

IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No. S116 of 2011

ON APPEAL FROM FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

BETFAIR PTY LIMITED
 ACN 110 084 985

Appellant

AND

RACING NEW SOUTH WALES
 ABN 86 281 604 417

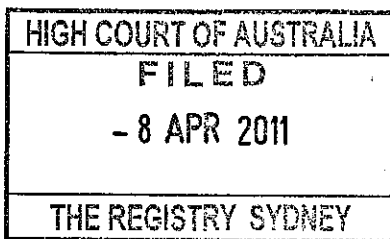
First Respondent

HARNESS RACING NEW SOUTH
 WALES
 ABN 16 962 976 373

Second Respondent

ATTORNEY GENERAL
 (NEW SOUTH WALES)

Third Respondent



APPELLANT'S CHRONOLOGY

PART I:

This chronology is in a form suitable for publication on the Internet.

PART II:

Date	Event	AB reference
1960s	Several State and Territory governments established government owned and operated totalizator agency boards (TABs) to offer totalizator wagering on racing (including outside the boundaries of licensed racecourses or "off-course"), e.g. <i>Totalizator Act 1997 (NSW)</i> (previously <i>Totalizator (Off Course Betting) Act 1964 (NSW)</i>).	N/A
1990s	Most States and Territories provide for licensing of corporate bookmakers. All States and Territories enact legislation to permit licensed bookmakers to bet on sporting events (as well as racing) and by telephone or over the internet with persons who were "off course". E.g., <i>Thoroughbred Racing Act 1996 (NSW) s 14A</i> , <i>Racing Administration Act 1998 (NSW) ss 16, 18-19</i> .	

Date	Event	AB reference
11.12.97	Racing Distribution Agreement (RDA) entered into between TAB Limited (TAB Ltd) and the three codes of New South Wales racing (Racing NSW, Harness Racing NSW (HRNSW) and what is now Greyhound Racing NSW (GRNSW)) represented by a company now called Racingcorp Pty Ltd (Racingcorp). The RDA provides for TAB Ltd to pay a sizeable proportion of its wagering revenues to Racingcorp; grants a royalty-free licence for TAB to use and publish "NSW Racing Information"; and requires regular meetings of a 'Business and Strategy Committee', the membership of which includes representatives of TAB Ltd and of each of the racing codes.	J[60]-[62], [66], [68], [291]- [301]
1998	NSW TAB privatised: TAB Ltd commences operating the only off-course totalizator in NSW under an exclusive licence: <i>Totalizator Act 1997</i> (NSW) and <i>Totalizator Agency Board Privatisation Act 1997</i> (NSW).	J[35], [36], [282]
February 2003	Betting Exchange Taskforce established by the "Australasian Racing Ministers' Conference" and included representatives of executive governments of each State and Territory. It was tasked to consider the effect of betting exchanges upon (amongst other things) existing Australian licensed wagering operators and hence revenue streams of the Australian racing industry and State and Territory Governments.	
10.7.03	Report of the Betting Exchange Taskforce to the Australasian Racing Ministers' Conference concluded that betting exchanges on Australian racing would pose a serious threat to current betting turnover levels of TABs and recommended against the granting of any licences authorising conduct of betting exchanges on racing and sporting events in Australia. Report recognises that betting exchanges are attractive to punters because they offer better odds relative to bookmakers and TABs, and that if betting exchanges were subject to significant levels of racing industry levies and betting taxes this attractiveness would be diminished.	
2004	All of the shares in TAB Ltd acquired by Tabcorp Holdings Limited (Tabcorp).	J[36]
July 2004	Racing NSW published its "Strategic Plan for the NSW Thoroughbred Racing Industry". That plan echoed the views of the Betting Exchange Task Force and stated that betting exchanges should be eradicated to " <i>recoup lost revenue</i> ".	
February 2005	Access Economics report to the Australian Racing Board entitled "Financial Implications of Betting Exchanges". The report noted that betting exchanges were a low cost method of delivering wagering products and therefore had the potential to significantly reduce the price of wagering, making it more attractive to punters and resulting in a change in market share between the TABs and Betfair.	
24.6.05	Letter from Racing NSW to NSW Minister for Racing & Gaming proposing introduction of legislation requiring approval from racing control bodies to publish race fields.	
June 2005	CEO report contained in Racing NSW's Annual Report for 2005 refers to the operations of corporate bookmakers in the Northern Territory, and betting exchanges, " <i>present[ing] a major threat to the well-being of the industry</i> " and refers to enactment of race fields legislation as " <i>enhanc[ing] our ability to protect racing industry revenue</i> ".	
10.1.06	Gaming licence with a betting exchange endorsement issued to Betfair pursuant to s 76I of the <i>Gaming Control Act 1993</i> (Tas)	J[263]-[264]

