HIGH COURT OF AUSTRALIA
FILED
13 MAY 2011
THE REGISTRY ADELAIDE

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No: S116 of 2011

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN

BETFAIR PTY LTD
ACN 110 084 985

Appellant

- and -

RACING NEW SOUTH WALES
ABN 86 281 604 417

First Respondent

- and -

HARNESS RACING NEW SOUTH WALES
ABN 16 92 976 373

Second Respondent

- and -

ATTORNEY-GENERAL FOR NEW SOUTH WALES

Third Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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Part I - Certification:

1. This written submission is in a form suitable for publication on the Internet.

Part II - Basis of intervention:

2. The Attorney-General for the State of South Australia ("South Australia") intervenes pursuant to s78A of the *Judiciary Act 1903 (Cth)* in support of the Respondents.

Part IV - Applicable Constitutional provisions, statutes and regulations:

3. South Australia has nothing to add to the references provided by the parties.

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Part V - Argument:

4. In summary, the submission of South Australia is as follows:

   4.1 it cannot be concluded in this case that interstate trade and commerce is subjected by the race fields fee to a discriminatory burden;

   4.2 if, and to the extent that, the Appellant invites this Court to excise notions of protectionism from the test applicable in determining whether or not s92 is offended, such-invitation should be rejected.

20 **i. Section 92**

5. It is inconsistent with its history to treat s92 as aimed at ensuring equality for individuals throughout Australia, or preferential treatment for trade and commerce "among the States", or as aimed at conditions within State boundaries.[1] 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.[2]

6. The object of s92 was identified as prohibiting protectionism:

30 > 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.[3]

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

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1 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 390-1 (The Court).
2 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 391 (The Court).
3 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 393 (The Court).

guarantee of anarchy.[4] 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.[5] 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.[6]

And:

> ... The history of s92 points to the elimination of protection as the object of s92 in its application to trade and commerce. The means by which that object is achieved is the prohibition of measures which burden interstate trade and commerce and which also have the effect of conferring protection on intrastate trade and commerce of the same kind. The general hallmark of measures which contravene s92 in this way is their effect as discriminatory against interstate trade and commerce in that protectionist sense. ...[7]

7. This approach was the product of constitutional interpretation making use of history and the Convention debates.[8] 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.[9] This approach may direct attention

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4 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 393-4 (The Court) citing *Duncan v Queensland* [1916] HCA 67; (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 (Lord Pearce).

5 *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). This gives rise to questions of substitutability analysis; *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [4] (Gleeson CJ, Gummow, Hayne, Kirby, Crennan and Kiefel JJ).

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

7 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 394 (The Court).

8 *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.

9 *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] HCA 41; (1945) 71 CLR 29 at 81 (Dixon J); *Attorney-General (NSW) v Brewery Employees Union of NSW* [1908] HCA 94;

from the framer's "policy regarded, it is said, as basal to the federation".[10] That policy was, in effect, that free trade between the colonies was a *sine qua non* of federation.[11] That is, as was said in *Betfair*, to recognise the intended link between political federation and economic federation.[12] 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;[13]
ii. that s92 may be offended by the economic consequences of a law;[14]
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;[15]
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.[16]

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".[17]

(1908) 6 CLR 469 at 610 (Higgins J); *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* [1975] HCA 45; (1975) 134 CLR 559 at 615 (Mason J).

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

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

12 *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).

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

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

15 *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).

16 *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).

17 *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

8. However, 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.[18] Trade and commerce 'among the States' may vary from the actual crossing of the border[19] to everything which happens in the course of an interstate activity from beginning to end.[20] Thus, a law which on its face applies to, or is inseparably connected to, movement across a border, and imposes an impediment thereon is, *prima facie*, invalid.

10 9. Further the prohibition in s92 is not formal.[21] A law or executive act which in its terms does not operate on movement across a border in the sense explained, but which in its operation or effect impedes such movement, will be valid only if it has an object or purpose which is not to impede such movement and the impediment which it imposes on such movement is not disproportionate to that object.[22]

10. 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
20 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 s92 if the discrimination is of a protectionist character. A law which

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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).

