IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S116 of 2011**

BETWEEN

BETFAIR PTY LTD
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

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Date of Document: 6 May 2011

Filed on behalf of 1st & 2nd Respondents by
Yeldham Price O'Brien Lusk
Level 2, 39 Martin Place
Sydney NSW 2000

DX 162 SYDNEY
Tel: 02 9231 7000
Fax: 02 9231 7005
Reference: TRP:PAC:1645

Part I: Certification

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

Part II: Issues

2. The following issues arise on this appeal:

   a. Is the appellant (**Betfair**) able to succeed in challenging the impugned fee conditions without challenging the *Racing Administration Act* 1998 (NSW) (the **Act**) or the Racing Administration Regulation (NSW) (the **Regulation**)?

   b. Is it sufficient to prove a contravention of s 92 for Betfair to prove that the facially neutral impugned fee conditions had a greater effect on Betfair's "gross revenue" vis-à-vis the "gross revenue" of TAB?

   c. Does Betfair need to prove that the impugned fee has an impact on interstate trade or a tendency to inhibit competition in a national market?

   d. Can the impugned fee be characterised as protectionist simply because it has a differential impact on a single interstate trader (Betfair) vis-à-vis a single local trader (TAB), where that difference arises between high margin and low margin operators, and there are many traders in the market, including local low margin operators and interstate high margin operators?

   e. If there is a difference in effect between high margin and low margin operators, can the impugned fee be characterised as protectionist if that distinction has no connection with a trader's status as an interstate trader?

   f. Did the Respondents have a protectionist purpose in selecting turnover rather than "gross revenue" as the metric for calculation of the impugned fee and, if so, is that relevant to the s 92 inquiry?

   g. Is the impugned fee reasonably appropriate and adapted to a legitimate object?

3. These questions include the issue posed in AS[3(a)], and the questions raised by the draft notice of contention on which the Respondents seek to rely. The Respondents say that the issue in AS[3(b)] does not arise because the Full Court did not so hold (see para 64 below).

Part III: Notice under s 78B of the *Judiciary Act 1903*

4. Section 78B notices have been issued. The Respondents do not consider that any further s 78B notice is required.

Part IV: Facts

5. The centre of Betfair's case is its concept of "gross revenue" which, as applied to it, means no more than the sum total of the commissions received by it in the course of providing wagering services on NSW races. Betfair's claim is that a facially neutral fee will contravene s 92 if it has an arithmetically different impact on the "gross revenue" of a single interstate trader vis-à-vis a single intrastate trader at a given time, without proof of anything more. Part VI below sets out the reasons why this must be wrong on any view of s 92.

6. However, Betfair's case fails on an anterior matter, namely, its suggestion that whether the impugned fee is relevantly discriminatory must be assessed by focusing upon its

impact upon "gross revenue" rather than its treatment of the money flow by reference to which it is calculated – that is, wagering turnover. The facts in this case afford no basis for thinking that "gross revenue" should thus be privileged. Nor do they afford any basis for concluding that the impugned fee operated adversely upon competition in a national market or on interstate trade.

A. The nature of the relevant market and the use of race field information

7. To describe the relevant market in this case as the national market for wagering services, while in one sense correct, is apt to conceal the complexities that attend the different ways in which wagering operators attempt to win turnover and turn it to profit. This can be explained in the following simplified form. From the punter's perspective, assume he or she wants to bet $100 on horse A to win in race 1, the options are:

   a. If bet with a totalisator, that $100 will be pooled with all other win wagers on each horse in race 1; the totalisator will take out of the total pool a percentage amount which it uses to cover all of its costs, fees, taxes and leave a profit element. (Betfair's CEO, Mr Twaits, conceded that taxes and payments to the racing industry under the RDA by TAB constituted approximately 66% of TAB's commission: D4 T104-5 (FCAB 4588-4589). The take-out percentage of the pool will be fixed for each race in advance, but can vary between races. If horse A wins, the ultimate odds received by the punter are not known until the betting closes just before the race, and will be a function of all wagers on the race and the take-out percentage of the totalisator. The punter pays no separate fee for winning;

   b. If bet with a bookmaker, that $100 forms part of his or her book. The book may be constructed to achieve an overround (although the bookmaker may also assume risk). The bookmaker hopes that the wager, when taken together with all other wagers on the race, will leave the bookmaker with a surplus, which might be described as a take-out, which enables the bookmaker to meet costs, fees and taxes and leave a profit element. Again the punter pays no separate fee for winning;

   c. If bet with a betting exchange, that $100 (at least under Betfair's terms) forms a wager with Betfair at odds set at the time of wager, but with Betfair making a matched wager with an individual who wishes to lay the bet, i.e. play a bookmaker's role on that horse. The odds are a function of what the backer and the layer decide to take the risk on. Betfair earns interest on the client's funds held in trust,[1] and it charges certain fees for its role as faciliator:

      i. Commission: Betfair charges to each participant who makes any successful bets (as wagerer or layer) a commission on the net winnings on each race. The commission can be up to 5% under Tasmanian regulation (or higher, with the approval of Tasmania);

      ii. Betfair charges fees and commissions to its customers apart from its base commission. They include additional fees for high volume, or more successful punters (described as the "premium charge"),[2] API licence fees,

[1] D2 T106 (FCAB 4459). Client interest for Betfair (ie the Australian enterprise) was $1,313,000 in FY2009 and was forecast to be $810,000 in FY2010: FCAB 4316.

[2] The premium charge, which Betfair's internal records treat as "revenue", amounted to $506,000 for FY2009 and was forecast to grow to $1,105,000 in FY2010: FCAB 4316. Betfair's Board Report for 24 Sep 2009 noted

read management fees and excess transaction fees: D3 T12-14 (FCAB 4503-4505); D3 T20-25 (FCAB 4511-4516).

8. It follows that from the punter's perspective, the comparative attractiveness of the offerings will be influenced by a range of money and non-money aspects:

   a. In pure money terms, punters will be interested in what return they will get if the horse being backed wins. This involves comparing the odds which the totalisator is likely to close at (to be estimated at the time of wager), with the odds offered by the bookmaker (which can be known in advance) and the odds offered by the layer through the betting exchange (which can be known in advance, but the punter have to make allowance for what fees Betfair will charge – which in turn may be a function of the result of not just this wager, but other wagers by that punter on that race);

   b. The decisions of a totalisator and a bookmaker as to the percentage of the take-out or overround will affect the odds offered to the punter: the higher the take out or overround, the lower the average odds available on horses in a given race (although the precise odds offered by a totalisator will be determined by what wagers are made on all of the horses in the race). By contrast, Betfair makes no judgment on odds – that is made by the punters when bets are matched (either by a backer accepting odds offered by a layer or vice versa), but Betfair makes judgments on the nature and level of the fees referred to above. The evidence also indicated that collectively layers on Betfair typically created their own overround (in an amount similar to bookmakers): see TJ[52];

   c. On a given race, the totalisator may offer a better return on a particular horse, even if price is viewed solely in money terms: this will depend on what wagers are made on other horses in the pool and the take-out the totalisator applies to the given race – at times it is reduced to as low as 6% (TJ [315]) compared to the odds offered by Betfair's layers and its own commission;

   d. There are also non money aspects of competition between the offerings: a totalisator may offer the convenience and pleasure of wagering in a retail shop or on the course where the actual race can be seen, and the challenge of effectively betting against the combined weight of the other punters in the pool. A bookmaker may offer the pleasure of betting with one known person, certain odds and sometimes the on-course experience. The betting exchange does not offer these attractions but does offer the ability for backers and layers to stipulate their own odds together with a platform for punters to behave like bookmakers (without being licensed as such) by laying bets (which they are not otherwise able to do with totalisators and bookmakers);

   e. Also, some punters may be interested in risk management or arbitrage (D2 T114-115, FCAB 4467-8) which might make one or other offering more attractive.

