the scheme offends s92, the approach is as identified in *Cole v Whitfield*[5] and developed in *Betfair v Western Australia*;[6]

iii. consideration of the practical effect of the scheme in this case requires consideration of the scheme in totality, that is, including pre-existing burdens modified in consequence of the introduction of the scheme. Such consideration in this case discloses an absence of discrimination against wagering service providers on the supply side of the market who are not located within New South Wales;

iv. *Bath v Alston* does not apply such that the pre-existing burdens in this case and the operation of the scheme in relation to them is offensive to s92;[7]

v. *Boardman v Duddington* has not been overruled by *Cole v Whitfield* and is of assistance in the resolution of this case.[8]

ii. Section 49 of the Self-Government Act and Section 92 of the Constitution

10. Section 49 of the *Northern Territory (Self-Government) Act* prohibits certain legislative and administrative arrangements involving trade and commerce between the Northern Territory and a State. The prohibition is infringed if the same arrangements, had they been applied to trade and commerce "among the States", would have been contrary to s92 of the Constitution.[9] To the extent that the arrangements consist of State legislation or involve the exercise of powers purportedly conferred by State legislation, that State legislation is inconsistent with s49 of the *Northern Territory (Self-Government) Act* and is thus invalid (in the sense of "inoperative") by reason of s109 of the Constitution.[10] It follows that the approach to the application of s92 applies equally to s49.

11. In *Cole v Whitfield* it was said of s92 that:

> The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.[11]

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5 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360.
6 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418.
7 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411.
8 *Boardman v Duddington* [1959] HCA 64; (1959) 104 CLR 456.
9 *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160 at [36] (Gleeson CJ, McHugh and Gummow JJ), [153] (Kirby J), [221] (Callinan J) ; *Lamshed v Lake* [1958] HCA 14; (1958) 99 CLR 132 at 147 (Dixon CJ).
10 *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160 at [37]-[38] (Gleeson CJ, McHugh and Gummow JJ); *Lamshed v Lake* [1958] HCA 14; (1958) 99 CLR 132 at 148 (Dixon CJ).
11 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 391 (The Court).

The object of s92 was identified as prohibiting protectionism:

> Section 92 precluded the imposition of protectionist burdens: not only interstate border customs duties but also burdens, whether fiscal or non-fiscal, which discriminated against interstate trade and commerce. That was the historical object of s92 and the emphasis of the text of s92 ensured that it was appropriate to attain it.[12]

It was also re-affirmed that s92 did not guarantee "absolute freedom" in the sense of it being left "without any restriction or burden or even regulatory burden or hindrance" or as a guarantee of anarchy.[13] Having regard to the Convention debates and to the context in which s92 appears in the Constitution it was held that the section guaranteed freedom from discriminatory burdens on interstate trade and commerce of a protectionist kind.[14] The Court said:

> Attention to the history which we have outlined may help to reduce the confusion that has surrounded the interpretation of s92. That history demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade. ...
>
> The expression "free trade" commonly signified in the nineteenth century, as it does today, an absence of protectionism, i.e., the protection of domestic industries against foreign competition.[15]

12. This approach was the product of constitutional interpretation making use of history and the Convention debates.[16] However, resort to history and to the Convention debates can have the result that in considering the application of s92 the focus is unduly narrowed to a consideration of the then identified enemies of free trade - border taxes, discrimination, especially in railway freight and rates, and preferences.[17] This approach may direct attention from the framer's "policy regarded, it is said, as basal to the federation".[18] That policy was, in effect, that free trade between the colonies was a *sine qua non* of

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12 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 393 (The Court).

13 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 408-9 (The Court) citing *Duncan v Queensland* (1916) 22 CLR 556 at 573; *Freightlines & Construction Holding Ltd v New South Wales* (1967) 116 CLR 1 at 4-5; [1968] AC 625 at 667.

14 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 394-395, 407-8 (The Court); *W & A McArthur v Queensland* [1920] HCA 77; (1920) 28 CLR 530 at 567-8 (Gavan Duffy J). Despite the Court referring on two occasions to a law offending s92 if it "burdens" or "discriminates against" interstate trade and commerce and thereby protects intrastate trade and commerce "of the same kind", it is to be understood as referring to the imposition of burdens on the goods or services of an out-of-State producer which thereby protects competing goods or services of an in-State producer; *Barley Marketing Board (NSW) v Norman* [1990] HCA 50; (1990) 171 CLR 182 at 204-205 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

15 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 392-3 (The Court).

16 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 387-391 (The Court); see also, Sir Anthony Mason, Law and Economics (1991) 17 Mon ULR 167 at 176.

17 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 391 (The Court). The Court noted itself that the ways in "which domestic industry or trade can be advantaged or protected are legion"; at 408-9. Staker has written that "just as the operation of s92 today should not be restricted by the types of protection known in the nineteenth century, it should not be confined to limits that existed in the very concepts of "free trade" and "protectionist" at the time the Constitution was drafted, bearing in mind that 'it is a Constitution we are interpreting, an instrument of government meant to endure'." See, C Staker, *Section 92 of the Constitution and the European Court of Justice*, (1990) 19 Fed LR 322 citing *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J); *Attorney-General (NSW) v Brewery Employees Union of NSW* [1908] HCA 94; (1908) 6 CLR 469 at 610 (Higgins J); *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 at 615 (Mason J).

