ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No. S118 of 2011

SPORTSBET PTY LTD
Appellant

and

HIGH COURT OF AUSTRALIA
FILED
28 SEP 2011
THE REGISTRY SYDNEY

10 **STATE OF NEW SOUTH WALES**
First Respondent

RACING NEW SOUTH WALES
Second Respondent

HARNESS RACING NEW SOUTH WALES
Third Respondent

ATTORNEY-GENERAL FOR SOUTH AUSTRALIA
Fourth Respondent

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SUPPLEMENTARY WRITTEN SUBMISSIONS OF TAB LIMITED AND TABCORP HOLDINGS LIMITED

1. TAB Limited and Tabcorp Holdings Limited make these submissions in response to the invitation from the Senior Registrar by facsimile dated 8 September 2011.

2. The three questions raise overlapping issues. It is convenient to address those issues together before providing a short answer to each question.

3. All three questions can be answered by reference to the law established by *Cole v Whitfield*, and developed in subsequent decisions of the Court.

30 4. As the Court observed in *Cole v Whitfield* (1987) 165 CLR 360 at 392-393, the expression "free trade" has long commonly signified an absence of protectionism, ie, the protection of domestic industries against foreign competition. If there is no protectionism, a free trade area exists among the States.

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Filed on behalf of TAB Limited and Tabcorp Holdings Limited by
Freehills
MLC Centre
Martin Place, SYDNEY NSW 2000

DX 361 Sydney
Tel +61 2 9225 5000
Fax +61 2 9322 4000
Ref Juliana Warner

5. In the context of section 92, the domestic industry is the industry of a State that serves consumers within the State. Foreign competition is competition emanating from other States. That competition comes from foreign industry, and the manifestation of that competition is interstate trade. It is essential in the application of section 92 to distinguish intrastate trade from interstate trade. That is because section 92 is only relevantly concerned with trade and commerce "among the States", it is not concerned with intrastate trade.[1] The term "intrastate trade" is used to signify trade that is not among the States because it is internal to a State.

10 6. The Court confirmed in *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418 at [118] and [122] that a law offended section 92 if the law "answers the description of a discriminatory burden on interstate trade of a protectionist kind". The concepts of discriminatory burden, interstate trade and protectionism are critical to the operation of section 92. The new economy requires some increased sophistication in the application of these concepts, but they remain relevant and require no modification.

7. The logic of free trade is often attributed to the insight of Adam Smith, although the use of the expression "free trade" can be traced back to the 17th century.[2] Smith observed:[3]

20 > It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy... If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.

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[1] The *Convention Debates*, summarised in *Cole v Whitfield* from 387 to 391, support this contention. The words "among the States" were adopted, in preference to alternative wording of "throughout the Commonwealth" in order to make clear that internal regulation of trade was not the concern of the clause: see in particular discussions at the First Session on 22 April 1897 at pages 1141 to 1142 and discussions at the Third Session on 16 February 1898 at pages 1014 to 1020 and 23 February 1898 at pages 1384 to 1386.

[2] "Merriam-Webster's Collegiate Dictionary" (11th ed) 2004 Merriam-Webster, Incorporated p499.

[3] Smith, Adam "An Inquiry into the Nature and Causes of the Wealth of Nations" (Thomas Nelson, 1843) Book IV, Chapter 2, p185.

The logic was refined by the principle of comparative advantage, which is generally attributed to David Ricardo.[4] Generally, free trade enables all countries to specialise in areas of comparative advantage, and all countries are consequently better off.

8. Protectionism is the economic policy of restraining trade from foreign competitors in order to shield domestic industry against the full rigours of that competition. The theoretical vice in the policy is that it discourages specialisation in areas of comparative advantage. It fosters inefficiency. Protectionism results in what economists call deadweight loss, and a loss to overall welfare. The motivation to engage in protectionism comes about from the perception that the protected trade will add to the well-being of the domestic area, usually by encouraging employment and providing more opportunities to raise revenue.

9. The application of the principle of free trade requires close attention to the particular circumstances. For instance, the principle of comparative advantage assumes that there are no market failures. In the real world markets sometimes fail. Externalities are a common source of market failure. Trade that fails to take externalities into account may not maximise economic welfare. In a particular case it might be appropriate for a government to take steps to remove or to internalise or otherwise address an externality. Such steps are consistent with the policy of free trade. It sometimes requires sophisticated analysis to distinguish between government actions that are consistent with and promote efficient free trade and policies that serve to protect an inefficient domestic industry. The analysis will often require close analysis of the industry under scrutiny and the market forces at play in that industry.