9. Betfair's description of itself as a "low margin" operator should be understood as a shorthand for the above more complex position: it confines attention to the position overall and on average, and it ignores non-money aspects of competition. In other words, the concept of being "low margin" says nothing about the relative prices on an

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that "premium charge revenues had exceeded expectations" and that this was "expected to continue": FCAB 4318.

individual event, nor about the quality of services provided nor about the relationship between revenue and the cost of providing those services. It was only the difference between high margin and low margin that the trial judge considered to be discriminatory: TJ[153].

10. The initial use of race fields information is in soliciting bets – eg by publication in the media of the names and numbers of the horses in each race on which bets will be accepted. As part of this use, the wagering operator will identify actual or likely odds (as the case may be). The subsequent, and more critical, use is at the stage of a bet being accepted; acceptance of a bet necessarily involves a communication between wagering operator and customer of a contract by reference to the name and number of the horse.[3]

11. The technique adopted by the approval and fee condition under the race fields scheme is twofold:

    a. To measure the use of race fields information at the point of acceptance of a bet; i.e. at the point at which one wagering operator has succeeded over the others in obtaining that wager from that customer (Betfair raises no challenge to this); and

    b. To set as the amount of the fee the same percentage of turnover for whichever operator wins the turnover (this Betfair challenges).

12. As noted above, which operator wins the wager from a particular punter will be a function of decisions made by each operator as to how to structure and charge for its offering (together with decisions by others – eg in the case of the totalisator, what bets are made by others in the pool, and in the case of the betting exchange, what odds are accepted by customers); and how punters choose to respond to those decisions. Those decisions by operators also will have an effect on the ultimate return which operators will make from the bets placed with them.

13. The fee is indifferent to those decisions by the various operators, and is indifferent to which operator wins the wager of the particular punter. Whoever wins pays $1.50 per $100 of back-bet turnover.[4] Whether the operator seeks to adjust its business model to accommodate the fee, in whole or in part, is a matter for decision by each operator.

B. The appropriateness of turnover as a measure of use of race fields information

14. Turnover is an appropriate measure of the use by a wagering operator of race fields information in the course of betting operations:

    a. The interstate trade relied on by Betfair is the market in which Betfair, TAB and other wagering operators compete to induce punters to place bets with them. Mr Twaits agreed that Betfair's business objective is to get customers' back bet turnover into its control so that Betfair can earn revenue from it: D3 T57 (FCAB 4545).

[3] As the primary judge noted at [70], this use of race fields information is an essential part of the wagering operator's business.

[4] Indeed, Betfair only pays $1.50 for each $100 matched bet, even though there are two customers dealing with Betfair, the backer and the layer. The fee is only payable on back bet turnover.

b. Turnover is widely used in the industry as a measure of the volume of betting activity.[5]

c. Betfair uses turnover in its own business as a measure of the volume of betting activity. Betfair publishes "matched bet figures" (being double turnover) on its exchange website for each market: D2 T111 (FCAB 4464). In its submission to the Independent Review of Wagering in NSW, Betfair provided figures as to "gross revenue" and volume (i.e. double turnover) to indicate the nature of its business: FCAB 2384, 2401. Betfair's board papers dated 24 Sep 2009 treated volume (i.e. turnover) as a relevant competitive metric: D3 T49 (FCAB 4537); D3 T54 (FCAB 4542). Betfair's CEO, Mr Twaits, receives monthly turnover figures, which he agreed were among the metrics which Betfair acts on in its business: D2 T110 (FCAB 4463). Mr Twaits agreed that turnover is "a relevant factor in terms of our assessment of how the business is performing" and that he considers turnover a "means to an end": D3 T54 (FCAB 4542).

d. Betfair's competitors use turnover as a measure of market share and/or success in the marketplace: D2 T121-123 (FCAB 4474-4476); FCAB 2689; FCAB 2715.

e. In *Betfair v WA* (2008) 234 CLR 418 (***Betfair v WA***) at [107], the majority noted (based on the case advanced by Betfair in that litigation) that Betfair had undertaken to pay a fee based on turnover to the Victorian regulator.

15. It is not clear whether Betfair now relies on there being no fixed and direct relationship between turnover and "gross revenue" for a betting exchange (AS[25]). This was rejected (correctly) as a ground of discrimination by the trial judge at [151]-[152]. It was not raised before the Full Court. In any event, while it may be true that there is no fixed and direct relationship in respect of a given event, Mr Twaits agreed that there was an empirical relationship whereby Betfair's commission had been in aggregate and on average around 2.5% of backbet turnover (D2 T108, T123; FCAB 4461, 4476) and Mr Twaits could not offer any reason why the historical relationship was unlikely to be a fair indicator for the future (D2 T120, FCAB 4473). (This needs to be qualified, of course, by the possibility of Betfair's changing its commission structure or business model and thereby changing the empirical relationship.) It is difficult to see how the absence of a fixed and direct relationship in respect of a given event affects any s 92 inquiry. As the trial judge found, Betfair failed to plead or prove that this difference operated adversely to Betfair, or that it was connected with the asserted difference between Betfair's and TAB's margins.

[5] Australian Racing Fact Book: FCAB 4333; Betfair's email to Racing Victoria dated 29 May 2006, referring to the "traditional" concept of turnover: FCAB 1040-1041; Betfair's CEO, Mr Twaits, gave evidence that in many jurisdictions, the only figures available are turnover figures: D3 T31; FCAB 4522; historically, betting taxes in NSW have generally (albeit not always) been charged on turnover: see, e.g., *Finance (Bookmakers Taxation) Act* 1932; *Racing Taxation Act* 1937; *Racing Taxation (Betting) Act* 1939; *Racing Taxation (Betting Tax) Act* 1952; *Racing Taxation (Betting Tax) Amendment Act* 1975; *Racing Taxation (Betting Tax) Amendment Act* 1976; *Racing Taxation (Betting Tax) Amendment Act* 1987); *Betting Tax Act* 2001 (as in force prior to 30 March 2002); until recently, the Northern Territory charged corporate bookmakers a fee based on turnover: *Racing and Betting Act* (NT), section 106; when Racing Victoria first acceded to Betfair's request to pay a fee based on gross revenue, it did so expressly on the basis that Betfair's credit for payments to Tasmania would continue to exceed 1% of turnover: FCAB 2082; the majority in *Betfair v WA* (2008) 234 CLR 418 referred to turnover as a metric of betting volume and noted that licence fees and race club fees were based on turnover: [54]-[55], [76], [80].

C. Problems with "gross revenue"

16. Against the appropriateness of wagering turnover as a measure of the use by wagering operators of race field information may be set Betfair's concept of "gross revenue", which is confined merely to commissions received in the course of providing wagering services and thus does not fully reflect the accounting concept of revenue. As noted, Betfair charges fees and commissions to its customers apart from its base commission. (FCAB 4503-4505) (FCAB 4511-4516). The evidence established that these amounts, taken together, could not be dismissed as trivial, and Betfair adduced no adequate evidence by which they might be quantified. There is nothing to stop a business in Betfair's position altering its business model in such a way as to reduce significantly its "gross revenue" on NSW races (using NSW races as a loss leader), while recouping that revenue through other charges in respect of which (on Betfair's case) no fee would be payable to the Respondents.