18 *Bank Nationalisation Case* (1948) 76 CLR 1 at 38 (Dixon J).

federation.[19] That is not to advocate for a return to an individual rights interpretation of s92, but it is, as was said in *Betfair*, to recognise the intended link between political federation and economic federation.[20] It is also to appreciate:

i. that in considering the application of s92, regard must be had to the effect of the impugned law upon both the supply and demand side of the market;[21]

ii. that s92 may be offended by the economic consequences of a law;[22]

iii. the place occupied by ss90 and 92 and Ch IV in the Constitution and their role in fostering national markets which serve the political goal of national unity within the federation. In this regard it also permits the acknowledgment of economic policy at the national level and in particular the current primacy of competition policy;[23]

iv. that s92 must account for the new economy and the fact that the localisation of a market may not have an economic centre commensurate with State boundaries with the result that difficulties arise in conceptualising across-border advantage and disadvantage as contemplated by traditional notions of protectionism.[24]

In short, the application of s92, and more particularly the identification of laws and arrangements which constitute permissible regulation of interstate trade and commerce, is driven by the fact that s92 is an expression of the economic aspect of the political unity necessarily contemplated by the federal compact. Hence in *Betfair* it was said that one significant outcome of *Cole v Whitfield* was in returning consideration of "s92 to the matters of political economy with a general understanding of which the provision was framed at the end of the nineteenth century".[25]

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19 F Beasley, *The Commonwealth Constitution: Section 92 - Its History in the Federal Conventions*, Annual Law Review (WA) Vol 1 (1948) 97, 280.

20 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [21]-[32] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

21 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

22 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [11] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

23 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [12]-[13], [16] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); see also, *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* [1993] HCA 67; (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

24 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [14]-[15], [17]-[18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

25 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [20] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). As the then Premier of New South Wales, George Reid, said of s92, "This clause touches the vital point for which we are federating, and although the words of the clause are certainly not the words that you meet with in Acts of Parliaments as a general rule, they have this recommendation, that they strike exactly the notes which we want to strike in this Constitution." *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 1898 (Melbourne, 1898) Vol 2, p 2367. This also explains the utility of certain decisions of the Supreme Court of the United States as recognised in *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 470 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), and in *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [33]-[39] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

13. That said, sight cannot be lost of the fact that the words "among the States" are words of limitation. Those words were substituted in place of the words, "throughout the Commonwealth", to exclude laws regulating intrastate trade.[26] Their content may vary from the actual crossing of the border[27] to everything which happens in the course of an interstate activity from beginning to end.[28]

14. In *Cole v Whitfield* the Court described the task to be undertaken in determining whether or not a State law or Executive act offends s92 in the following terms:

> In the case of a State law, the resolution of the case must start with a consideration of the nature of the law impugned. If it applies to all trade and commerce, interstate and intrastate alike, it is less likely to be protectionist than if there is discrimination appearing on the face of the law. But where the law in effect, if not in form, discriminates in favour of intrastate trade, it will nevertheless offend against s. 92 if the discrimination is of a protectionist character. A law which has as its real object the prescription of a standard for a product or a service or a norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by s. 92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s. 92.[29]

Here 'object' refers to the mischief to which the law is directed.[30]

15. This was developed further in *Castlemaine Tooheys* where in the joint reasons it was said:

> [T]he fact that a law regulates interstate and intrastate trade evenhandedly by imposing a prohibition or requirement which takes effect without regard to considerations of whether the trade affected is interstate or intrastate suggests that the law is not protectionist. Likewise, the fact that a law, whose effects include the burdening of the trade of a particular interstate trader, does not necessarily benefit local traders, as distinct from other interstate traders, suggests that the purposes of the law are not protectionist. On the other hand, where a law on its face is apt to secure a legitimate object but its effect is to impose a discriminatory burden upon interstate trade as against intrastate trade, the existence of reasonable non-discriminatory alternative means of securing that legitimate object suggests that the purpose of the law is not to achieve that legitimate object but rather to effect a form of prohibited discrimination. There is also some room for a comparison, if not a balancing, of means and objects in the context of s. 92. The fact that a law imposes a burden upon interstate trade and commerce that is not incidental or that is disproportionate to the attainment of the legitimate object of

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26 *Official Record of the Debates of the Australasian Federal Convention*. Third Session. Melbourne, 1898 (Melbourne, 1898) Vol 1, pp 1014-1020. See also, J A LaNauze, *A Little Bit of Lawyers' Language: The History of 'Absolutely Free' 1890-1900*, in A W Martin (Ed) Essays in Australian Federation, 1969) Melbourne University Press at 83-4,90. It is, perhaps, in this connection that the reference in the joint reasons in *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 to the "fundamental consideration" that a State legislature had power to enact laws for the well-being of its people should be understood (at 472); cf *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [85]-[97] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). State regulatory legislation may have much to do in the 'new economy' on the demand/consumption side (e.g. the prohibition upon the possession of child pornography which may be purchased and downloaded from the internet).

27 *James v The Commonwealth* (1936) 55 CLR 1 at 58-9.

28 *W & A McArthur Ltd v Queensland* [1920] HCA 77; (1920) 28 CLR 530 at 549 (Knox CJ, Isaacs and Starke JJ).

29 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 408 (The Court). See also, *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 466-7 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

30 *APLA Ltd v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at [178] (Gummow J). The object of a law falls to be determined by reference to the totality of the context in which it was enacted; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *APLA Ltd v Legal Services Commissioner* (NSW) [2005] HCA 44; (2005) 224 CLR 322 at [423] (Hayne J).

the law may show that the true purpose of the law is not to attain that object but to impose the impermissible burden.[31]

16. This approach (i.e. that set out at [14] & [15] above) must now be modified in the light of the joint reasons in *Betfair*. In particular, the notion of discrimination for protectionist purposes is to be considered in the context of the relevant market and the persons participating in that market on the supply and demand sides as opposed to drawing distinctions between intrastate and interstate trade.[32] Thus the correct approach is to consider the practical effect the impugned law has on "persons who from time to time are placed on the supply side or the demand side of commerce and who are present in a given State at any particular time".[33] The required interstatedness is determined by identifying the location of those occupying the demand and supply sides of the relevant commerce. In the 'new economy' the interstate element is often more readily satisfied than in earlier times. Further:

i. it is not sufficient that one of several objectives of a law is non-protectionist. It may be so, but it is a matter of characterisation involving questions of fact and degree;[34]

ii. Ch III commits to the federal judicial power the determination of whether a particular legislative enactment is reasonably and appropriately adapted to a non-protectionist purpose;[35]

iii. what is reasonably appropriate and adapted involves considerations of proportionality which requires that significant weight be given to:

> [T]he constraint upon market forces operating within the national economy by legal barriers protecting the domestic producer or trader against the out-of-State producer or trader, with consequent prejudice to domestic customers of that out-of-State producer or trader. They suggest the application here, as elsewhere in constitutional, public and private law, of a criterion of "reasonable necessity". For example, in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*, Mason J said:
>
> > "As the defendant has failed to show that the discriminatory mode of regulation selected is necessary for the protection of public health, it is in my judgment not a reasonable regulation of the interstate trade in pasteurised milk."
>
> His Honour also referred to remarks in a similar vein by the Privy Council in *The Commonwealth v Bank of NSW*.[36] (footnotes omitted).

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31 *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 471-2, and also 473-4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), 478-9 (Gaudron and McHugh JJ).

32 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [18], [97] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). discrimination may either be apparent on the face of the impugned law or arise as a result of the actual operation of the law on the factual circumstances of a particular market; *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 408 (The Court); *Barley Marketing Board of NSW v Norman* [1990] HCA 50; (1990) 171 CLR 182 at 199 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). It is discrimination that confers a market or competitive advantage that is offensive; *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 467 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 409 (The Court). As to what amounts to discrimination see *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ).

33 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

34 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [48] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

35 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [99] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). See also, *Rowe v Electoral Commissioner* [2010] HCA 46; (2010) 85 ALJR 213 at [161]-[163] (Gummow and Bell JJ), [263] (Hayne J), [436]-[444] (Kiefel J).

17. In *Betfair* this Court did not hold that a protectionist character was not relevant to the determination of whether or not a law offended s92, despite the conceptual and practical difficulties that traditional notions of protectionism entail in application to the 'new economy'. It has been suggested that protectionism should form no part of the approach to determining whether or not a law or executive act offends s92.[37] It is contended that discrimination between interstate and intrastate trade is all that is required to enliven the guarantee contained in s92.[38] Elsewhere it has been suggested that discrimination alone may not suffice to afford the protection contemplated by s92.[39] These are large questions that should be resolved in a case the facts of which demand as much. That is not this case. For the reasons advanced below and by the other respondents, the impugned acts in this case do not discriminate between inter and intrastate suppliers of wagering services and are not protectionist in the relevant sense. That is, in both form and substance the race fields fee does not discriminate between those wagering operators on the supply side of the wagering services market nor prevent access by those on the demand side, punters, to the market.

iii. The ambit of the inquiry into the practical effect

18. When s92 is relied upon to invalidate a law it is the "effect of the law in and upon the facts and circumstances to which it relates - its practical operation ... as well as its terms in order to ensure that [the prohibition is] not circumvented by mere drafting devices".[40] That is, discrimination and protectionism are assessed as matters of substance.[41] The result is that questions of fact and degree arise.[42]

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36 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

37 G V Puig, *Section 92 Since Betfair Pty Ltd v Western Australia*, (2009) Constitutional Law and Policy Review 152. G V Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008) Thomson Lawbook Co; C Staker, *Section 92 of the Constitution and the European Court of Justice*, (1990) 19 Fed LR 322.

38 G V Puig, *Section 92 Since Betfair Pty Ltd v Western Australia*, (2009) Constitutional Law and Policy Review 152. G V Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008) Thomson Lawbook Co.

39 P H Lane, *The Present Test for Invalidity Under Section 92 of the Constitution*, (1988) 62 ALJ 604. See also, D J Rose, *Federal Principles for the Interpretation of Section 92 of the Constitution*, (1972) 46 ALJ 371.

40 *Ha v New South Wales* [1997] HCA 34; (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

41 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 407-8 (The Court); *Bath v Alston* [1988] HCA 27; (1988) 165 CLR 411 at 426; *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 466-7 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [118] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

42 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 408-9 (The Court); *Barley Marketing Board of NSW v Norman* [1990] HCA 50; (1990) 171 CLR 182 at 204 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [17] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). See also *Sportsodds Systems Pty Ltd v NSW* (2003) 133 FCR 63 at [32]-[50] (Branson, Hely and Selway JJ).

19. *Castlemaine Tooheys Ltd v South Australia* also confirms that "[d]iscrimination in the relevant sense against interstate trade is inconsistent with s 92, regardless of whether the discrimination is directed at, or sustained by, all, some or only one of the relevant interstate traders".[43]

vi. Discrimination in this case

20. At the heart of the Appellant's case is the contention that the Appellant was discriminated against by the First, Second and Third Respondents in that it was required to pay the race fields fee[44] for the relevant periods where NSW wagering operators were insulated from the fee. It complains that the Full Court did not have regard to the practical effect of the interconnected legislative and administrative arrangements.[45] This, with respect, is incorrect. In its consideration of the issues the Full Court assumed that the primary judge was correct in having regard to the arrangements made between the parties to the RDA and by racing clubs an on-course bookmakers in recognition of the need upon the introduction of the race fields fee not to doubly burden intrastate trade.[46]

21. The milieu to which the Appellant submits regard must be had includes that:

i. the TAB, which had itself paid the race fields fee to HRNSW and RNSW as a condition of being granted race fields approvals by RNSW and HRNSW, was subsequently paid by HRNSW and RNSW amounts, as recorded in the Deed of Release dated the 25 November 2009, equal to the fees it paid to HRNSW and RNSW for the said race fields approvals, and

ii. 95% of registered on-course bookmakers in New South Wales were not required to pay the race fields fee for approval to use thoroughbred race fields information by reason of the fee not applying to the first $5 million of wagering turnover (the fee being calculated as 1.5% of wagering turnover), and

iii. for the same reason (i.e. the $5 million threshold), no registered bookmaker in New South Wales was required to pay the race fields fee for approval to use harness racing race fields information.