18 *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).

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

20 *W & A McArthur Ltd v Queensland* [1920] HCA 77; (1920) 28 CLR 530 at 549 (Knox CJ, Isaacs and Starke JJ) ; *Australian Coarse Grain Pool Pty Ltd v Barley Marketing Board* [1985] HCA 38; (1985) 157 CLR 605 at 626-628 (Mason J).

21 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 399 (The Court) citing *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* [1975] HCA 45; (1975) 134 CLR 559 at 588-9, 602, 606-7, 622-3.

22 *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 471-2 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

> 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 s92. 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 s92.[23]

Here 'object' refers to the mischief to which the law is directed.[24] Further, the concept of discrimination involves the departure from equality of treatment (i.e. differential treatment as between interstate and intrastate trade).[25]

11. 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 s92. 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 the law may show that the true purpose of the law is not to attain that object but to impose the impermissible burden.[26]

12. This approach (i.e. that set out at [10] & [11] 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.[27] Thus the correct approach is to consider the practical effect

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23 *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).

24 *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).

25 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 399 (The Court); *Castlemaine Tooheys Ltd v South Australia* [1990] HCA 1; (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ).

26 *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).

27 *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*

the impugned law has in terms of the imposition of a competitive advantage or disadvantage 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".[28] The required interstatedness is determined by identifying the location of those occupying the demand and supply sides of the relevant commerce and the differential application of the impugned law or executive act upon them. Of course, the market in relation to which they occupy either the demand or supply side is one which must involve the movement of tangibles or intangibles across borders. In the 'new economy' the interstate element is often more readily satisfied than in earlier times.

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13. 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;[29]

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;[30]

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
20 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:
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> > "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*.[31] (footnotes omitted).

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ii. **A discriminatory burden on interstate trade and commerce?**

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).

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

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

30 *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).

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

14. The Appellant contends that as an interstate supplier of wagering services participating in the national market for the supply of wagering services on New South Wales thoroughbred and harness races, it is discriminated against in comparison to the New South Wales TAB by the practical effect of the imposition of the New South Wales race fields fee. That practical effect is a reduction in commission earned by the Appellant of between 54% and 61% in comparison to a reduction of 9% for the TAB.[32] It is then contended that the consequence to be inferred from such reduction is the future loss of competitiveness.[33]

15. The Appellant does not contend that it has sustained loss of market share since the incursion of the race fields fee.[34] Implicitly the Appellant concedes that whilst the status quo remains it cannot be said that the imposition of the fee operates as an impediment to the movement of the services it supplies across the border. That is, whilst the status quo is maintained, the fee does not result in the imposition of a competitive disadvantage upon the Appellant in comparison to others who also occupy the supply side of the market in wagering services on New South Wales thoroughbred and harness races and who are present in New South Wales.[35] As at today, therefore, the fee does not discriminate against interstate trade and commerce.[36]

16. Impact in terms of competitiveness is linked in this case, as both the Full Court and the Respondents observe, to choice of business model and choice of business practice. It is not that the fee in effect treats unequals equally. It treats all who enter the market on the supply side equally. Difference arises from the choice made as to the way in which the supplier chooses to participate in the market in the light of the imposition of the fee. All that has occurred is the imposition of a new fee. Hence the absence of change in business practice to date by both TAB and the Appellant has resulted in no change in market share or competitiveness that can be considered a function of the imposition of the race fields fee.

17. As the Full Court observed:

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32 Appellant's submissions at [6]-[11], [45]-[47], [49]. See also *Betfair v Racing New South Wales and Anor* [2010] FCA 603 ; (2010) 268 ALR 723 at [118]-[136].