17. Betfair's concept of "gross revenue" takes a particular slice out of a wagering operator's business and total revenue and excludes a range of relevant considerations. Betfair's own business is by no means limited to the operation of a betting exchange on NSW races in return for payment of a commission on net winnings. For example:

    a. Betfair makes a wide range of betting events available, of which NSW racing events form only a part (albeit a significant part for Betfair). Betfair seeks to cross-sell its other products (where it may have a higher margin) and hopes thereby to derive additional business from customers attracted to it by betting on NSW races: D3 T27-28 (FCAB 4518-4519); D3 T60 (FCAB 4548). NSW thoroughbred and harness racing accounts for around 15% of Betfair's revenue: D2 T128 (FCAB 4481). It is hoped that customers will go on to bet on other events with Betfair, including elsewhere in Betfair's "global pool": D3 T34 (FCAB 4525). Another way that customers may be attracted to bet on other products (including more profitable products such as Tote Tasmania where Betfair receives 50% of Tote Tasmania's take out rate of 18%: D2 T93, FCAB 4446) offered by Betfair is Betfair's loyalty program. "Betfair Points" (as to which see: D3 T3, FCAB 4496) give customers a discount on the commission payable to Betfair on the betting exchange (thus reducing Betfair's "gross revenue" and any fee to the Respondents charged on that basis).

    b. Betfair is predicting a "healthy" growth in the Australian market: D2 T126 (FCAB 4479). Betfair's internal view is that it is not chasing high revenue in the short term, but is "on a medium term strategy": D3 T66-67 (FCAB 4554-4555). Consistent with this, Betfair has been engaging in a heavy marketing spend and is seeking on average to be a low margin operator: D2 T116 (FCAB 4469); D2 T134 (FCAB 4487).

    c. Betfair is building customer loyalty and a customer base, as a substantial, intangible, capital asset: D3 T28-29 (FCAB 4519-4520); D3 T67 (FCAB 4555). Building customer loyalty is an essential part of Betfair's plan (D3 T29; FCAB 4520) and adds to the value of the business: D3 T36 (FCAB 4527).

    d. Betfair's average commission on net winnings has grown in recent years from around 3.2% to around 3.5% and this growth was because new customers were paying higher commissions on average: D2 T104 (FCAB 4457).

e. Betfair receives commercial value from each bet in the form of intellectual property that Betfair requires the customer to assign to a related company of Betfair: D2 T102 (FCAB 4455).

f. At the time of the hearing, Betfair UK was giving consideration to a public offering. Betfair's operations would be a material contributing factor to such an event, if it occurred: D3 T36 (FCAB 4527).

g. The trial judge correctly found that Betfair was taking and would continue to take steps to expand its betting exchange system in relation to many different kinds of events (at [318]) and that Betfair was likely to conduct its business with a view to building a customer base and increasing goodwill across the whole of its integrated business (at [319]).

h. Moreover, the evidence indicated that layers on Betfair's exchange required an overround: TJ[52]; letter from Betfair to Tasmanian Minister for Racing, FCAB 4289. In a commercial sense, the traditional bookmaker's role, which would see all revenue from punters in the pocket of the bookmaker, has been divided into Betfair's facilitation role, for which it takes a commission, and the layers requiring an overround for taking true risk. Analysed this way, turnover has the same role for Betfair as for a bookmaker, but Betfair's concept of "gross revenue" excludes revenue that Betfair has externalised to its layers.

18. Any inquiry into the practical effect of the impugned fee which excludes these matters addressed above (as Betfair does) fails to engage with s 92. If a fee were imposed by reference to Betfair's concept of "gross revenue", a wagering operator in Betfair's position might easily reduce its "gross revenue" in the short to medium term while recouping lost revenue elsewhere or building a capital asset in the long term (either by increasing other customer charges, or by using NSW race field events as a "loss leader",[6] with a view to attracting customers who would then bet on other events). This may jeopardise the funding of the industry.

19. The trial judge made no findings about the additional financial benefits identified at [16]-[17] above because his Honour erroneously characterised the Respondents' arguments as being limited to a pleading point. At [131], the trial judge noted that Betfair had pleaded its case based solely on "gross revenue", and said that accordingly the other financial benefits were irrelevant. This misunderstood the Respondents' position – the important point is not that Betfair's concept of "gross revenue" cannot be determined without regard to these matters, but rather that, because Betfair's concept of "gross revenue" excludes these matters, it is of little assistance in any s 92 inquiry.

20. Moreover, the adoption of Betfair's concept of "gross revenue" would be at odds with the Respondents' roles as regulators. First, a fee based on "gross revenue" means the Respondents receive higher fees from high margin operators, giving them a direct pecuniary interest in the success of such high margin operators. Second, bookmakers generally make more money when a favourite horse loses a race (D4 T112; FCAB 4596), which means a fee based on "gross revenue" would give the Respondents a pecuniary interest in the outcome of each race. Third, a fee based on "gross revenue" would be dependent on the business decisions and/or financial success of individual wagering operators. Mr Twaits agreed that the achievement of "gross revenue" would be influenced by such matters as business model, pricing structure, management skill,

[6] A concept properly noted by the primary judge at [168]-[170].

brand and scale: D3 T67-68 (FCAB 4555-4556). Especially where bookmakers take risks and may achieve no "gross revenue" from a given race or extended period, this would mean that there would be no fee payable to the racing industry for the use of the race fields information in respect of that race or that extended period. This would place the certainty of funding of the racing industry in jeopardy.

21. Further, Betfair made no attempt to explain how regulators might overcome substantial difficulties in monitoring and enforcing a fee based on "gross revenue":

    a. Mr Twaits agreed that in order to verify Betfair's "gross revenue", it would be necessary to audit or verify 12 different classes of information that are relevant to how much "gross revenue" Betfair earns from each bet: D3 T2-4 (FCAB 4495-4497). Due to Betfair's discount system based on "Betfair points", this requires investigation of the whole of the customer's Betfair activity on all events throughout the world during the relevant period. If a fee included Betfair's premium charge (as well as Betfair's pleaded concept of "gross revenue"), it would be necessary to verify several of the 12 classes of information in respect of the premium charge, as well as knowing the customer's lifetime profit and loss position: D4 T83 (FCAB 4567). It would also be necessary to adopt some method of apportioning the premium charge between the different sporting codes and different jurisdictions: D3 T12-14 (FCAB 4503-4505).

    b. There are also difficulties with a fee based on "gross revenue" when imposed on a totalisator. The Victorian Supreme Court in *TAB v Racing Victoria* [2009] VSC 338 at [37] rejected a fee based on gross revenue as impermissibly uncertain. Davies J at [36] identified four areas where the gross revenue metric presents difficulties for a totalisator. In addition to those areas, TAB offers rebates to large customers, and it would be necessary to investigate every rebate arrangement in order to calculate and verify TAB's gross revenue: D3 T50 (FCAB 4538).

    c. The terms of the Regulation (unchallenged by Betfair) create even more difficulties with a fee based on "gross revenue". Regulation 16 imposes a limit of 1.5% of a wagering operator's turnover. If Betfair's argument were accepted, the maximum fee that the Respondents could charge Betfair would be the proportion of Betfair's "gross revenue" that equals the proportion of "gross revenue" that 1.5% of turnover represents for the highest margin local wagering operator. The Respondents would need to determine the local wagering operator with the highest margin and back-calculate the maximum proportion of "gross revenue".