But as the Full Court observed:

> [85] It may be said immediately that the view of the facts which Sportsbet urges is consistent with an understanding by all in "the milieu" that it would be unjust if, under the new regime, TAB and NSW on-course bookmakers were required to bear the burdens currently borne by them, as well as an extra burden in the shape of the fee to be imposed under the new scheme. And in relation to TAB, not only would that seem unjust in a general sense, it would be inconsistent with TAB's existing legal rights under the RDA.
>
> [86] It may be accepted, for the sake of argument, that all persons responsible for the implementation of the race field information regime expected that TAB and bookmakers located in New South Wales would not be required to continue to bear the burdens of their previous obligations to support racing in

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43 *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 475 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

44 As provided for by s33A of the *Racing Administration Act* 1998 (NSW) and Cls 14 and 16 of the *Racing Administration Regulations* 2005 (NSW).

45 Appellant's written submissions at [40]-50].

46 *Racing New South Wales v Sportsbet Pty Ltd* [2010] FCAFC 132; (2010) 274 ALR 12 at [111].

> New South Wales, as well as the extra burden of the fee under the new scheme. It was only to be expected that TAB would insist on its rights under the RDA and that NSW on-course bookmakers would seek relief from their current obligations to the racing clubs who would benefit from the fees imposed under the new regime. In our respectful opinion, that these expectations were abroad is not surprising, much less sinister. The important point, however, is that the existence of such a universal expectation affords no basis for concluding that TAB and NSW on-course bookmakers were not truly required to bear the burden of the fee in common with interstate traders.

22. South Australia contends that the primary judge's approach failed to properly account for "pre-existing burdens" applicable to TAB when considering the practical operation of the fee condition.

23. Section 21A of the *Totalizator Act 1997* (NSW) imposed an obligation on TAB to enter into a satisfactory commercial arrangement with the New South Wales racing industry.[47] The primary judge held that "[b]ecause compliance with the RDA is a condition of the TAB's totalizator licence the contractual nature of the agreement is of less moment than it might otherwise be".[48] The RDA should be understood as part of the overall regulatory arrangements for the payment of fees by wagering operators to support the New South Wales racing industry. Under the terms of the RDA, TAB was required to pay fees involving a fixed product fee, 21.9965% of its net wagering turnover, and a wagering incentive fee. The total fees payable by TAB for 2006/07 were $221 million.[49]

24. Properly considered, there is no discrimination against Sportsbet when compared with TAB, because TAB is subjected, by reason of s21A of the *Totalizator Act* and the RDA, to a greater burden for the purposes of contribution to the racing industry than the burden imposed on Sportsbet by reason of the 1.5% fee.[50]

25. The error in the approach of the primary judge is most evident in [148]-[149] of His Honour's judgment. Having accepted that "there may be ways in which the free rider problem may be solved without infringing s92",[51] the primary judge set out the "conceivable" ways in which the free rider problem might be addressed, identifying the following:[52]

    (a) imposing an equalising burden upon the interstate free riders to reduce the disadvantage suffered by the TAB by its having to pay New South Wales betting taxes and contributions to the industry under the RDA; or
    (b) imposing a fee equally on all wagering operators; [or]
    (c) imposing a fee which is apparently equal on all wagering operators but ensuring that the TAB and the local bookmakers are not affected by the fee; [or]

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47 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [31].
48 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [34].
49 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [35].
50 This was the argument rejected by the primary judge at *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [134]-[136]. If the Full Court's comment at [94] of its judgment is to be understood as a comparison between the amount paid under the RDA and that payable by TAB under the *Totalizator Act 1997 (NSW)*, it is correct.
51 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [147].
52 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [148].

(d) removing New South Wales betting taxes and rewriting the RDA so that the TAB no longer funds the racing industry and then imposing a fee equally on all operators the proceeds of which are then used to fund the industry.

26. It is apparent that the "conceivable" ways to address the free rider problem which were identified by the primary judge do not exhaust the possibilities. For example, the RDA could have been re-written (either by agreement between TAB and the other parties to the RDA or directly by New South Wales legislation) so that the contribution payable to the racing industry by TAB thereunder was reduced by 1.5% of wagering turnover involving New South Wales race fields, and the race fields use fee could have been imposed equally on all wagering operators. It is difficult to understand how it could be invalid to reduce TAB's obligations under the RDA, given that His Honour held that it would be permissible either (1) to impose the race fields use fee equally while TAB's obligations under the RDA remained in force, or (2) to remove the existing obligation entirely and to impose the race fields use fee on all operators.

27. Clearly, applying the race fields use fee to TAB and refunding it is identical, in substance, to reducing the amount payable under the RDA by the amount of the race fields use fee.

28. It is obvious that a single law or regulatory scheme requiring *both* TAB *and* interstate bookmakers to pay the same fee to the racing industry (which the primary judge accepted would be valid[53]) would be in substance equivalent to two separate and distinct laws or regulatory schemes, one of which requires TAB to pay the fee and the other of which requires interstate bookmakers to pay the same fee. That is so even if the legislation or administrative or contractual arrangements by which TAB is required to pay the fee came into operation before the legislation or arrangements requiring the interstate bookmakers to pay the fee. In that hypothetical situation, there would be (once both laws have come into operation) no discrimination either in favour of or against the interstate bookmakers.

29. The present case presents just such a situation, except that the regime applicable to TAB (which came into operation prior to that applicable to Sportsbet) actually required TAB to pay substantially more than was required to be paid by Sportsbet.