33 Appellant's submissions at [49]-[50].

34 First and Second Respondent's submissions at [35].

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

36 That is not to deny that the fee has a differential effect on low margin wagering service providers in comparison to high margin wagering service providers. It clearly does. However, the constitutional guarantee contained in s92 is not offended by differential treatment that has an impact on an interstate trader but not their interstate trade. As the Full Court said, "Section 92 operates to protect interstate trade, not individual traders"; *Betfair v Racing New South Wales and Anor* [2010] FCAFC 133; (2010) 189 FCR 356 at [95].

> No disturbance of competition is shown merely by showing that the percentage of the turnover of a low margin operator captured by an impost is greater than the percentage taken from a high margin operator.[37]

No imposition on the movement of services across the border is evident. Thus, the fee does not discriminate against interstate trade and commerce.

18. This case is not analogous to *Fox v Robins*.[38] There the discriminatory effect of the licence fee on the sale of wine the product of fruit grown outside Western Australia in Western Australia was apparent on the face of the legislation. The impugned legislation did not treat equals (those on the supply side of the market for the retail sale of wine to Western Australian consumers) equally (those who wished to sell wine the product of fruit grown outside Western Australia paid a higher licence fee). The licence fee operated in form and substance to impede the interstate movement of goods by reason of their origin being from outside Western Australia. That is not this case. Here the fee is *ex facie* neutral. It has not been shown in substance to impede the movement of services across borders. The Full Court was correct in distinguishing *Fox v Robins*.[39]

19. The Appellant contends that the likely effect of the fee on its ability to compete on the supply side of the wagering service market for New South Wales thoroughbred and harness racing is negative in that it must either:

    i. absorb the cost of the fee leaving it 40c in each dollar of gross revenue to pay its remaining costs with the result that it will sustain a significant reduction in profitability which will impact upon its competitiveness, or

    ii. pass the costs on to its punters leaving it vulnerable to a loss in market share as punters opt to wager with those offering cheaper products.[40]

    A third option is to do nothing, absorbing the cost and relying upon the contribution that a less profitable presence in the market for New South Wales thoroughbred and harness racing has in terms of contributing to the profitability of other services. A further option is to do nothing in expectation that the TAB will raise its costs with the consequence, depending upon demand elasticity, of attracting punters away from the TAB resulting in an increase in market share and profitability.

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37 *Betfair v Racing New South Wales and Anor* [2010] FCAFC 133; (2010) 189 FCR 356 at [94].
38 *Fox v Robins* [1909] HCA 81; (1908) 8 CLR 115.
39 *Betfair v Racing New South Wales and Anor* [2010] FCAFC 133; (2010) 189 FCR 356 at [91].
40 Appellant's submissions at [50].

20. The point is that the availability of other choices which do not result in a loss of competitiveness suggests that the impact of the fee cannot so easily be characterised as discriminatory against interstate trade and commerce. In s92 discourse characterisation goes beyond notions of sufficiency of connection to include purpose which then requires a consideration of means and end. Here there may in fact be no disturbance in competitive relativities. That is, both means and end may be competitive neutral. It follows that reliance by the Appellant on the inferences it invites this Court to draw is insufficient to make out its case.

21. The Appellant then contends that it is enough that the facts inferred are likely. Whether or not the standard for the ascertainment of a constitutional fact can be framed in terms of what is 'likely' or the 'tendency' of something to occur is arguable.[41] It must be remembered that the authorities relied upon for the proposition were cases involving questions reserved or the statement of a special case and not the product of a trial in which the parties were at liberty to call all relevant evidence and test the same. That is not to contend that the Court is constrained in its ascertainment of constitutional facts by the fact that a trial has occurred. It is to observe that some cases, particularly practical effects cases of which this is one, may be evidence dependant in order that the particular interstate trader bring him or herself within the constitutional guarantee.[42]

22. In any event, the 'to be inferred likely outcome' of future action contended cannot be accepted without more. Too many contingencies arise as contended by the First and Second Respondents [43] and the Appellant's comparison between itself and one intrastate trader is too simplistic for the reasons advanced by the Third Respondent.[44]

