ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN

No. S116 of 2011

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

HIGH COURT OF AUSTRALIA
FILED
26 SEP 2011
THE REGISTRY SYDNEY

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN

No. S118 of 2011

SPORTSBET PTY LTD
ACN 088 326 612

Appellant

AND

STATE OF NEW SOUTH WALES

First Respondent

RACING NEW SOUTH WALES
ABN 86 281 604 417

Second Respondent

HARNESS RACING NEW SOUTH WALES
ABN 16 962 976 373

Third Respondent

STATE OF SOUTH AUSTRALIA

Fourth Respondent

SUPPLEMENTARY WRITTEN SUBMISSIONS OF RACING NSW AND HARNESS RACING NSW

Preliminary Observations

1. If a market is the field of activity in which buyers and sellers amongst whom there can be strong substitution given a sufficient price incentive interact,[1] then a national market, for present purposes, is one in which the participants can be geographically grouped without regard to internal political boundaries. In other words, in such a market, it does not make economic sense to speak of (e.g.) New South Wales buyers or sellers. Internal political boundaries are irrelevant to the definition and functioning of that market.

2. The existence of national markets does not mean, however, that, within those markets, there is no such thing as inter- or intra-State trade. Buyers and sellers can still be located on one or other side of a political boundary, and their respective locations enable the trade between them to be labelled inter- or intra-State trade. Indeed, the test in *Cole v. Whitfield* (discrimination in a protectionist sense), that no party or intervenor has sought leave to argue was wrongly decided and should be overruled, necessarily postulates the existence of inter- and intra-State trade.

3. In some cases, identifying the location of a buyer or seller will be straightforward. In many cases, however, particularly where the relevant trade or commerce is carried on by means of the internet, it will not be so simple.[2] Market participants may have a multitude of connections, physical or legal, with different States, any one of which may, in contravention of s. 92, select its relevant connecting factor with those business as the basis for conferring upon them some competitive advantage. There is no reason why one trader may not be regarded as located in different places for different purposes.

4. In the circumstances of this case, for example:

---

[1] *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169 at 190; see also *Singapore Airlines v Taprobane Tours* (1991) 33 FCR 158 at 176; *Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 188 per Mason CJ and Wilson J, 199 per Dawson J, 210-211 per Toohey J.

[2] See, e.g., *Betfair Pty Ltd v. Western Australia* (2008) 234 CLR 418 at 452 [14].

a. Betfair has its Australian servers and call centre located in Hobart, Tasmania (Betfair 1AB 21-22), is incorporated in Victoria with its head office in Melbourne (Betfair 1AB 298), its data collection warehouses in London, United Kingdom and Australia (Betfair 1AB 236) and takes bets by telephone and internet from customers located in Tasmania, other states and territories within Australia and overseas (Betfair 1AB 21-22);

b. Sportsbet has its servers and call centre located in the Northern Territory (Sportsbet 1AB 174), its head office in Melbourne (Sportsbet 1 AB 171) and takes bets by telephone and internet from customers located in the Northern Territory, territories and states within Australia and overseas (Sportsbet 1 AB 176).

c. TAB Limited has its servers and call centre located in Sydney, Australia (Betfair 1AB 27), its ultimate holding company (Tabcorp Holdings Limited) is located in Melbourne, Victoria (Betfair 2AB 531-532), it takes bets in retails venues within New South Wales and takes bets by internet and telephone from customers located in New South Wales and other states and territories within Australia;

d. On-course bookmakers in NSW take face-to-face bets from punters located on the relevant racecourse and also take bets by internet and telephone from customers located in New South Wales and other states and territories within Australia.

5. It follows that there is an air of unreality about any attempt to ascribe a single "locality" to such entities for all purposes.

6. Ultimately, for the purposes of determining locality in a particular case (i.e., for the purposes of assessing the constitutionality of a particular measure) the location of individual traders will fall to be resolved as a question of fact on the circumstances of the case (including by reference to the regulatory regime under which a trader conducts its trade), and by regard to the nature of the impugned measure.