30. Just as it was necessary to assess the true "economic burden of the fee"[54] and the requirement "in substance" to pay the fee,[55] including by having regard to the arrangements by which the fee was (as the primary judge found) in effect repaid to TAB, it

53 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [149].
54 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [117].
55 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [120].

was also necessary to have regard to the *totality* of the fees (pre-existing and new) required to be paid by TAB.[56]

31. If this were not correct, the States would be unable to respond to dynamic markets by amending their existing regulatory arrangements. Instead, every time new circumstances arose that called for modification of existing regulation, the States would be required to repeal all existing legislation and remove all existing regulation then replace it with a new non-discriminatory regulatory scheme (or a new scheme which discriminated against in-State operators and in favour of out-of-State operators). Such inconvenient and meaningless formalism is not required by s92 of the Constitution.[57]

32. So long as only *some* wagering operators (i.e., TAB and New South Wales bookmakers) were required to (and did) make contributions (whether directly or indirectly) to the New South Wales racing industry, other wagering operators who provided facilities by which bets could be placed on races staged by New South Wales racing clubs were able to take the benefit of the fact that races were being staged, without making any contribution to the racing industry. In that sense, wagering operators who were not making a contribution to the racing industry could be regarded as "free riders": in effect taking the benefit of the fact that races were being held, without paying their dues. This is all that is meant by the shorthand expression, the "free rider problem".[58]

33. At [45]-[46], the primary judge stated:

> In the case of New South Wales, I conclude from the Minister's second reading speech on the introduction of the *Racing Administration Amendment Act 2006* on October 2006 that the State's expressed concern was to address the problem of free riders all of whom, it was known, were interstate traders. For the reasons already given I would conclude, if it were relevant, that this was a protectionist purpose.

34. It appears that the reference to "the reasons already given" is to the statement in [44(c)] that:

> an intention to level the playing field and to ensure that the interstate free riders pay their way is also a protectionist intention. I discuss this further below. ... In Australia, at least, a desire to level the playing field by imposing equal burdens on interstate free riders is an established species of protectionism.

35. The reference in that passage to further discussion below appears to be a reference to [146]-[151] of the primary judge's judgment. In that part of his judgment the primary judge made it clear that "at least at a high level of generality ... seeking to catch the free riders

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56 The primary judge's reference in [127] of his reasons to "the totality of the legislative or executive action", but this was evidently a reference only to the totality of the "new" arrangements.

57 In this connection South Australia also adopts the submissions of the First Respondent at [35]-[39] of its written submissions.

58 Of course, at the level of principle, free riding also has adverse economic impacts including the distortion of markets and inefficient allocation of resources.

may be a legitimate object",[59] but that "the difficulty lies ... in the method adopted to achieve that object" in this particular case.

36. Read as a whole, the primary judge's judgment should be understood as holding that:
    (1) "catching free riders" is a legitimate purpose; but
    (2) "the method adopted to achieve that object"[60] was impermissible because (so the primary judge found) the method adopted was to impose a new "equalizing burden" on interstate wagering operators.

37. The first proposition should be accepted. It is legitimate for New South Wales to regulate the wagering industry in such a way that all wagering operators who take bets in relation to races staged by the New South Wales racing industry are required to make contributions to support that industry. To the extent that Sportsbet submits that that is an impermissible objective, the submission should be rejected.

38. The second proposition, that the "method adopted" by New South Wales was impermissible, should not be accepted. In this context, the "method adopted" is merely a synonym for the "form" of the regulatory scheme. On the findings of the primary judge, the method adopted was to leave in place an established requirement (by reason of s21A of the *Totalizator Act* and the RDA) for TAB to make a monetary contribution to the New South Wales racing industry which was substantially greater than 1.5% of wagering turnover, and to impose a new requirement on interstate bookmakers that they make a monetary contribution equal to 1.5% of turnover. The Full Court was correct to conclude:

> [88] Nothing in the circumstances of "the milieu" in which the new regime was implemented is apt to attract the reasoning of the majority in *Bath v Alston* on which Sportsbet so heavily relied or to support the primary judge's conclusion that TAB and NSW on-course bookmakers would be relieved of their liability to also pay the fee in accordance with its terms.
>
> [89] The race field information scheme did not seek to erode any advantage which Sportsbet enjoyed by reason of its location in the Northern Territory and the business it had established in the "more favourable" regulatory and taxation environment there. Unlike the tobacco retailer in *Bath v Alston*, no competitive advantage enjoyed by Sportsbet in the Northern Territory was burdened by the fee. The fee was payable only because Sportsbet sought to use in its trade race field information in relation to races conducted in New South Wales.
>
> [90] TAB was subject to a real liability to pay the 1.5% fee imposed on it as a condition of its approval. It paid that fee. Had it not done so, it would have been in breach of this condition of its approval and it would have been at risk of the loss of its approval and prosecution for an offence. It was because it was, in truth, obliged to pay and did pay the licence fee to RNSW that RNSW was in breach of the RDA. Prima facie, the measure of the damages payable by RNSW by way of compensation for that breach was the amount of the fee, because that was the amount TAB was now obliged to pay in order to use the race field information to which it was already entitled under the RDA. Under the RDA, RNSW had bound itself to ensure that TAB had that benefit without any further payment.

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59 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [147]. See also at [151] where this conclusion was repeated.

60 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [148].

39. Where existing regulation applies to all in-State competitors and only to in-State competitors, any additional regulation which is appropriately directed to "catching free riders" will *necessarily* apply only to interstate competitors. That fact alone does not mean that the resulting regime has a protectionist purpose or operation. In South Australia's submission, the *entire regulatory regime* must be considered *as a whole.* It is an error of principle to divide the regime into its pre-existing and new parts, and to assess only the effect of the new parts.