23. As set out above the correct approach as required by *Cole v Whitfield* and developed further in *Betfair* is to consider the practical effect the impugned law has in terms of the imposition of a competitive advantage or disadvantage 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

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41 In this connection the history of the Inter-State Commission's gestation in the convention Debates and its brief appearance in the second decade of the federation shed some light on the relationship between s92 and the High Court, particularly in terms of fact finding. The intention was that someone deal with questions of preference, discrimination and protectionism on a factual level, at least because the nature of any inquiry into whether the guarantee had been violated, the complex factual questions raised thereby and the expertise required to undertake such an inquiry; A S Bell, *Section 92. Factual Discrimination in the High Court* (1991) 20 Fed LR 240.

42 In this connection see Mason CJ's lament as to what is 'self-evident'; *Barley Marketing Board of New South Wales v Norman* HCA Transcript 5 and 6 June 1990 at 102, 117. See also A S Bell, *Section 92. Factual Discrimination in the High Court* (1991) 20 Fed LR 240 at 249.

43 First and Second Respondents' submissions at [56].

44 Third Respondent's submissions at [59]-[71].

particular time".[45] The Appellant has not adequately done so. Thus the Full Court was, with respect, correct in its observation:

> [92] The authorities direct attention to the question whether the substantial effect of the imposition of the fee is to impose a burden which so disadvantages the provision of interstate wagering services by betting exchanges such as Betfair or interstate bookmakers, as to raise a protective barrier around wagering services provided by traders in New South Wales. Betfair seeks to answer this question by pointing to the fact that the fee takes a greater percentage of Betfair's commission than it takes of TAB's commission. To make this arithmetical point is not to show that the fee disadvantages interstate bookmakers or betting exchanges (which may or may not use the same low margin business model as Betfair) so as to protect the TAB and intrastate bookmakers from interstate competition. Nor is it even to show that Betfair is not able to continue to enjoy any competitive advantage which it enjoys by reason of its business model. By limiting its case to the arithmetical point to which we have referred, Betfair eschewed the "questions of fact and degree" with which it was required to engage if it was to make good its case of discrimination in fact.[46]

24. For the reasons advanced by the Respondents, neither *Bath v Alston Holdings Pty Ltd* nor *Castlemaine Tooheys v South Australia* assist the Appellant.[47]

25. South Australia contends that there is no basis upon which it can be held that the race fields fee discriminates against interstate trade in that it in effect operates as an impediment to the movement across borders of the supply of wagering services on New South Wales thoroughbred and harness races.

iii. Is a separate concept of 'protectionism' still required?

26. There are commentators who consider that s92 was included in the Constitution in order to create a common market. They contend that, consistent with this purpose, laws which discriminate against interstate trade and commerce should be *prima facie* struck down as offensive to s92 irrespective of whether a protectionist intent can be shown. It is said:

> The narrowness of the scope of [the existing test] excludes many laws and measures from the jurisdiction of s92 even though their purpose and effect may be to restrict the common market ...[48]

27. In this case the Appellant contends that the imposition of the race fields fee subjects it, an out-of-state provider of wagering services, to a competitive disadvantage *vis a vis* the in-state TAB.

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

46 *Betfair v Racing New South Wales and Anor* [2010] FCAFC 133; (2010) 189 FCR 356 at [92].

47 First and Second Respondents' Submissions at [61]-[63]; Third Respondent's Submissions at [61]-[71].

48 G V Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008) 121, 133-5; G V Puig, *A European Saving Test for Section 92 of the Australian Constitution'* (2008) 13 Deakin LR 99. See also D Rose, *Federal Principles for the Interpretation of Section 92 of the Constitution* (1972) 46 ALJ 371 where at 374 he says: 'The discrimination might be intended to serve protective purposes ... but even if it is not actually intended to serve such purposes it can nevertheless be reasonably held to infringe the "free trade" purpose of s92'. See also, C Staker, *Section 92 of the Constitution and the European Court of Justice*, (1990) 19 Fed LR 322 and P H Lane, *The Present Test for Invalidity Under Section 92 of the Constitution*, (1988) 62 ALJ 604.