Date	Event	AB reference
	taking effect on 7 February 2006. Licence authorises Betfair to operate a betting exchange at its Hobart premises by means of a computer connected to the internet or a telephone.	
16.6.06	Betfair begins to operate its betting exchange from its premises in Glenorchy, Tasmania by means of a telephone call centre accessible to persons using a telephone from anywhere in Australia.	J[270]
10 June 2006	HRNSW Annual Report of 2006 welcomed the introduction of race fields fees as providing protection to industry although it noted that the introduction of the legislation does not in itself prohibit betting exchanges.	
28.8.06	Betfair commenced operating its betting exchange by means of a computer server located in Glenorchy, accessible to persons using a computer connected to the internet from anywhere in Australia and overseas.	J [270]
20 21.11.06	<i>Racing Legislation Amendment Act 2006</i> (NSW) No 91 enacted to introduce the offence of publishing a NSW race field without a race field publication approval, which approval was to be granted by racing control bodies. Second reading speech for the Act provides that “ <i>the main purpose of the race fields proposal is to address the issue of ungering operators free riding on New South Wales racing events</i> ” and “ <i>to encourage the ongoing viability and future economic development of the racing industry</i> ”. Relevant provisions do not commence until 1 July 2008.	J[91]
28.11.06	Betfair gives Racing NSW a detailed explanation of the effect on Betfair of a fee condition based on “back bet” turnover.	
30 Late 2006 to June 2008	Development of race fields regulations by representatives of racing control bodies and the NSW Office of Liquor, Gaming and Racing (OLGR).	
20.12.06	Meeting of the Board of Racing NSW. CEO report to Board proposed a race fields fee regime as follows: no fee payable on face-to-face fixed odds betting; a 2-2.5% turnover levy payable on telephone and internet fixed odds betting (with betting exchange turnover identified as calculated on the amount of the ‘back’ as distinct from the ‘lay’ part of the transaction); and 4.5% of turnover on totalizator betting with a full credit for totalizator operators who had financial arrangements with the racing industries in each of the States and Territories, including TAB Ltd.	
40 16.4.07	Letter from Betfair to Racing NSW enclosing draft proposal in relation to race fields fees. Betfair proposes to make an economic contribution on the same basis as it does in Victoria, or on basis of gross revenue if it will not receive a credit for payments made in other States.	
23.4.07	CEO report to the Board of Racing NSW set out the proposal by Betfair in relation to the fee condition to be imposed on any approval to publish pursuant to the RA Act.	
May 2007	CEO report to the Board of Racing NSW for its 21 May 2007 meeting contains first detailed proposal for an “in-principle policy position” to be adopted by Racing NSW in relation to the fee condition for race field approvals. The proposed fee scale, applicable to both fixed odds and totalizator wagering, was divided between face-to-face betting (\$0 for the first \$25 million and 1.5% of turnover after that, save that there was no threshold applicable to face to face betting at betting auditoriums) and	

Date	Event	AB reference
	telephone and internet betting (1.5% of 'back bet' turnover) with no credit for payments made in the wagering operator's licensing State or Territory. Estimates of revenue from the proposal do not show any anticipated revenue from TAB Ltd. The proposal was anticipated to have an adverse impact on only 6 New South Wales bookmakers with the remainder benefiting to varying degrees.	
21.5.07	Racing NSW Board resolved that the recommendations of the Chief Executive be accepted in principle subject to legal advice and appropriate consultation with Tabcorp.	
22.5.07	Business and Strategy Committee meeting at which the CEO of Tabcorp is recorded as stating that to compete with price sensitive competitors and keep customers it was necessary to develop a strategy to " <i>stop business moving and keep[] turnover within [NSW]</i> "; followed by a report by Racing NSW to Tabcorp of proposed position on race fields legislation.	
16.7.07	CEO report to the Board of Racing NSW, repeating proposal in May 2007 report and adding that no levy was payable on the first \$1 million of 'back bet' turnover (for telephone and internet betting). Reports Tabcorp's view that while Tabcorp may be faced with a \$6 million payment [referring to the possible 'reciprocal' imposition of fees by interstate authorities, not the Racing NSW fee], " <i>it believes that the proposal would be in its overall best interests on the basis that the corporate bookmakers and betting exchanges will be required to make financial contributions to the industry. In this regard it believes that the proposed fee structure will create a more level playing field and enable it to become more competitive with its competitors increasing thereby its profitability who currently operate with an unfair financial advantage.</i> "	
30.8.07	Letter from HRNSW to OLGR commenting on drafting of regulations under RA Act for race fields fees; describes intended fee regime of nil fees on face to face betting, and 1.5% of 'back bet' turnover for telephone and online betting.	
6.9.07	Letter from Tabcorp to NSW Minister for Gaming and Racing. Refers to " <i>NSW wagering revenue [being] unfairly lost to other jurisdictions</i> " as the result of competition from interstate wagering operators. Advocates banning of betting exchanges and imposition of a fee on wagering operators using NSW race field information to offer fixed odds betting.	
31.10.07	Media release from HRNSW records a concern that the introduction of betting exchanges would have a negative financial impact on the NSW racing industry.	
12.11.07	Letter from Tabcorp to NSW Premier expressing concerns about leakage of revenue away from NSW and advocating introduction of a fee of 1.5%-2% of turnover on corporate bookmakers and betting exchanges.	
19.11.07	CEO report to Board of Racing NSW meeting. Reports on meeting between the Chairs of Racing NSW, HRNSW and GRNSW where the Chairs agreed that due to pressures on TAB Ltd's business by " <i>internet bookmakers and betting exchanges with lower cost structures and no product fees</i> ", the three racing codes should control pricing for the use of their product under the umbrella of the race fields legislation.	
18.12.07	Paper by Tabcorp on the topic of revenue leakage presented to meeting of Board of Racing NSW and summarised in the CEO report to the Board of Racing NSW. CEO report also refers to letter from Tabcorp to Premier of NSW dated 12 November 2007	Discussed at JJ[223]-230]