7. When transactions occur between a seller located in one State, and a buyer located in another State, that trade is still sensibly described as inter-State. It does not follow, of course, that any one seller can only be engaged in inter- or intra-State trade. In a national market, especially one for services that may be provided instantaneously, and at a uniform cost, regardless of distance (as will usually be the case with services provided over the internet), it is to be expected that nearly every seller will be engaged in both inter- and intra-State trade. The fact that individual traders may be involved in both kinds of trade within a national market does not pose any conceptual difficulty in relation to s. 92: the section is concerned with trade, not traders. It simply means that the one trader (engaged in both inter- and intra-State trade) may well have the benefit, and bear the burden, of s. 92 in relation to a particular measure.

8. In the context of national markets, therefore, s. 92 operates to ensure that inter-State trade within those markets is not subjected to discrimination in a protectionist sense.

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

9. Given the extent to which, at the time of the framing of the *Constitution*, "protection" and "free trade" were seen to be antithetical,[3] any attempt to consider how only one or the other applies in a national market for services is fraught with difficulty. Indeed, regardless of whether a controversy involves a market that is national, or one that is more confined, s. 92's conception of "free trade" can only be understood as the product of "the elimination of protection" which is the object of the provision.[4]

10. This Court's decision in *Betfair v Western Australia* demonstrates an evolving approach to the identification and definition of "protection". In that case, it was observed by the plurality that, in the period immediately preceding federation, "protection" generally referred to "the protection of local production of goods by

[3] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 457 [27].
[4] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452 [15].

tariff barriers".[5] However, their Honours recognised, aptly in the context of the present day, that "the term 'protection' is concerned with the preclusion of competition, an activity which occurs in a market for goods or services".[6]

11. It does not follow, however, that any preclusion of competition within a national market offends s. 92. That is because the direct concern of s. 92 is not freedom of trade and commerce within markets, but rather freedom of trade and commerce among the States. The former is achieved only as a possible corollary of the latter. The preclusion of competition in a national market in a way that does not burden inter-State trade does not, in other words, attract the operation of s. 92.

12. Nor is it sufficient to say, as Betfair proposes, that a measure will contravene s. 92 if it restricts competition in a national market in pursuit of a "narrow economic interest".[7] Even putting to one side the ambiguity of meaning of that phrase (to take but an obvious example, does a Commonwealth measure to the competitive disadvantage of some traders, but for the intended economic advantage of the nation as a whole, attract the epithet "narrow"?), it does not assist in identifying those measures that burden inter-State trade, making it less than "absolutely free".

13. Any measure, Commonwealth or State, directed towards the regulation of trade or commerce may have some impact – perhaps an adverse impact, however slight – upon competition in a national market. That the text of s. 92 does not identify such impacts as a vice *per se* is, or at the very least should be, uncontroversial. Therefore, anterior to any considerations of "reasonable necessity", it should be possible to formulate the current doctrine relating to s. 92 in terms that distinguish, or are capable of assisting in distinguishing, between those burdens that fall foul of that provision and those that are placed beyond its reach.

14. The starting point of analysis is the language of s. 92, as informed by its context, namely, the provisions of Ch IV of the *Constitution*. Commencing with the explanation of the relationship between ss. 90 and 92 of the *Constitution* provided

[5] (2008) 234 CLR 418 at 457 [27].
[6] (2008) 234 CLR 418 at 452 [15].
[7] Betfair Supplementary Submissions at [40].

by a majority of this Court in *Ha v New South Wales*,[8] the plurality in *Betfair v Western Australia* observed that the inclusion of s 92 in Ch IV indicated that that Chapter "implemented a broader scheme of political economy".[9] Some insight into what was entailed in that scheme is afforded by their Honours' earlier remark that "[t]he creation and fostering of national markets would further the plan of the *Constitution* for the creation of a new federal nation and would be expressive of national unity".[10] The same might also be said of their Honours' invocation of the emphasis placed by the United States Supreme Court upon the existence of a "national economic unit" in the development of its so-called negative Commerce Clause jurisprudence.[11]