On the Appellant's case, this competitive disadvantage may itself be sufficient to enliven s92 on the basis that either:

(a) it is, given its scale, a discriminatory burden of a type which the Court may accept has an inherently protectionist purpose and effect;[49]

(b) because it cannot be justified by reference to a legitimate non-protectionist purpose, it may be characterised as protectionist.[50]

Either approach suggests that it may be unnecessary, at least in this case, to establish 'discriminatory protectionism' over and above discrimination alone. It is not clear whether the Appellant contends that the requirement that discrimination be of a protectionist kind should be abandoned.

28. In *Cole v Whitfield* the Court said:

> The adoption of an interpretation prohibiting the discriminatory burdening of interstate trade will not of course resolve all problems. It does, however, permit the identification of the relevant questions and a belated acknowledgment of the implications of the long-accepted perception that "although the decision [whether an impugned law infringes s92] was one for a court of law the problems were likely to be largely political, social or economic": *Freightlines & Construction Holding Ltd.* Inevitably the adoption of a new principle of law, though facilitating the resolution of old problems, brings a new array of questions in its wake. The five traditional examples of protection of domestic industry which we gave earlier are by no means exclusive or comprehensive. The means by which domestic industry or trade can be advantaged or protected are legion. The consequence is that there will always be scope for difficult questions of fact in determining whether particular legislative or executive measures constitute discriminatory interference with interstate trade. And acquisition of a commodity may still involve the potential for conflict with s92. That problem does not now arise.[51] (footnote omitted)

29. It would not be inconsistent with the history and context of s92 as discussed in *Cole v Whitfield* to develop the test therein prescribed to reflect 21st century risks to the viability of the economic aspect of political unity necessarily contemplated by the federal compact. That is, where the framers were concerned with late 19th century risks to economic unity wrapped up in the concept of protectionism as then understood, it would be appropriate, as foreshadowed in the quotation taken from *Cole v Whitfield* above, to frame the test in terms of contemporary protectionist methods that impede economic unity. Indeed, as much is contemplated in *Betfair Pty Ltd v Western Australia*[52] and was foreshadowed by Mason J, as he then was in the *North Eastern Dairy* Case:

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49 Appellant's submissions at [101].

50 Appellant's submissions at [53], [54], [102].

51 *Cole v Whitfield* [1988] HCA 18; (1988) 165 CLR 360 at 408-9 (The Court).

52 *Betfair Pty Ltd v Western Australia* [2008] HCA 11; (2008) 234 CLR 418 at [12]-[20] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

> The freedom guaranteed by s92 is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900: it is a concept of freedom which should be related to a developing society and to its needs as they evolve from time to time.[53]

Thus, what was a matter of discrimination in a protectionist sense becomes discrimination between intrastate and interstate traders that impedes access to and effective competition in markets the supply and demand side of which concern the movement of tangibles and intangibles across borders. The saving test would be similarly modified. Such modification of the test of invalidity would not assist the Appellant in this case.

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30. Of course, this is also not to abandon the concept of protectionism so much as to, perhaps, update it. Such update is faithful to those matters of history and context alluded to in *Cole v Whitfield*.

31. While development of the test warrants consideration, the following considerations need to be taken into account before any wholesale rejection of protectionism as a component of the test were to occur.