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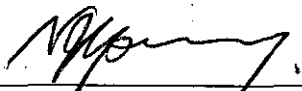
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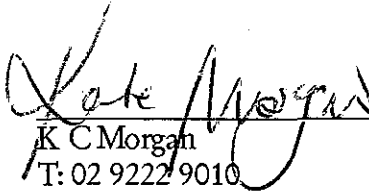
Date	Event	AB reference
	and records that Tabcorp's suggestion that " <i>all interstate operators should be required to pay a levy of between 1.5% to 2.0% for the use of NSW race fields ... is in line with Racing NSW's recommendations.</i> "	
27.3.08	Decision of High Court in <i>Betfair v Western Australia</i> (2008) 234 CLR 418.	N/A
18.5.08	CEO report for the Board of Racing NSW recording the earlier proposal for race fields fee has been amended to eliminate the exclusion for face-to-face betting from liability to pay any fee and replaced with a \$5 million turnover threshold. The report estimated Racing NSW's revenue from the amended proposal and included a nil payment from TAB Ltd.	
5.6.08	Letter from Betfair to the NSW Minister for Gaming and Racing, the OLG and NSW Department of the Arts, Sports and Recreation copied to Racing NSW and HRNSW. Letter argues against implementing a race fields fee based on back bet turnover and states that fee of 1% of back bet turnover would equate to approximately 60% of Betfair's total revenue (i.e. customer expenditure) where 1% of back bet turnover would equate to 6-7% of revenue of totalizators.	
11.6.08	Board of HRNSW resolves that a fee of 1.5% of back bet turnover be charged to wagering operators who derive a commercial benefit from the use of NSW harness race fields.	J[99]
18.6.08	CEO report to the Board of Racing NSW reiterated proposal put forward to the board in May 2008: 1.5% of back bet turnover with a \$5 million threshold and presents an analysis of the impact of the proposed race fields fee of 1.5% of back bet turnover (Sensitivity Analysis). The Sensitivity Analysis recorded (among other things) that the proposed race fields fee would " <i>directly impose additional costs on corporate bookmakers and betting exchanges</i> " and " <i>represent a significant proportion of the revenue margin ... currently being realised by [those] operators,</i> " and stated that it expected those operators would take action to mitigate effects including by increasing revenue margin (that is " <i>an increase in player losses per dollar bet</i> " which could be expected to reduce the amount that punters bet with these operators " <i>as the 'cost' of wagering is increased</i> ").	Discussed at J[218]-[221]
18.6.08	Racing NSW resolved at a board meeting to approve a fee of 1.5% of back bet turnover in excess of \$5 million per annum being imposed on all wagering operators who were given approval to publish NSW thoroughbred race fields.	J[93]
June 2008	HRNSW annual report for 2008 describes race fields regime as introduced to " <i>support the racing industry in reducing [revenue] leakage to corporate bookmakers and other parties ...</i> "	J[232]- [235]
1.7.08	<i>Racing Legislation Amendment Act 2006</i> (NSW) No 91 commenced. The relevant amendments to the <i>Racing Administration Regulations 2005</i> (NSW) also commenced.	J[90], [316]
9.7.08	Board of HRNSW again resolved that a fee of 1.5% of back bet turnover be charged to operators who derive a commercial benefit from the use of NSW Harness race fields.	J[99]
25.7.08	Racing NSW resolved to endorse previous decisions in respect of conditions relating to fees to be imposed on race fields publication approvals granted by Racing NSW to wagering operators, being 1.5% of the wagering operator's wagering turnover i.e. back bet turnover on NSW thoroughbred race	J[95]