22. On a related point, Betfair failed to prove TAB's "gross revenue" was as high as Betfair asserts (AS[10]-[11]). The Respondents pleaded, and the evidence demonstrated, that TAB's commission on events where it competed directly with Betfair (i.e., win and place bets) was lower than 16%: TJ[122], and indeed, on average, was lower than 14.5% and 14.25%: FCAB 2538; D3 T35-37 (FCAB 4526-4528); D4 T112 (FCAB 4596).[7] Betfair adduced no evidence to enable the Court actually to quantify TAB's average commission on the events in respect of which there was direct competition.[8]

[7] In light of this evidence, the primary judge's finding in the last sentence of [315] could not be sustained.

[8] The primary judge's finding at [36] that 78.96% of all money wagered on NSW thoroughbred races was through TAB was also an error. The table relied on by the trial judge (FCAB 4343) in fact showed figures for all thoroughbred racing (wherever the events occur) that are wagered through NSW operators. In other words, TAB represents 78.96% of the volume of wagering activity by NSW traders, but not 78.96% of the volume of activity

23. Finally, the race fields fee was imposed, not merely on TAB and Betfair, but on all operators offering wagering services in respect of NSW races, including bookmakers, both local and interstate. Bookmakers do not charge commissions for the services they provide, but instead take risk and derive a profit on the basis of overrounds (or take risk and may produce no revenue from a given race). Betfair's artificial concept of "gross revenue" would mean something different again for a bookmaker, and would depend on how well each bookmaker balanced his or her book.

D. Betfair is not an "unequal"

24. What is said above should suffice to establish that there is nothing sufficiently sacrosanct about Betfair's concept of "gross revenue" to warrant its elevation to the status of the measure by which discrimination is to be assessed. However, even on that measure, Betfair is no "unequal".

25. Betfair chooses its method of charging and level of margin. Whilst Betfair relies on the requirement in its licence that its commission not exceed 5% of gross winnings (AS [24]), the evidence indicated that Betfair has substantial freedom (and possibly complete freedom) to set its commission in the manner that best suits its business. With a partial exception in relation to certain Australian football commissions, whenever Betfair has sought an amendment to the licence conditions imposing a limit on fees, Betfair has received it. The position of the Tasmanian authorities has consistently been that setting commission is a commercial matter for Betfair: D3 T3 (FCAB 4496).

26. However, even if the asserted licence requirement placed some upper limit on Betfair's ability to increase its commissions, this is irrelevant. There is nothing in the decided cases on s 92 to suggest that in imposing a uniform and universal impost on trade and commerce, wherever its origin, a State is obliged to make adjustments to compensate for regulatory burdens imposed upon an interstate trader by its State of origin.

27. The trial judge noted at [168] that the evidence did not disclose why Betfair's commission rate was low while TAB's commission rate was high, and identified five possible reasons for this. Betfair adduced no evidence to explain which of those matters (if any) bore on its alleged comparatively low commission rate, and how.

28. The evidence showed that Betfair has the ability to adjust its commission rate. Betfair's present business model is to seek on average to be a low margin operator: D2 T115-116 (FCAB 4468-4469); D2 T134 (FCAB 4487). The growth in new customers has brought with it a higher average commission on net winnings, from around 3.2% to around 3.5%: D2 T103-104 (FCAB 4456-4457). Betfair has been able to introduce new fees (in particular, the premium charge) and to reduce the value of its standard-offer discounts (D3 T3, FCAB 4496) in recent years. In other words, Betfair was operating well within the supposed 5% "limit", and had significant flexibility in relation to the commission and other fees charged within that limit. This further demonstrates that Betfair is at no competitive disadvantage in its ability to absorb or pass on the fee.

29. Thus Betfair did not bring itself into that category of discrimination where it is an "unequal" of TAB entitled to be treated differently from TAB (contra AS[63]).

E. The impugned fee had no effect on competition or on interstate trade

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on NSW races. The Respondents accept that TAB is a major player, but the evidence did not establish that TAB was in any way "dominant" (contra AS[7]).

30. The isolated comparison that Betfair makes between its "gross revenue" and that of TAB also disregards the evidence about the market in which they operated, and avoids completely the issue of the impugned fee's impact upon competition in that market.

31. First, there were many other traders in the market, including interstate totalisators (with comparatively high ratios between turnover and "gross revenue") and local bookmakers (with comparatively low ratios). If Betfair were right that the adoption of turnover discriminates against comparatively low margin operators, then the selection of that metric would discriminate against local low margin operators (such as those bookmakers who are above the fee-free threshold) in favour of interstate traders.

32. Second, the market and the regulatory environment was fluid. Betfair accepts that the breakdown of the Gentleman's Agreement (as to which, see AS[27]) brought with it the need for an alternative model for collecting fees (or contributions from those who profit from racing events to the cost of staging those events): AS[29]. Different States adopted different (and changing) responses. For example, prior to 1 July 2009, payments made by Betfair to the Tasmanian Treasurer included a product levy of 20% of its commission on all Australian racing: FASOC[91]. After 1 July 2009, Betfair obtained relief in respect of interstate product fees (such as the NSW race fields fee) up to the full amount of the Tasmanian product levy: D3 T59; Gaming Control Regulations 2004 (Tas), reg 5A. On 22 February 2010, Tasmania and Betfair reached an in-principle agreement that Tasmanian betting taxes would be reduced from 15% of Betfair's commission to 5%: reasons of the primary judge at [335].

33. Betfair's own business is fluid. As is noted in paragraph [17] above, Betfair's commission structure and average commission has continued to evolve, although it insists that none of these changes is referable to the NSW race fields fee: D3 T41 (FCAB 4532). There is no reason to think that other traders are in a different position.

34. In such a complex and ever-changing environment, it cannot simply be assumed that the differential impact of the NSW race fields fee on "gross revenue" as between Betfair and TAB must constitute some form of burden on Betfair, let alone a discriminatory burden of a protectionist kind. Evidence was required in order to establish the existence of such a burden, and no such evidence was adduced at trial.

35. In any event, the impugned fee had no impact on Betfair's activity in the market. Mr Twaits agreed that at the date of trial, after the impugned fees had been in place for 12 months, they had had no effect on the number and type of NSW horse races on which Betfair offers wagering services, nor on the structure of Betfair's commission, nor on the actual commission charged, nor on the odds offered on Betfair's exchange, nor on the amount spent by Betfair on marketing, nor on the volume of back bet turnover achieved by Betfair (which has continued to increase since the introduction of the impugned fee), nor on the "gross revenue" achieved by Betfair, nor on the competitive activity between Betfair and its competitors: D3 T39-41 (FCAB 4530-4532).

36. As to the future, the trial judge found that the most that was known was that Betfair would consider what (if any) decisions to make in response to the race fields fee, if and when it were unsuccessful in these proceedings (at [320]). Betfair had not developed a "Plan B", by which it would alter its business model in the event that it lost the case: D3 T42 (FCAB 4533).