15. Put simply, s. 92 operates, against the backdrop of the theory that "the peoples of the several states must sink or swim together";[12] guarding against the "inconvenient truth"[13] that the Parliament of one State may be motivated to legislate contrary to the trading and commercial interests of residents of other States. It thus affords the constitutional mechanism by which national markets are created and, once created, protected from the possibility of segmentation or disintegration along State lines.

16. An overt one cent per tonne border impost on goods in a national market (leving aside s. 90) would therefore be invalid under s. 92 regardless of any demonstrated competitive effect on the market in question. It is invalid because it makes relevant internal political boundaries when those boundaries are economically irrelevant to the market in question.

17. A measure that is said to offend s. 92 by reason of its practical (or non-overt) operation or effect is required, under the *Cole v. Whitfield* test, to be demonstrated

[8] (1997) 189 CLR 465 at 494-495.
[9] (2008) 234 CLR 418 at 455 [22].
[10] (2008) 234 CLR 418 at 452 [12].
[11] (2008) 234 CLR 418 at 461 [39].
[12] *Baldwin v. GAF Seelig Inc* 294 US 511 at 523 (1935), quoted in *Betfair Pty Ltd v. Western Australia* at [35].
[13] *Betfair Pty Ltd v. Western Australia* at [34].

to discriminate against inter-State trade in a protectionist sense (i.e., to the advantage of intra-State trade).

18. Seen in this light, what was said in *Cole v Whitfield* in the context of local markets (or, more precisely, markets, the geographical dimensions of which coincided with, or fell entirely within, State boundaries), is but one manifestation of the manner in which s. 92 discharges its function, namely, by preventing States from inhibiting the development of a national market in particular goods and services. It is, after all, trite that the evolution of such a market would be frustrated, contrary to the scheme of Ch IV of the *Constitution*, if a State could, by legislative and executive measures, prevent or obstruct the meeting of the out-of-State "supply" and in-state "demand" sides of trade and commerce.

19. But what of a situation in which a national market has already developed, such as the national market for wagering services on racing and sporting events? In such a market, the analysis must not, it is submitted, be confined to the impact of a State measure upon the ability of competing out-of-State and in-State traders to attract the custom of in-State consumers. At the very least, the scope of the inquiry must extend to the effect of the measure upon competition between out-of-State and in-State traders, in so far as they seek the patronage of consumers throughout the national economy (as distinct from in-State consumers only).

20. And because s. 92 was not designed to create a laissez-faire economy in Australia,[14] the vice against which such an inquiry must be directed is not some curtailment in what would otherwise be the unfettered operation of free market forces; rather, it is a derogation from, or an erosion of, the national character of the relevant market (that is, the character of the market deriving from the irrelevance of internal political boundaries). In short – and it is necessary at this point to speak at a relatively high level of abstraction – the question is whether the measure makes relevant internal political boundaries that had no prior economic significance.

[14] (2008) 234 CLR 418 at 460 [36].

21. To put the matter more concretely, the question is: does the impugned measure discriminate between traders on the basis of some connection or lack of connection, physical or legal, that they might have with a State? A market characterised by the conferral or imposition of competitive advantages or disadvantages upon traders on such a basis would disclose qualities of parochialism inconsistent with the existence of a national market. Such a measure impermissibly burdens trade and commerce "among the States".

22. Free trade, in the sense that the phrase is used in s. 92, may therefore be seen not to refer to free trade within markets (whatever their geographical dimensions), but to free trade (in the sense of an absence of discriminatory protectionism) among the States, whether that trade involve purely local markets, national markets, or something in between.