32. The view that s92 is intended to guarantee against any laws which restrict the common
20 market is arguably inconsistent with the view of history taken by this Court in *Cole v Whitfield*, as set out in paragraph [6] above. An absence of protectionism is (and was) the true object of s92, and therefore any test upon which to base s92 invalidity should arguably retain protectionism or the notion of unnecessary risk to economic unity at its core. As was observed in *Betfair Pty Ltd v Western Australia*:

> [32] The domestic aspect of trade and fiscal policy was not dealt with so readily. Looking at the subject of domestic protectionism and the operation of s 92, it may be suggested that the emergence of global institutions, including the International Labour Organisation (1919), the General Agreement on Tariffs and Trade (1947) and the World Trade Organisation (1995), some of
> 30 which appear to be premised on the economic value of "free trade", is a development which properly fuels "an implicit assumption that anti-protectionist rules in national legal systems share that same normative foundation". However, domestic political pressures in the Australian colonies and the Imperial context in which the colonies conducted their affairs meant that more was involved in the formulation of s 92.[54] (footnote omitted)

33. The role of the Court in applying s92 is also pertinent. The Court is not, via matters brought before it raising potential s92 invalidity, intended to actively foster the development of

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53 *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* [1975] HCA 45; (1975) 134 CLR 559 at 615 (Mason J).

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

national markets by ensuring the equality of treatment of all relevant participants. Coper notes:

> [T]he Court assumes a narrower and more workable role as the enforcer of one aspect of the achievement of economic unity in a federal system, the prevention of state protectionism resulting from the imposition of discriminatory burdens on interstate trade. If this be thought to be too narrow, it should be remembered that other kinds of laws or practices that detract from the achievement of an internal common market or otherwise threaten national economic unity (usually state laws or actions ...) may require different remedies, such as overriding national legislation or uniform agreement among the states.[55]

34. Considerations of constitutional context are also significant. In this regard s102 speaks of "undue or unreasonable" "preference or discrimination", the effect of which may be unjust to a State. Similarly s104 deals exclusively with preferential railway rates, a notorious example of colonial protectionism. Section 99 expressly prohibits the Commonwealth from legislating so as to preference one State or part thereof over any other in trade, commerce or revenue matters. Section 92 is therefore one of a suite of constitutional provisions intended to underpin the development of a common market as part of the political cooperation in the federation, and it need not be given a particularly prominent role in this context. Further, it is normally the case that where the Constitution protects against discrimination *simpliciter* it says so (e.g. ss 99, 102 & 117).

35. Further it is relevant to consider whether the jettisoning of the need to establish protectionism in s92 cases would conceivably improve the clarity of the section's application. If the protectionist requirement were removed, the invalidity test might ask simply whether there is discrimination either on the face of the impugned measure or in its effect. If this is answered in the affirmative, one may proceed to consider the saving test, namely whether the measure can be considered reasonably necessary, appropriate or adapted to a non-protectionist object. However it is not certain that such a test would necessarily be more straightforward to apply in practice, nor is it likely to yield different results. The current perceived difficulties with establishing 'protectionism' are likely to arise either as part of the assessment of whether there is any, or sufficient, discrimination for s92 purposes, or whether the impugned measure can be characterised as having a protectionist object for the purpose of the saving test.

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[55] M Coper, *'Freedom of Interstate Trade and Commerce'*, in T Blackshield, M Coper and G Williams (Eds), The Oxford Companion to the High Court of Australia (2002) 354 at 356.

36. While the establishment of discriminatory effect against interstate trade as compared to intrastate is critical to the application of s92, retaining the protectionism requirement assists, in most cases, in the identification of the unique type of discrimination that is required.[56] It is faithful to the intent of the framers and in particular the intention that not all power to regulate trade and commerce among the States be removed from the States. The notion of 'discrimination' does not sufficiently allow for this on its own.

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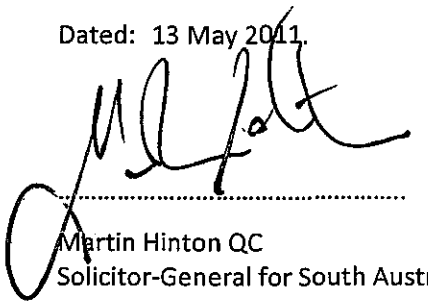
Dated: 13 May 2011.



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[56] The written submissions of the Third Respondent at [30]-[35] are adopted in relation to this point.