37. Betfair seeks now to rely on an assertion in the Productivity Commission Report that turnover-based fees discourage price competition: AS[65]. It should not be permitted to do so.

a. First, the assertion is at such a high level of generality as to be of little assistance in the particular context of this litigation.

b. Second, the evidence indicated that one cannot equate "commission rate" with price. To many punters, the question is not the average take-out rate, but rather the particular odds being offered on a given event; hence, the use of the expression "price" to denote a dollar rate of return on a successful wager.[9] There are often occasions where the odds on Betfair's betting exchange are not as good as the odds available elsewhere: D2 T115 (FCAB 4468). There was evidence of Betfair losing substantial turnover to the Victorian totalisator because the overall deal offered was more attractive: Betfair board report, 24 September 2009. Commission rate is one of several competitive metrics used by Betfair internally or publicly to make competitive comparisons, including overround (D2 T117, FCAB 4476); letter from Betfair to Tasmanian Minister for Racing, (FCAB 4289; D3 T37, FCAB 4528; D3 T50-51, FCAB 4538-4539) and Betfair's "weighted average price" (D3 T38, FCAB 4529). The advertising war between wagering operators, in which each asserts that it offers better prices (D4 T110, FCAB 4594) is indicative that there is no single metric for price in this industry.

c. Third, and most seriously, Betfair made no attempt to plead or prove at trial that a turnover- or volume-based fee would discourage price or non-price competition. It is not a self-evident economic proposition. Had such an assertion been pleaded or made the subject of evidence, the Respondents would have had an opportunity to adduce evidence to establish that this was not so. While the Draft Productivity Report was tendered before the trial judge, no express attempt was made to rely on this particular assertion in that Report. The trial judge considered the Report and said that he did not rely on it because it was irrelevant to Betfair's pleaded case (at [334]). Betfair made no attempt to ventilate the Productivity Commission Report in the Full Court. Betfair has had an opportunity to plead and prove this contestable economic proposition; it did not take that opportunity. It is wholly inconsistent with the principles of procedural fairness to allow Betfair to advance the proposition, on the basis of the Report, in this Court: c.f. *Thomas v. Mowbray* (2006) 233 CLR 307 at [523] per Callinan J and [636]-[638] per Heydon J.

38. Putting the Productivity Commission Report to one side, it is simply no part of Betfair's pleaded or proven case that a turnover- or volume-based fee has an adverse effect on competition. Betfair cannot ask the Court to infer such an effect at this stage in the proceedings (contra AS[50] and [64]). Having said at trial that it disavowed any case based on whether or to what extent it could pass on the fee (see Betfair's Opening Submissions at [33]), Betfair should be held to that position now. Further, the Court should not consider an argument based on "price relativity" (AS[50(b)], n83). The concept was not advanced at trial, and it would have been necessary to adduce evidence to show how "price relativity" could have any impact on competition – the more natural inference is that if an equal impost is imposed on all traders, then the alleged "cheaper" products will remain cheaper and competitive positions will be unaffected.

[9] Reasons of the primary judge at [18].

39. Betfair also seeks to rely in this Court on so-called evidence of the effect of the impugned fee on its gross profit: AS[49]. There are two reasons why Betfair cannot be permitted to do so:

a. First, the table at Annexure A, which is simply a more detailed version of Betfair's arithmetical exercise, has a number of factual problems. It takes into account fees and taxes paid to Tasmania. They must be irrelevant for present purposes. Moreover, the analysis wrongly stops short of the point at which Tasmania introduced a credit for the product fees (such as NSW race field fees) paid to other States (D3 T59, FCAB 4547; Gaming Control Regulations 2004 (Tas), reg 5A), and takes no account at all of the subsequent announcement in February 2010 of an agreement between Betfair and Tasmania to reduce betting taxes from 15% to 5% (TJ [335]). It does not examine all the other financial benefits derived by Betfair other than "gross revenue", including possible loss-leader or cross-selling strategies (see para 17 above). It does not consider the whole of Betfair's profit and loss account. It excludes externalised revenue (in the hands of layers, see para 17(h) above). It does not consider Betfair's capital account. It contains no evidence of the real world consequences of the fee for Betfair's business.

b. Second, and crucially, at trial the table was first advanced by Betfair in its reply submissions. Not only did Betfair fail to plead any actual effect on its gross profit or profitability, Betfair expressly withdrew such an allegation from its pleading by amendment (see the strike-through in paras 96 and 97 of the Further Amended Statement of Claim). The Respondents had no opportunity to investigate and challenge Betfair's actual profit figures, or to explore the effect that the various factual omissions described in subpara (a) above would have on Betfair's asserted figures. Betfair cannot be permitted to raise such a case in reply, or to rely on such a case at this stage of the proceedings.

40. In short, Betfair should not be permitted to assert propositions of economic consequence that it chose not to plead, articulate or prove by lay or expert evidence at trial.

F. No evidence of protectionist purpose in adopting turnover rather than "gross revenue"

41. As Betfair concedes (AS[29]), the breakdown in the Gentleman's Agreement made it necessary to adopt a new model for securing contributions to the cost of staging NSW racing events from the traders who profited from those events. The introduction of telephone and internet betting meant that interstate wagering operators could offer bets on NSW events to NSW punters in competition with local traders without paying any fee to NSW in respect of the NSW events. For as long as NSW only sought fees from local traders, this meant that interstate telephone and internet operators were not only free-riding, but were parasitic – they were eroding the customer base of the local traders (described in much material as "revenue leakage"). In a national economy, the erosion of the customer base of local traders is not an evil per se. However, it became necessary to design a fee that was indifferent to any leakage of business from local to interstate traders. Betfair accepts that such a fee may be imposed, provided it is not relevantly discriminatory. That is how documents attributable to the Respondents should be understood when they express a concern over revenue leakage (contra AS[36]).

42. It is important to stress at this point the limited nature of Betfair's case. Betfair does not complain about the Act or Regulation. Betfair complains only about the choice of turnover as the relevant metric rather than "gross revenue". In order to establish a

protectionist purpose, Betfair needed to establish that the purpose of choosing turnover was protectionist. There was nothing in the evidence adduced by Betfair or in the material considered by the trial judge at [217]-[235] that could support the conclusion that the adoption of turnover was designed to protect TAB's revenues. Rather, the evidence suggested that the decision to adopt turnover rather than "gross revenue" was made for reasons unrelated to interstate trade or revenue leakage. Specifically, those reasons related to turnover being less susceptible to manipulation, less dependent on the monitoring systems of interstate regulators, not being affected by the outcome of particular races or the betting activities of particular operators, and being simpler and requiring fewer resources to administer: FCAB 1271, 2164-2165. They are entirely legitimate grounds for adopting turnover in preference to "gross revenue".

43. The analysis provided to the First Respondent's board on 18 June 2008 (the **sensitivity analysis**) does not assist Betfair in showing a protectionist purpose (contra AS[40]). The sensitivity analysis referred to an expectation that corporate bookmakers and betting exchanges would be affected (perhaps, by implication, relative to local traders like TAB) because they would face a new fee. That is unsurprising – they had been free-riders previously, whereas TAB already made substantial payments to the NSW racing industry. Unlike the Sportsbet appeal, it is no part of Betfair's case that the fee is unconstitutional because TAB may be entitled to damages under the Racing Distribution Agreement: T270 (FCAB 4709); T294 (FCAB 4730). Indeed, Betfair's case is premised on payment of the fee by TAB. Moreover, the sensitivity analysis assumes that TAB will make no additional contributions, but it is clear in other parts of the document that the sensitivity analysis is prepared on a conservative basis: see, e.g., FCAB 1872. Nothing in that analysis warrants a conclusion that the adoption of turnover is protectionist.