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

23. Protectionism remains an important element of the mischief against which section 92 is directed. However, it follows from what has already been said that the word "protectionism" is not used in this context necessarily to mean "the protection of domestic industries against foreign competition".[15] In a national market, where local and inter-State traders are engaged in both inter- and intra-State trade, "protectionism" is more readily understood as the distortion or fracturing of the market along internal political boundaries.

24. *Betfair Pty Ltd v. Western Australia* provides a recent example of protectionism in this sense. The vice in that case was the exclusion of Betfair from competition in the national market within Western Australia by preventing it from taking bets from customers located in Western Australia. In this case, of course, the appellants have both been granted approvals to use NSW race field information

[15] *Cole v Whitfield* (1988) 165 CLR 360 at 392.

on precisely the same terms as every other wagering operator, and have not demonstrated any affect on competition in the market as a result.

25. Consequently, to describe a measure as "protectionist" in the context of a national market, whether for goods or services, is not merely a conclusion following inevitably from the demonstration of a measure's substantial anti-competitive effects in a market. Rather, it is the criterion by which discriminatory laws may be identified as rendering trade and commerce among the States less than absolutely free.

26. That is to say, s. 92 does not invalidate every measure that has an adverse effect on competition. That is because, not every measure having such an effect burdens interstate trade and commerce. Only where competition in a national market is burdened in such a way as to intrude internal political boundaries does s. 92 operate to invalidate the impugned measure.

27. An effect on competition in a national market, devoid of any differential, protectionist, treatment of the trade of those traders that have a connection, physical or legal, with a particular State and those that do not, is therefore insufficient to attract the operation of s. 92. The fact that the relevant trade is carried on without reference to State borders does not mean that State borders – or more precisely, the reach of State legislative power, as revealed by the connecting factors that States may create between themselves and particular trades or classes of traders – have become irrelevant to s. 92 analysis.

28. Protectionism (i.e. the protection of traders connected to one State against competition, in a national market, from traders lacking that connection) therefore remains important as the criterion by which it may be determined whether trade "among the States" is absolutely free.

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

29. It does not follow from the fact that a measure is shown to have an adverse effect upon competitive behaviour in a national market that the freedom of trade between the States has been rendered less than absolutely free. Such an adverse effect does not necessarily mean that the national market has been, or is likely to be, distorted along State boundaries. Nor does it mean that the performance of the market is now characterised by a quality of parochialism inconsistent with the existence of a national market.

30. The fact that s. 92 requires that trade "among the States" shall be absolutely free means that it is not the effect on competition in the national market per se, but the effect on trade among the States within that market, that is relevant. Put another way, the expression "among the States" is no mere synonym for "throughout the Commonwealth" or "in every part of the Commonwealth" (a phrase which the framers of the *Constitution* could well have employed if they wished, given the terms of covering clause 5).

31. The overlap between the two notions of competition within a national market and trade among States within that market will frequently be great, but there are important differences. Critically, s. 92 requires a focus on the effects of the measure on inter-State trade, rather than the effect on a particular trader in a national market.

32. If all a trader was required to demonstrate was that he or she traded in a national market (or any market extending over a State border) and that he or she was subject to a competitive disadvantage in comparison with another trader in that market, the following anomalous consequences would be observed:

    a. section 92 would operate to invalidate State laws that imposed a competitive disadvantage on the State's own, local, traders in a national market, and which conferred a corresponding advantage on inter-State traders in that market;

b. section 92 would operate to invalidate State laws that imposed a competitive disadvantage on some inter-State traders in common with all local traders;

c. section 92 would operate to invalidate State laws that imposed a competitive disadvantage on some inter-State and some local traders;

d. section 92 would operate to invalidate Commonwealth laws [16] that imposed a competitive disadvantage on some traders (whether from one State, several States, or all States) in a national market.

33. Not only have such measures never previously been held to involve a contravention of s. 92, in many cases they are directly contrary to the conventional understanding of the role of s. 92.