Date	Event	AB reference
	meetings to the extent that turnover exceeds an "exempt turnover threshold" of \$5 million over a financial year.	
July 2008	Submission made by HRNSW to Cameron Inquiry including that <i>"it would not be in the best interests of harness racing if any regulatory change adversely affected the TAB Ltd wagering business."</i>	J[232]- [235]
31.7.08	Submissions to Cameron Inquiry by Betfair, Tabcorp, Racing NSW. Tabcorp's submissions advocate race fields fees based on turnover. The BCG report accompanying Racing NSW's submissions state that race fields fees may have significant impact on lower priced operators.	
5.8.08	Betfair applied to Racing NSW for an approval to publish NSW thoroughbred race fields. Letter accompanying application noted that wagering turnover as defined in the regulations has no fixed relationship with the gross revenue received by Betfair, and that from the previous 12 months it would be the equivalent of 60% of Betfair's gross revenue received (being the total of all commissions prior to the payment of GST).	J[97]
12.8.08	Meeting between A Twaits (Betfair) and P V'landys (Racing NSW) in which, responding to Mr Twaits' statement that <i>"this turnover fee would decimate our racing business"</i> , Mr V'landys stated <i>"Why don't you just increase your prices."</i>	
31.7.08 and 21.8.08	Betfair applied to HRNSW for an approval to publish NSW harness race fields. Letter accompanying application noted that wagering turnover as defined in the regulations has no fixed relationship with the gross revenue received by Betfair and that for the previous 12 months it would be the equivalent of 55% of Betfair's gross revenue received (being the total of all commissions prior to the payment of GST).	J[100]
31.8.08	Betfair granted approval to publish NSW greyhound race fields subject to a condition that Betfair pays the lesser of 10% of its "gross margin" and 1.5% of back bet turnover in connection with NSW greyhound races in monthly instalments for the duration of the approval. "Gross margin" is defined to mean Betfair's commission or any rebate or other revenue received or credited in connection with wagering transactions in connection with NSW greyhound races during approval period.	
1.9.08	Betfair's HRNSW approval granted for the two year period from 1 September 2008 to 31 August 2010 on condition that Betfair pay to HRNSW a fee of an amount equal to 1.5% of the Approval Holder's NSW Harness Turnover for the duration of Approval in installments.	J[100]
17.9.08	CEO report to HRNSW Board describes submission by Betfair that Betfair pay the race fields fees to HRNSW on the same basis as Betfair pays such fees to GRNSW. States that while <i>"pragmatic course of action would be to avoid litigation by revising the charging model ... the moral dimension ... of such a position would be an abandonment of Racing NSW..."</i> .	
November 2008	Report prepared by Alan Cameron AM for the NSW Minister for Gaming and Racing titled <i>"Correct Weight? A review of wagering and the future sustainability of the NSW racing industry"</i> . Expresses view that NSW racing regulatory environment is essentially protectionist.	

Date	Event	AB reference
3.12.08	<i>Racing Administration Amendment Act 2008</i> (NSW), Sch 1[11] reference to "publication" amended to "use".	J[92], [211]
22.6.09	Betfair's 2009 Racing NSW Approval granted, requires payment of monthly installment of \$241,370.	J[98]
25.11.09	TAB Ltd and Racingcorp (as agent for Racing NSW, HRNSW and GRNSW) enter into a Deed of Release which provides for the refund of an amount equivalent to the amount of the race fields fees paid by TAB Ltd pursuant to race fields approvals granted to TAB Ltd by Racing NSW, HRNSW and GRNSW for the period 1 September 2008 to 30 June 2009.	
18.11.09 – 1.12.09	Hearing at first instance before Justice Perram.	
16.6.10	Judgment at first instance (<i>Betfair v Racing NSW</i> (2010) 268 ALR 723).	
23.6.10	Productivity Commission Final Report on Gambling, which concluded that "turnover-based fees will tend to either drive low margin operators out of business or compel them to change their business models and increase their prices to punters. In short, turnover-based fees (if universally applied) discourage price competition."	
27.09.10 – 29.09.10	Hearing of appeal before the Full Court of the Federal Court.	
17.11.10	Judgment on appeal (<i>Betfair v Racing NSW</i> (2010) 189 FCR 356).	
11.3.11	High Court grants special leave to appeal	

Dated: 8 April 2011


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