44. The only other document expressly considered by the primary judge as indicating a protectionist purpose is the document referring to "stemming the leakage": TJ [223]. That document was prepared by TAB and was not the Chairman's tabled report referred to at TJ [222]. There was no evidence that this document reflected the views of, or was adopted by, the Respondents – the evidence indicated that the Respondents considered submissions from many market participants, including Betfair: FCAB 1216-1217; FCAB 1262; FCAB 1280-1281; FCAB 1713; FCAB 1814; FCAB 1875. Betfair at AS[36] attempts in this Court to use TAB's document to support an assertion that the Respondents "re-iterated ... that the fee condition would be a means of stemming the leakage". This factual submission should be rejected.

Part V: Legislation

45. The appellant's statement of applicable constitutional provisions, statutes and regulations is accepted.

Part VI: Argument

A. No challenge to the Act or the Regulation

46. Regulation 16(2)(a) provides that a race fields fee must not exceed 1.5% of a wagering operator's turnover. Betfair does not challenge the validity of this regulation.

47. The term "wagering operator" is defined in s 27 to mean "a bookmaker, a person who operates a totalisator or a person who operates a betting exchange". In other words, the Act and Regulation, taken together, have identified turnover as an appropriate measure for the equal treatment of all relevant kinds of wagering operator.

48. This is confirmed by other parts of the Regulation, which provide for the provision of information about turnover, and the ability to vary or revoke approvals based on it, but make no provision for investigations into broader questions of "revenue": see regs 17(a)(ii), 17(f), 18(2), 19(1)(d)(iii).

49. Betfair's case has the logical conclusion that the Respondents must charge different amounts for the use of the same information in order to ensure an equivalent impact on different traders at the level of "gross revenue". In other words, Betfair's case is that the Respondents may not do what they are specifically authorised to do by reg 16(2)(a), namely impose a fee of 1.5% of turnover on all wagering operators.

10 50. Further, a requirement that the Respondents perform an "equalising" calculation before fixing the fees for a particular approval, to ensure that no interstate trader is relatively disadvantaged (in "gross revenue" terms) compared to the highest margin local trader, poses insuperable difficulties in terms of timing. The actual amount of revenue derived by all traders in respect of their use of NSW race field information would not be known until the end of the approval period, and would be influenced by factors such as the business decisions made by those traders. Even if accurate predictions could be made, an approval granted to an interstate trader prior to the grant of approval to a new-highest margin local trader, would either need to be adjusted, or would become invalid.

51. If Betfair is correct, then this is not a case where the legislative and regulatory scheme is
20 cast in permissibly general terms, but the approvals are to be regarded as unauthorised incursions on the freedom of interstate trade: cf *Wilcox Mofflin v NSW* (1952) 85 CLR 488 at 522. Rather, the only way in which the approvals can be made to conform with s 92, on Betfair's case, is to reject the model laid out in the Regulation, and create a new and different basis for imposing the fee. That approach is not available as a reading down of the Regulation.

52. Betfair has consistently eschewed the necessary step of challenging the Act or Regulation. That is a sufficient reason for Betfair's claim to fail.

B. No discrimination

53. Befair's case is that the impugned fee discriminates against it because it imposes a fee
30 that has a different effect at the level of "gross revenue". The first reason why this is not relevant discrimination is that, for the reasons set out in Part IV above, Betfair's concept of "gross revenue" cannot be equated with an accounting concept of revenue, let alone the full measure of the range of financial benefits available to wagering operators from the use of NSW race fields information. The Court is unable to translate a differential effect on "gross revenue" into any sort of financial or economic differential effect in the real world.

54. The second reason is that it involves the assertion that a trader's revenue line is somehow privileged under s 92. Betfair's case is that once it proves a differential effect on revenue as a matter of arithmetic, the burden on interstate trade may be inferred
40 without any other evidence, and in the face of evidence that there has been no relevant impact on the competitive activity of the supposedly affected trader. Such a proposition must be rejected.

55. Gaudron and McHugh JJ explained the concept of discrimination in *Castlemaine Tooheys v South Australia* (1990) 169 CLR 360 (***Castlemaine***) at 478. It involves a law operating by reference to a distinction that the overriding law decrees to be "irrelevant",

or a law that operates equally although there is a "relevant difference". Betfair needs to establish that a differential impact at the level of so-called "gross revenue" is a relevant difference for the purpose of s 92. There is no basis in principle or precedent for the elevation of a trader's revenue line (let alone of Betfair's artificial concept of "gross revenue"), so that a fee imposed neutrally by reference to an established metric for volume of wagering activity will nevertheless offend s 92 because it happens to have, at a particular point in time, a greater impact on a single interstate trader vis-à-vis a single local trader.

56. The trial judge noted at [168], when concluding that the fee was not protectionist, that mere differential effect on revenue was not enough when the evidence did not explain why Betfair's margin was so much lower than TAB's margin. Five possible contributing factors are identified. Of those, the first three are particularly significant for the present case, and would have a direct bearing on whether the fee discriminates by reference to a relevant difference:

    a. The first is the absence of the need to maintain a retail network. If this is a contributing factor, then Betfair might be a low-margin, low-service trader, while TAB might be a high-margin, high-service trader. If so, it is impossible to say whether the fee discriminates against Betfair without understanding the nature and cost of those additional services (i.e. the other figures in the revenue account).

    b. The second is the possibility of loss-leadership in order to generate market share. If this is a contributing factor, then it is impossible to say whether the fee discriminates against Betfair without an appreciation of successive revenue accounts and the capital account.

    c. The third is the possibility of cross-selling other products to obtain financial benefits while maintaining a low "gross revenue" on NSW racing events. If this is a contributing factor, then it is impossible to say whether the fee discriminates against Betfair without understanding the full range of benefits derived from other streams of revenue.

57. In circumstances where Betfair chose to explore none of this, the Court cannot conclude that the adoption of a volume metric such as turnover discriminated in any relevant sense against Betfair. It did not preclude Betfair from access to, or competition within the national economy. It did not cause Betfair to date to modify any of its competitive behaviour, or to assert that it would do so in the future. No allegation was made, or economic evidence led to prove, that the fee had the tendency to impair competition within the national economy. The fee based on turnover provided the Respondents with a reasonably certain means of raising an appropriate sum in the aggregate for use of a valuable product. In doing so, it used a measure of equality (turnover) that (a) reflected the immediate benefit obtained by the various wagering operators, (b) was an established concept for measuring volume of betting activity, (c) was what traders actually compete for (see paras 10-14 above), and (d) was supported by the Regulation itself (see paras 46-52 above).

C. No impact on interstate competition or interstate trade

58. Section 92 is concerned with the inhibition of interstate trade – in particular, the "preclusion of competition" or "restriction" of competition in a national market: *Betfair v WA* at [15], [116]. Betfair, at least at times, appears to accept that the focus is the imposition of a "competitive disadvantage" on interstate trade: AS[57], *Cole* at 409,

Castlemaine at 467-468. Whilst it may be convenient, when applying s 92, to test for the existence of a "discriminatory burden of a protectionist kind", it must be borne in mind that the expression is, first, no substitute for the text of s 92 (the proper construction of which must accommodate the complexities discussed in *Betfair v WA* at [10]-[49]), and secondly, not amenable to parsing as if it were a phrase in a statutory provision. Betfair's current case fastens upon the concept of discrimination, as if it were an independent (and possibly sufficient) requirement for establishing contravention of s 92, without sufficiently recognising that the relevant question is whether the impugned fee rendered trade and commerce among the States less than absolutely free.