40. There is a national market for wagering services[61] a component of which is wagering services provided in relation to NSW thoroughbred, harness and greyhound racing. The milieu with which this case is concerned focuses upon that component. Within that context the racefields fee reflects the symbiotic relationship between the gambling and racing industries. On the supply side of the market the race fields fee represents an indiscriminate barrier applicable to all wagering service providers.[62]

41. As to the application of the scheme to on-course bookmakers, South Australia adopts the submission of the First Respondent at [52]-[60] of its written submissions.

vi. *Bath v Alston*

42. The primary judge considered that the decision in *Bath v Alston Holdings Pty Ltd*[63] stood for the proposition that it was contrary to s92 to impose a burden upon interstate traders for the purpose of increasing their expenses to a level that equates with that of intrastate trade.[64] As a statement of principle this is not incorrect - to introduce a burden upon out of state traders on the supply side because of an advantage they enjoy by reason of their location, in order that intrastate traders on the supply side may more favourably compete, is protectionist.[65] But that is not this case, as the Full Court held.[66]

43. The legislative scheme considered in *Bath v Alston Holdings Pty Ltd*[67] involved two taxes imposed in relation to the sale of tobacco products in Victoria. The first tax was imposed upon wholesalers of tobacco in Victoria. The second was imposed on retailers of tobacco in Victoria, and took the form of an *ad valorem* component of the licence fee payable by Victorian retailers of tobacco. The *ad valorem* component of the licence fee was calculated

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61 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [114] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

62 In this regard *West Lynn Creamery Inc v Healy* 512 US 186 (1994) is distinguishable for the reasons given by the First Respondent in it's submissions at [61]-[62].

63 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411.

64 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [134].

65 *Racing New South Wales v Sportsbet Pty Ltd* [2010] FCAFC 132; (2010) 274 ALR 12 at [98], [101]; See also *Baldwin v G A F Seelig Inc* 294 US 511 (1935).

66 *Racing New South Wales v Sportsbet Pty Ltd* [2010] FCAFC 132; (2010) 274 ALR 12 at [96].

67 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 423-4 (Mason CJ, Brennan, Deane and Gaudron JJ).

by reference to "the value of the tobacco sold by the applicant in the course of tobacco retailing in the relevant period (other than tobacco purchased in Victoria from the holder of a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence)".[68]

44. The High Court held that the provisions imposing the tax imposed "discrimination *at the retail level*" which was "of a protectionist kind".[69] A critical feature of the scheme considered in *Bath v Alston* was that the two burdens fell upon different "levels"; that is, there were two different markets involved, tobacco retailers and tobacco wholesalers. At the level of the wholesale market for tobacco products, the Victorian legislative scheme imposed a discriminatory burden on *Victorian* wholesalers (which was not impermissible because it discriminated against in-State competitors and was therefore not "protectionist"). But at the level of the retail market for tobacco products, the scheme imposed a discriminatory burden on interstate trade (which was protectionist and thus impermissible).

45. It is evident that the *ad valorem* component of the retailer's licence fee under consideration in *Bath* was an "equalizing burden" of a particular kind. It was a burden designed to "equalize" an "advantage which the interstate goods enjoy *in their State of origin*".[70] That "advantage" was described as follows:[71]

> If wholesalers of tobacco products in another State already pay taxes and bear other costs which are reflected in wholesale prices equal to or higher than those charged by Victorian wholesalers, the practical effects of the discrimination involved in the calculation of the retailer's licence fee would be likely to be that the out of State wholesalers would be excluded from selling into Victoria and that the products which they would otherwise sell in interstate trade would be effectively excluded from the Victorian market. On the other hand, if out of State wholesalers pay less taxes and other costs than their Victorian counterparts, and in particular if they pay no (or a lower) wholesale licence fee, the effect of the discriminatory tax upon retailers will be to protect the Victorian wholesalers and the Victorian products from the competition of the wholesalers operating in the State with the lower cost structure. Either way, the operation and effect of the provisions of the Act imposing the retail tobacconist's licence fee are discriminatory against interstate trade in a protectionist sense.

46. *Bath* did not hold that *all* kinds of burdens which could be described as "equalizing burdens" necessarily infringe s92. The majority in *Bath* expressly stated that:[72]

> If the tax had been imposed directly on all retail sales of tobacco products in Victoria, it would not have infringed the injunction of s92 of the Constitution".[73]

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68 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 422 (Mason CJ, Brennan, Deane and Gaudron JJ).

69 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 426 (Mason CJ, Brennan, Deane and Gaudron JJ).

70 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 427 (Mason CJ, Brennan, Deane and Gaudron JJ).

71 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 426 (Mason CJ, Brennan, Deane and Gaudron JJ).

72 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 424 (Mason CJ, Brennan, Deane and Gaudron JJ).

73 Obviously enough, if two separate taxes had been imposed on all retailers, each calculated in the same way but one by reference to tobacco purchased from Victorian wholesalers and one by reference to tobacco purchased from out-of-State wholesalers, then that purely formal difference would not have resulted in invalidity.

47. *Bath* says nothing about the imposition of a burden upon interstate traders that constitutes a fee in return for which such trader may participate in a market, such fee being for the purposes of the maintenance of the market, where that burden is already borne by others participating in the market, namely, intrastate traders.

48. In the present case, the relevant burdens are imposed on all competitors at the same "level" irrespective of their location; that is, on all competitors in the same market irrespective of their location. In *Bath*, by contrast, the effect of the imposition of a discriminatory tax at the retail level was to protect Victorian wholesalers from competition from interstate wholesalers. For the purpose of considering whether the retail tax was protectionist, the wholesale tax was regarded (by the majority in *Bath*) as a cost of production of the good provided to the retailer,[74] and the attempt to "equalize" that cost by imposing a discriminatory tax on retailers of tobacco purchased from interstate wholesalers amounted to the removal of a competitive advantage enjoyed by those interstate wholesalers (i.e., the lower cost of production enjoyed as a result of not being subject to the Victorian wholesale tax).

49. It is evident that the majority in *Bath* accepted that the proper approach to s92 should not:[75]

> ... divert s92 from its intended function as a guarantee of the freedom of interstate trade and commerce from the barriers and burdens of protectionist laws and to permit the section to emerge again as a cause of senseless business or administrative artificiality and inefficiency and as a source of preference of interstate trade and commerce.