10. Nor is a policy protectionist merely because it promotes or assists domestic industry. To take some perhaps extreme examples: government spending on public education, public health and public roads may serve to give an advantage to domestic producers in many industries over foreign competition, yet these measures are not protectionist and do not fetter free trade.

[4] Ricardo, David "On the Principles of Political Economy and Taxation" 3rd ed 1821, Chapter VII "On Foreign Trade".

Protectionism will ordinarily involve the specific assistance lent to a specific inefficient domestic industry against a specific more efficient foreign industry. Even then, care is required. For example, a domestic policy response to dumping may not be inimical to the principle of free trade. It might be important to ascertain whether the foreign competition has a legitimate competitive advantage.

11. A feature of the new economy is that transportation, at least in the traditional sense, is often eliminated as a part of the economic transaction between traders and their customers. The internet has vastly increased economic opportunities because it facilitates communication and the instantaneous exchange of information. Many services are provided and paid for over the internet without the movement of goods or persons. Services can be distributed instantly with ease. On-line wagering is an example of such a service. However, these features are not unique to the internet economy. Many traditional services, such as insurance, banking and stockbroking, have been provided by means of instantaneous or close to instantaneous means of communication across State borders for many years.[5] Nor is the new economy separate from the old one. The internet has become a vital trading tool in most industries, no matter how ancient the industry.

12. In the new economy it may be difficult in some instances to distinguish a domestic industry from a foreign one. That is because the physical presence of the trader and the services it provides cannot easily be linked to a particular State. But that is true in both the new and the old economy. Many commodities in the old economy are produced by firms that operate nationally. Many commodities are produced directly or indirectly by persons living and working in different States and have components sourced from around the nation. Often customers also have simultaneous links with more than one State. As firms (as traders and as customers) cease to have a domestic presence within a particular State, the distinction between domestic and foreign industries becomes blurred. Traders and customers cease to have a State-

[5] See, for example, *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, where the Court referred to banking transactions by means of telegraphic messages across State boundaries (see Latham CJ at 230, Rich and Williams JJ at 289 and Starke J at 306).

based domestic affiliation. In this environment, incentives to engage in protectionism may be lessened.

13. Nevertheless, it remains possible, in the new economy as much as the old, to draw a distinction between domestic and foreign industry. Whether an industry is characterised as domestic or foreign has to be considered as a matter of substance. An industry is domestic if the substantive part of the activities conducted by the traders in order to supply the goods or services to customers within a State is conducted within that State. In the new economy traders still have to have a physical existence. In both the new and the old economy, traders still require staff and equipment in order to supply goods or services.

14. Difficulties may surface when traders have both a domestic and a foreign connection. But any difficulties are as likely to arise in the old economy as in the new. A firm with domestic and foreign connections might simultaneously be a domestic and a foreign trader. It is still possible and necessary to inquire into whether a legislative or executive act protects domestic trade from foreign competition. The act might offend section 92 if it protects a firm in so far as it trades domestically in a State from trade that can be characterised as foreign to that State. That was what occurred in *Betfair v WA*. In relation to players in Western Australia, Betfair was an "out-of-State wagering operator" prohibited from providing a service, thus protecting "in-State operators", such as RWWA: at [122].

15. In a national market for services it may not be easy to distinguish what is purely local or intrastate trade from interstate trade. But it remains true that section 92 is only invoked if it is proved that the impugned measure protects domestic (or intrastate) trade against foreign (or interstate) trade. If as a practical matter the distinction between domestic trade and foreign trade cannot be drawn, then a section 92 challenge must fail. In that case the impugned measure is not protectionist. If a market truly operates on a national basis without reference to State borders, then domestic trade is not being protected and trade among the States is relevantly free. A protectionist measure has a tendency to partition national markets by creating breaks in substitution possibilities. That is,

customers within a State have less opportunity to switch to a supplier from outside the State. Markets become State-based rather than national.