59. The focus needs to be on interstate trade, and not on the financial preferences or priorities of particular interstate traders. As the Full Court stressed, the question is whether interstate trade has been inhibited, not whether particular interstate traders have been adversely affected: at [104] and see the cases cited there.

60. The Respondents have never suggested that Betfair needs to prove something like a "substantial lessening of competition". However, this is not to say, as Betfair now contends (AS [72]), that concepts familiar to competition law have no role to play in a s 92 inquiry. Indeed, Betfair's case proceeds in part upon the deployment of such concepts. In particular, it involves an assertion that TAB and Betfair were engaged in trade and commerce "of the same kind" (see [100(a)] of Betfair's Further Amended Statement of Claim). Betfair makes good this assertion by pointing to the existence of a national market for wagering services in which totalisator wagering and the services provided by betting exchanges can be seen as substitutes (AS [12]-[13]). Nonetheless, having thus employed the twin notions of a national market and substitutability as the conceptual foundations for its case, Betfair's submissions would have this Court assign no significance to the likely, or possible, impact of the race fields fee upon the operation of that market. It must therefore be asked why questions of market definition should feature at all in the analysis if market outcomes are completely irrelevant? There is no cogent answer to this question on Betfair's case.

61. Neither *Bath v Alston Holdings* (1988) 165 CLR 411 nor *Castlemaine* can be taken as suggesting otherwise. The passage from the majority reasons in *Bath* which is relied upon by Betfair (AS [77]) indicates simply that whatever permutation of burdens may be thought to have afflicted an interstate wholesaler of tobacco products, the impugned measure in that case operated to erect a protective barrier around Victorian wholesalers. As a consequence, there was no need to consider in great detail the actual competitive position of market participants, their cost structures or the relative prices of their products.

62. As for *Castlemaine*, Betfair's submissions wholly ignore the significance ascribed by the Court in that case to the fact (established on a case stated) that the practical effect of the impugned measure was "to prevent the Bond brewing companies obtaining a market share in packaged beer in South Australia in excess of 1 per cent" (at 464), when they might otherwise have achieved a market share of 10 per cent (at 459).

63. Needless to say, the nature and extent of the factual dispute between the present parties distinguishes this appeal from both *Bath* and *Castlemaine*. It follows that Betfair needed to prove that the measure impugned in this litigation has a tendency to preclude or inhibit interstate trade or competition in a national market. In some cases, this tendency, even if slight, can easily be inferred. For example, a $1 annual fee imposed exclusively and directly on interstate traders clearly has such a tendency, albeit to very small

degree. By contrast, the present fee is imposed equally at the level of turnover (i.e., equally by reference to volume of betting activity). The Court simply cannot infer that this has a tendency to preclude competition where the Court is only given a particular slice of each competitor's business (i.e., part of the so-called "revenue line"). Any tendency to affect interstate trade (i.e., to preclude or restrict competition between traders in an interstate market) would need to be proved. This is especially so in the face of positive evidence from Mr Twaits that in 12 months the fee had had no effect on competitive activity between Betfair and its competitors (see para 35 above).

64. The Full Court's holding did not go beyond this – contrary to AS[72], the Full Court did not hold that a necessary element for contravention of s 92 is adverse impact on market share or profitability. That being so, their Honours cannot be understood as suggesting that there is a different test for establishing such a contravention if discriminatory protectionism is not apparent from the terms of the impugned measure (contra AS [66]). The Full Court was rather noting a range of matters that Betfair made no attempt to prove – one of them was impact on Betfair's market share or profitability; another was effect on competition or diminishing of Betfair's competitive advantages: FC [98]-100]; [107]. They were matters that had been considered by this Court in *Castlemaine* and *Betfair v WA*. It is Betfair's decision not to plead or prove any of these matters, in circumstances where the fee is apparently neutral (requiring the payment of $1.50 from every wagering operator per $100 bet), that was fatal to Betfair's claim.

D. No protectionist effect where many disparate market participants

65. It has been suggested that the Court should abandon any separate requirement under s 92, contemplated by *Cole*, that discrimination be "of a protectionist kind".[10] It is unclear if Betfair so submits. The Court should not abandon the requirement in *Cole* for protectionism, and it provides an independent reason why Betfair's claim must fail.

66. It would give s 92 a role beyond regulating the State and Commonwealth relations in a federation to hold that it prohibits any competitive distortion, regardless of whether it is apt to protect the local trade of one State from competition from interstate trade. One major driver behind s 92 is the appreciation that State law-makers are democratically responsible only to their own constituents, and that the Constitution is concerned to ensure that the several States "sink or swim together": *Betfair v WA* at [35]. The Court accepted in *Betfair v WA* at [36] that s 92 was concerned not with a laissez-faire economy, but with the protection of intrastate players in a market from competition from interstate players in that market.

67. The market in which Betfair and TAB compete has many participants. They include relatively low margin local traders (i.e., bookmakers) and relatively high margin interstate traders (i.e., interstate totalisators). As between those traders, the selection of turnover may create a difference in favour of interstate trade. Moreover, it will always be possible to choose a perspective from which an otherwise uniform fee has a different effect on different traders, by reason of their particular business models. A fee based on "gross revenue", for example, might be said to operate against traders attempting to deliver products with a high level of service (in return for a higher margin) in favour of traders aiming to sell products in high volumes with a low level of service. In a large and variegated market, the negative impact on a single interstate trader vis-à-vis a single intrastate trader at a particular point in time cannot warrant characterisation of the governmental measure as "protectionist".

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10 See, e.g., Puig, *The High Court of Australia and Section 92 of the Australian Constitution* (2008) at 132ff.

E. No link between supposed discriminating factors and interstate trade

68. The Respondents put this submission in the strict alternative. The Respondents' primary case is that there is no contravention of s 92 regardless of whether Betfair's alleged discriminating factors need to have any sort of nexus with interstate trade. However, the Respondents say that the absence of any nexus with interstate trade is an additional reason why the claim must fail.

69. The discrimination alleged by Betfair is different from the discrimination alleged in other "practical effect" cases. In *Castlemaine* and *Betfair v WA*, the laws were expressly discriminatory, although the features by reference to which they discriminated (i.e., non-refillable bottles and betting exchanges respectively) had no express connection with interstate trade. It was by regard to the practical effect of the laws that the Court concluded that the express discrimination in the law had the practical effect of discriminating against interstate trade. In each case, the impugned legislation was protectionist because the feature by reference to which the legislation discriminated was an effective proxy for an interstate trader increasing its market share at the expense of local traders.

70. The present case involves a different kind of alleged discrimination. The impugned fee does not discriminate on its face at all. Betfair's case (AS[63]) is that the law treats unequal persons equally.[11] Betfair must therefore persuade the Court that Betfair and TAB are relevantly "unequal" – in other words, that there is a relevant difference that the law fails to take into account. The only difference that could be relevant of the purposes of s 92 is a difference that has some connection with interstate trade. And contrary to what is submitted on behalf of Betfair (AS [95]), it was only in this limited sense that the Full Court attributed any importance (at [68] and [103]) to the state of origin of an interstate trader for the purposes of applying s 92.