50. The approach of the primary judge, and particularly the observations at [148]-[149] of His Honour's reasons, would, it is submitted, reinstate precisely the kind of "... administrative artificiality" that the approach formulated in *Cole v Whitfield*[76] was meant to avoid.

vii. Boardman v Duddington

51. *Boardman v Duddington*[77] was not expressly overruled, or even discussed, in *Cole v Whitfield*. The question is whether it still stands based on the emphatic rejection of the criterion of operation doctrine by the Court in *Cole v Whitfield*.

52. The Appellant contends that *Boardman v Duddington* is an example of the application of the now discredited criterion of operation doctrine. A classical exposition of the criterion of operation doctrine is to be found in the judgment of Dixon CJ in *Hospital Provident Fund Pty Ltd v State of Victoria*[78] where His Honour said:

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74 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 428-9 (Mason CJ, Brennan, Deane and Gaudron JJ).
75 *Bath v Alston Holdings Pty Ltd* [1988] HCA 27; (1988) 165 CLR 411 at 427 (Mason CJ, Brennan, Deane and Gaudron JJ).
76 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360.
77 *Boardman v Duddington* [1959] HCA 64; (1959) 104 CLR 456.
78 *Hospital Provident Fund Pty Ltd v State of Victoria* [1953] HCA 8; (1953) 87 CLR 1.

> The *Benefit Associations Act* 1951 concerns itself only with the persons or bodies whose registration it requires in so far as they undertake or carry on the four descriptions of "benefit business" with which the Act deals. The legislation is not concerned with any of the incidents or accidents of the plaintiff company's business which by nature are capable of taking on the character of interstate commerce or intercourse. [...] The legislation selects as a ground for the operation or application of none of its provisions any fact matter or thing which forms a transaction of interstate trade or an essential attribute of the conception.
> [...]
> If a law takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being that particular example of trade commerce or intercourse among the States, and the law proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability, then that appears to me to be direct or immediate in its operation or application to interstate trade commerce and intercourse, and, if it creates a real prejudice or impediment to interstate transactions, it will accordingly be a law impairing the freedom which s 92 says shall exist. But if the fact or event or thing with reference to which or in consequence of which the law imposes its restriction or burden or liability is in itself no part of interstate trade and commerce and supplies no element or attribute essential to the conception, then the fact that some secondary effect or consequence upon trade or commerce is produced is not enough for the purposes of s 92.[79]

53. Critical to the doctrine is the need for the impugned law to operate on (i.e. its 'criterion of operation' is) an essential attribute of trade, commerce or intercourse among the States. If this criterion of operation is not found, then s92 does not operate on the law, irrespective of its potential impact on interstate trade in practical or economic effect. This produced a relatively limited field of operation for s92, in that laws which were found to operate on 'antecedent steps' to trade, commerce or intercourse among the States or the making or performance of contracts where the parties are interstate were found not to attract s92's protection.

54. *Boardman v Duddington* was decided at a time when the criterion of operation doctrine was in favour i.e. post *Hospital Provident Fund* and *Grannall v Marrickville Margarine*. However there is no express reference to either of these cases in the decision, and no application of the criterion of operation doctrine can readily be discerned from any of the judgments (in particular that of Dixon CJ).

55. *Boardman v Duddington* was determined based on what was considered the binding authority provided by *Armstrong v State of Victoria [No 2]*[80] and *Commonwealth Freighters Pty Ltd v Sneddon*.[81] Those two cases were themselves determined based on *Hughes & Vale Pty Ltd v State of New South Wales (No 2),*[82] which Dixon CJ (in *Armstrong*) explained as authority for the proposition that:

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79 *Hospital Provident Fund Pty Ltd v State of Victoria* [1953] HCA 8; (1953) 87 CLR 1 at 17 (Dixon CJ). The doctrine was developed further by Dixon CJ in *Grannall v Marrickville Margarine Pty Ltd* [1955] HCA 6; (1955) 93 CLR 55, and applied with similar effect by other members of the High Court in *Beal v Marrickville Margarine Pty Ltd* [1966] HCA 9; (1966) 114 CLR 283 (see in particular at 303 per Kitto J); M Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983), pp52-53).

80 *Armstrong v State of Victoria [No 2]* [1957] HCA 55; (1957) 99 CLR 28.

81 *Commonwealth Freighters Pty Ltd v Sneddon* [1959] HCA 11; (1959) 102 CLR 280.

82 *Hughes & Vale Pty Ltd v State of New South Wales (No 2)* [1955] HCA 28; (1955) 93 CLR 127. In *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 406 this Court referred to *Hughes & Vale Pty Ltd v State*

> ... the freedom of trade commerce and intercourse among the States which s 92 assures is not necessarily incompatible with the States obtaining from interstate carriers by road some contribution towards the upkeep of the highways they use. In [*Hughes & Vale [No 2]*] there is a discussion of the reasons why without impairing the freedom of interstate trade commerce and intercourse a State may require interstate carriers to pay some contribution to the maintenance of the roads used, and there is a consideration of the nature of, and the limits upon, the charge that might be made.

56. Through these road taxes cases, and those that followed *Boardman v Duddington*,[83] the High Court came to accept certain 'road maintenance' charges as an exception to the generally accepted proposition that a tax levied directly upon interstate transportation would infringe s92. This line of authority appeared to develop independently from the application of the criterion of operation doctrine such that the rejection of the latter should not imply rejection of the former.

57. There are themes in this line of authority which are entirely consistent with the approach to s92 expounded in *Cole v Whitfield*, despite the fact that they were decided many years in advance of it, namely, concepts of reasonableness and proportionality in the level of any regulation and concepts of uniform application, such that no discrimination between inter and intra-state trade is evident from the face of the law or its application.

58. *Boardman v Duddington* should therefore still be considered good law given its status, at the time that the criterion of operation doctrine was considered the correct application of s92, as an 'exception' to the otherwise generally prevailing operation of s92 and its general consistency with the principles underpinning *Cole v Whitfield*.