16. If a market is truly a national market then customers are generally able to switch reasonably easily from one supplier to another, no matter where the supplier is located. That points strongly to the absence of any protectionism. Moreover, once a national market has been achieved, and protectionism eliminated, then section 92 has no role – save to prevent fresh and unjustifiable market segmentation. Contrary to Sportsbet's submissions at [25], any further enhancement to the competitive framework is not a constitutional matter. Section 92 is not the only means by which national competition can be enhanced.

17. Section 92 is not concerned with "local" or "narrow economic interests", as Sportsbet contends at [17] and Betfair at [9], [15] to [23] and [30]. Such local or narrow economic interests may require analysis of wholly intrastate enquiries - for example, whether a measure prefers one domestic trader to another - in which section 92 has no interest. The freedom that section 92 protects is the freedom not to be burdened by measures that, in their terms or operation, assign significance to political borders that have always lacked, or have previously lost, economic significance in respect of a particular transaction or series of transactions. This arises from the content of the language "among the States" and "whether by means of internal carriage or ocean navigation" in section 92 and its situation within Chapter IV of the *Constitution*. Narrower economic enquiries are not the concern of the protection.

18. The growing prevalence of national markets does not demand a move away from *Cole v Whitfield*. Unless a policy serves to protect intrastate trade from interstate competition, the policy does not impede the freedom conferred by section 92. If a measure merely gives to one interstate trader an advantage over another interstate trader, the measure cannot be described as protectionist. The burden is not imposed merely because the trader is an interstate trader, and engaged in interstate trade. The burden does not offend the principle of comparative advantage; it does not harm economic efficiency by fostering local inefficiency. The theory lying behind the principle of free trade in

the context of section 92, and the development of the language of the section as reflected in the *Convention Debates*, demands a distinction to be drawn between interstate trade and intrastate trade.

19. The proper application of section 92 requires consideration of economic consequences.[6] Economics can assist in determining whether a measure is truly a discriminatory burden of a protectionist kind and also in determining whether a measure that does protect, nevertheless carries an acceptable explanation. The tools of economics assist in the consideration of relevant processes of competition, including demand and supply-side substitution. Economics also assists to identify market failures and assists in an understanding of how the policy of free trade can operate in a given industry.

20. It is important not to posit a false dichotomy between economics and geography (cf Sportsbet Submissions [20] and Betfair Submissions [16] and [27]). In competition law, market definition is a purposive exercise which seeks to situate conduct within an area of competitive activity by reference to four dimensions, being, product, geography, functional level and time. Geography is thus one of the axes of economic analysis of markets, and is not opposed to it.

21. The concepts of free trade and protectionism, as explained in *Cole v Whitfield*, apply in relation to a national market for services in the same way they apply in any other context. The new economy tends to sweep away the relevance of State borders. This does not so much mean that section 92 is difficult to apply, but rather that section 92 is less likely to be engaged as the motivations to engage in protectionism are subdued.

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

22. The concept of free trade in section 92 applies in the same way to all industries and markets, including a national market for services. Free trade exists in a national market for services when there is no protection of domestic or

[6] *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 19 per Barwick CJ, cited in *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418 at [11].

intrastate trade against competition from foreign or interstate trade. Domestic trade relevantly occurs between domestic traders and domestic customers, those matters being addressed as a matter of substance.

Question 2: In the past, protectionist measures found to offend against s 92 have discriminated against interstate trade and protected intrastate trade, that is, local trade carried on within state borders. How does the concept of protectionism apply to trade carried on in a national market without reference to State borders?

23. The concept of protectionism also applies in the same way to all industries and markets, including a national market for services. If trade is truly conducted without reference to State borders then there is no intrastate trade that is being protected, and section 92 is unoffended.

Question 3: In the context of trade, carried on in a national market, does "absolutely free" in section 92 prohibit any measure creating a burden on interstate trade, which amounts to a competitive disadvantage (if such is demonstrated) on an interstate trader by comparison with other traders irrespective of whether those other traders can be characterised as trading intrastate or interstate?

24. No. Otherwise the Court would have to reject the concept of protectionism as a critical dimension of the operation of section 92, which would require overturning *Cole v Whitfield* and the decisions following it. That course should not be taken.

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Peter Brereton

Ph: (02) 8239 0239

Fax: (02) 9101 9641

brereton@banco.net.au

Ruth C A Higgins

Ph: (02) 9376 0602

Fax: (02) 9335 3542

ruth.higgins@banco.net.au