71. The difference about which Betfair complains is differential impact at the level of revenue. Unlike in *Betfair v WA*, the fact that Betfair happens to be a betting exchange is irrelevant. Rather, it is simply Betfair's status as a low margin operator which is relevant. There is no connection between Betfair's low margin and its "interstatedness".[12] It was this absence of connection which the Full Court sought in its reasons to emphasise (at [80] and [95]) when suggesting that Betfair's case depended upon a burden arising from its particular business model. To the extent that Betfair now contends that the Full Court's invocation of its business model was directed at advancing some other point, which is then said to have entailed some error, that contention should be rejected. In any event, if Betfair increases its margin, the impugned fee will affect Betfair in the same way that it affects TAB. If TAB were to reduce its take-out rate (or take other steps to lower its margin), then the fee would affect TAB in the same way that it currently affects Betfair.

72. In summary, Betfair cannot establish that a fee of equal application is protectionist without establishing that the business feature by reference to which the fee has a

[11] See *Castlemaine* at 480 per Gaudron & McHugh JJ; see also, in the context of s 117 of the Constitution, *Street v Qld Bar Association* (1989) 168 CLR 461 at 510 per Brennan J, 571 per Gaudron J, 582 per McHugh J.

[12] The fact that Betfair's current Tasmanian licence restricts Betfair's fee to 5% of net winnings is irrelevant. At a factual level, it is clear that this "cap" is flexible and Betfair's average commission of 3.5% is still considerably below that artificial "cap". At a legal level, it cannot be the case that s 92 permits one State effectively to restrict another State's legislative power by imposing limits on its own traders' margins.

differential impact (i.e., "gross revenue") has some sort of connection with Betfair's status as an interstate trader.

F. No protectionist purpose

73. For the reasons set out in paras 41-44 above, this question does not arise on the facts of this case, because on the facts of this case there was no protectionist purpose in the selection of turnover as the criterion for the fee. In any event, as a matter of law, it is irrelevant.

74. The only relevant inquiry for the purposes of s 92 is into the effect of a governmental measure. As this Court explained in *Cole* at 394, s 92 achieves its object by prohibiting measures that burden interstate trade "and which also have the effect of conferring protection on intrastate trade and commerce of the same kind" (emphasis added). Inquiry into the effect of legislation was also how the Court approached the "object" of such legislation in s 92 inquiries before *Cole*.[13]

75. Where consideration is given in the modern cases to the object or purpose of a measure,[14] they make no reference to a "protectionist purpose". Rather, they hold that if a law discriminates in effect against interstate trade, then it may nevertheless be inoffensive if it is appropriate and adapted to a legitimate object. This inquiry adequately covers the ground that Betfair would cover by introducing a separate purpose inquiry. A measure whose sole purpose is protection of local traders would certainly fail this test. By contrast, it is difficult to see why s 92 would strike down a measure that was passed in the hope of protecting local traders, but where on proper analysis, there is no relevant discrimination, or where any discrimination is appropriate and adapted to a legitimate object.

76. Contrary to AS[105], the role of purpose is an area where US jurisprudence is of the least assistance. The application of dormant Commerce Clause involves varying standards of scrutiny, requiring differing levels of governmental interest in order to uphold the validity of a measure.[15] Questions of purpose inform the standard of scrutiny to be applied.[16] By contrast, s 92 is concerned with a single inquiry,[17] where governmental interest is considered in the specific context of asking whether the measure is appropriate and adapted to a legitimate object. The use of purpose in the US jurisprudence does not translate clearly into this inquiry and, for the reasons set out above, this Court should not endeavour to create a role for it.

G. Fee is appropriate and adapted to a legitimate object

77. If a governmental measure is appropriate and adapted to a legitimate object, then it will not offend s 92 even if it places a discriminatory burden on interstate trade: *Castlemaine* at 473-477.

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[13] See, e.g., *NEDCO v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 624 per Jacobs J; *SOS (Mowbray) v Mead* (1972) 124 CLR 529 at 573-574 per Windeyer J; *Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 637. While the Privy Council in *James v Cowan* (1932) 47 CLR 386 referred to the "object and intention" of a ministerial decision in this context, there is nothing to suggest that the "object and intention" was determined in any other way that by reference to the legal and practical effect of the decision.

[14] *Cole* at 394; *Castlemaine* at 473-477.

[15] See, e.g., *Pike v Bruce Church*, 397 US 137 (1970); *Philadelphia v New Jersey*, 437 US 617 (1978).

[16] *Baldwin v Seelig*, 294 US 511 (1934).

[17] *Castlemaine* at 471.

78. The majority stressed in *Castlemaine* at 471 that this is part of a single, composite inquiry. Betfair bears the burden of establishing that this single, composite inquiry should be answered in its favour. It would be an error to separate out this question and treat it as a separate element in respect of which the Respondents bear an onus of proof.

79. In the present case, the legitimate object advanced by the Respondents is ensuring that those who use the products of the NSW racing industry (specifically, race field events) for profit make a contribution to the industry commensurate with their use of those products, having regard to the following considerations:

    a. the extent to which each wagering operator uses the product in question (i.e., race fields information);

    b. the administrative ease of quantifying and enforcing any fee; and

    c. the importance of the Respondents being impartial, and being seen to be impartial, in their position as regulators of the NSW racing industry.

80. The reasons why the selection of turnover was appropriate and adapted to this object are set out in section A to Part IV above. The reasons why "gross revenue" is not more appropriate and adapted are set out in section B to Part IV.

81. In addition, Betfair's acceptance that the Act and Regulation are valid is relevant here, even if the Court rejects the Respondents' submission at paras 46-52 above that this acceptance is fatal to Betfair's case *in limine*. The practical difficulties that are posed by a fee based on "gross revenue", but subject to a 1.5% turnover cap, are there described. They are an additional reason why a fee based on turnover is more appropriate than a fee based on "gross revenue".

82. To the extent that the Respondents bore any persuasive onus to show that turnover was reasonably appropriate and adapted to a legitimate object, they discharged that onus.

83. This is especially so when one considers that the adoption of turnover rather than "gross revenue" was made against a background of contestable views as to what was appropriate for the welfare of the racing industry, the interests of competition and the progressive development of a national economy in gambling and wagering on sporting events.

84. The Respondents do not need to establish that turnover is clearly preferable to "gross revenue". It is enough if the Court concludes that a judgment was available to the Respondents that turnover was among the measures reasonably appropriate and adapted to the legitimate object. Section 92 would permit a range of legislative and administrative decisions on any subject matter, particularly where the subject matter involves the selection of an appropriate basis on which to levy a fee and there are many traders in the market with varying circumstances. Volume-based fees are commonplace in the national market: e.g., court hearing fees, professionals charging on time costing, airport passenger taxes, etc. They readily satisfy a reasonable necessity test.

Part VII: Conclusion

85. The appeal should be dismissed with costs.

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	Justin Gleeson		Nicholas Owens
Phone	(02) 8239 0200	Phone	02 8224 3031
Fax	(02) 8239 0299	Fax	02 9233 1850
Email	justin.gleeson@banco.net.au	Email	nowens@sevenwentworth.com.au

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	James Emmett		Gerald Ng
Phone	(02) 9231 4470	Phone	(02) 9233 4275
Fax	(02) 8023 9512	Fax	(02) 9221 5386
Email	jamesemmett@12thfloor.com.au	Email	gng@selbornechambers.com.au