34. The effect of such an approach would be to reinstate something very close to an "individual rights" theory of s. 92. That is to say, individual traders in a national market would, in effect, be guaranteed the right not to be disadvantaged in comparison with any other trader in the market. Such a position would not advance any notion of national unity, which underpins s. 92. It would only serve to privilege individual traders.

35. Ultimately, s. 92 is concerned with measures that burden inter-State trade by protecting intra-State trade. In a case (of which the present are examples) where it is demonstrated that those challenging a measure, which applies equally to all participants, are not prevented from trading in any market, and are in fact vigorously and successfully competing within the relevant market, convincing evidence is required to demonstrate the effect of the measure on competition and inter-State trade. That is so no matter what approach is taken to s. 92. The fact that one trader engaging in inter-State trade is burdened in comparison with other traders is irrelevant (in any event, neither appellant has demonstrated that fact in

[16] The Commonwealth, of course, being bound by s. 92: *James v. Commonwealth* [1936] AC 578.

this case): it is only if the burden operates to protect traders from one State from competition from traders from another State that the burden is relevant.

Particular Response to Betfair's Submissions

36. In its submissions directed to the application of the Constitutional principles for which it contends to the facts of its case, Betfair describes the race fields scheme as having a protectionist character because it imposes a "six times greater impost" on Betfair compared to TAB.[17]

37. That contention is, of course, controversial, for reasons canvassed in detail in the Regulators' earlier written and oral submissions. The simple fact is that Betfair, in common with all wagering operators, has been granted an approval to use NSW race field information upon payment of the precisely the same fee as all other wagering operators, namely $1.50 of every $100 of turnover on NSW races (after account is taken of the operation of the applicable fee-free threshold which, in the case of Racing NSW, sees no wagering operator pay any fee in respect of its first $5 million of turnover no matter where they are domiciled). The addition to the cost base of every wagering operator represented by the fee, therefore, has been identical (c.f. *Castlemaine Tooheys Ltd v. South Australia* (1990) 169 CLR 436). Other elements of the cost base of wagering operators, and the impact of that fee in that context, were not explored: Betfair conceded, for example, that the total betting taxes payable by TAB (taxes which Betfair does not pay) and payments made by it under the RDA constituted approximately 66% of TAB's commission).[18] The disparate impact asserted by Betfair is a product only of, first, the selection of a narrow and artificial conception of revenue (which takes no account of all of the benefits and revenue that Betfair receives as a result of its approval: see First and Second Respondents' Submissions at [17]) and, secondly,

[17] Betfair's submissions at [34].
[18] 1AB 262-3.

choices made by Betfair in relation to the business model it adopted and business decisions that it makes including the amount of its commission. If Betfair increases its commission rate, that comparison changes. Similarly, if TAB Limited decreases its takeout rate, that comparison changes. That is to say, tellingly, even on Betfair's case, the alleged disparate impact of the fee bears no connection to the fact that Betfair is a non-New South Wales trader or that it is engaged in inter-State trade.

38. Finally, and critically, the fee has not been demonstrated to have any impact whatsoever on competition within the national wagering market: indeed, the evidence was solely to the effect that Betfair had continued to compete vigorously, and successfully, for market share.[19] For the reasons given above, no matter what approach is taken to the construction of s. 92, in the absence of such a demonstrate Betfair's case must fail.

Bret Walker
Tel: (02) 8257 2527
Fax: (02) 9221 7974
Email: maggie.dalton@stjames.net.au

Justin Gleeson
Tel: (02) 8239 0200
Fax: (02) 8239 0299
Email: justin.gleeson@banco.net.au

Nicholas Owens
T: (02) 8257 2578
F: (02) 9221 7974
E: nowens@stjames.net.au

James Emmett
T: (02) 9231 4470
F: (02) 8023 9512
E: jamesemmett@12thfloor.com.au

Gerald Ng
T: (02) 9233 4275
F: (02) 9221 5386
E: gng@selbornechambers.com.au

[19] See the Regulators' Submissions in Chief in the Betfair Appeal at [35].