59. South Australia contends that the Full Court was correct to determine that *Boardman v Duddington* was not overruled by *Cole v Whitfield*[84] and that *Boardman* assists in the resolution of this case. The race fields fee born by both interstate and intrastate traders in this case represents an indiscriminate barrier applicable to all wagering service providers who wish to offer services related to NSW racing for the purposes of maintaining NSW racing.

vii. The Application of s 49 of the *Northern Territory Self-Government Act* in this case

60. If contrary to the conclusion of the Full Court the primary judge was correct to hold that the arrangements involving the imposition of the race fields fee (including, as he found, the repayment of the race fields fee to TAB) were prohibited by s49 of the *Northern Territory (Self-Government) Act 1978 (Cth)*, it does not follow that ss33 and 33A of the *Racing Administration Act*, and/or the *Racing Administration Regulations 2005*, are invalid. On the approach taken by the primary judge, it was the arrangements put in place by RNSW and

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of New South Wales (No 2) in terms indicating that it was not a case in which the criterion of operation doctrine was applied.

83 See Coper, M *Freedom of Interstate Trade under the Australian Constituion* (1983), p168.

84 *Racing New South Wales v Sportsbet Pty Ltd* [2010] FCAFC 132; (2010) 274 ALR 12 at [106]-[107].

HRNSW, particularly the repayment of the race fields fee to TAB, which resulted in the arrangements being prohibited by s49 of the *Northern Territory Self-Government Act*. Sections 33 and 33A were not the source of the power to make that repayment.

61. As indicated, the prohibition contained in s49 is infringed if the same arrangements, had they been applied to trade and commerce "among the States", would have been contrary to s92 of the Constitution. To the extent that the arrangements consist of State legislation or involve the exercise of powers purportedly conferred by State legislation, that State legislation is inconsistent with s49 of the *Northern Territory (Self-Government) Act* and is thus invalid (in the sense of "inoperative") by reason of s109 of the Constitution. As indicated in the preceding paragraph, however, in the present case the prohibited arrangements do not find their source in ss33 and 33A of the *Racing Administration Act* and it cannot be said that the practical effect of the existence of the discretion is to discriminate in a way that is protectionist nor that the very purpose or design of the conferral of discretion is to allow for its discriminatory exercise for a protectionist purpose. In those circumstances, the arrangements are themselves simply prohibited, directly, by s49 of the *Northern Territory (Self-Government) Act*, and are thus unlawful. No question of inconsistency between s 49 and State law arises.

62. The primary judge was correct to decline to declare invalid ss33 and 33A of the *Racing Administration Act* and/or the *Racing Administration Regulations*. In this connection South Australia also adopts the submission of the First Respondent to the effect that the legislative scheme bears a neutral regulatory character.[85]

63. Alternatively, if ss33 and 33A of the *Racing Administration Act* are properly to be regarded as providing the authority to establish the arrangements which the primary judge found to be prohibited by s49 of the *Northern Territory Self-Government Act*, those provisions are not *wholly* invalid. So much follows from the finding that there was at least one way in which ss 33 and 33A could operate consistently with s49.[86]

64. Section 31(1) of the *Interpretation Act 1987* (NSW) provides:

> An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.

65. In the present case, any partial invalidity of ss33 and 33A of the *Racing Administration Act* would arise not because those provisions *exceed the legislative power of the Parliament* of New South Wales but because, as laws *within* the legislative power of the Parliament but which were inconsistent with a law of the Commonwealth, they would attract the operation

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85 First Respondent's Submissions at [69]-[70].

86 The trial judge indicated that the approach of "imposing a fee equally on all wagering operators" (which was plainly authorised by ss33 and 33A of the) would have been consistent with s 49: *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [148], sub-para (b).

of s109 of the Constitution. The primary judge's conclusion to the contrary[87] is inconsistent with the plain meaning of the words of s31(1) and constitutional theory.

66. It is unnecessary, and would be inappropriate,[88] for a provision such as s31 of the *Interpretation Act* to apply where invalidity arises by reason of inconsistency with a law of the Commonwealth. Section 109 of the Constitution itself provides that State law is invalid "to the extent of the inconsistency", and it follows that the State law is valid and operative to the extent that it is not inconsistent. In other words, s109 of the Constitution itself builds in a constitutional rule to the same effect as the rule enacted in s31(2)(a) and (b) of the *Interpretation Act*.

67. For that reason, if s109 does render ss33 and 33A of the *Racing Administration Act 1998* (NSW) partially invalid then the appropriate declaration is that, by reason of s109 of the Constitution, ss33 and 33A of the *Racing Administration Act 1998* (NSW) and Part 3 of the *Racing Administration Regulation 2005* (NSW) are not wholly invalid but are inoperative to the extent that they would have otherwise empowered the imposition of conditions which impermissibly burdened or prohibited the freedom of trade and commerce between the Northern Territory and the States.

PART VII: ORDERS SOUGHT

68. The Appeal should be dismissed. Alternatively, if the appeal is allowed no order for costs should be made against the fourth respondent. In the Court below, as in this Court, South Australia's intervention was limited to making submissions on questions of law. Those questions were live as between the parties to the trial and were not enlarged by South Australia such that additional time and expense were incurred. South Australia took no part in the trial before the primary judge.

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87 *Sportsbet Pty Ltd v New South Wales* [2010] FCA 604; (2010) 186 FCR 226 at [59].

88 The effect of applying s31 in a s109 case would be to require a State law to be construed by reference to the content of a Commonwealth law (either as in force when the State law was enacted, or from time to time). It is most unlikely that the Parliament of New South Wales intended the proper construction of its law to vary according to the content of the Commonwealth statute book. Of course, it might be thought that s49 of the *Northern Territory Self-Government Act* is likely to remain stable, but there is no basis for applying s31 of the *Interpretation Act* selectively on the basis that s49 happens to have been intended to create a Territory-related equivalent to s92 of the Constitution.