BETFAIR PTY LIMITED v RACING NEW SOUTH WALES & ORS
(S116/2011)

Court appealed from: Full Court of the Federal Court of Australia [2010] FCAFC 133

Date of judgment: 17 November 2010

Date of grant of special leave: 11 March 2011

This matter concerns section 92 of the Constitution which provides that "trade, commerce, and intercourse among the States...shall be absolutely free".

Betfair Pty Limited ("Betfair") is a betting exchange based in Hobart. It provides wagering services to punters in New South Wales and elsewhere. It is common ground that Betfair is engaged in interstate trade. Racing New South Wales and Harness Racing New South Wales (collectively known as the "NSW Racing Authorities") are the regulators of horse and harness racing in New South Wales. TAB Limited ("TAB") is the largest wagering operator in New South Wales.

In 2006 the New South Wales parliament passed legislation which allowed the NSW Racing Authorities to impose a race field fee ("the Fee") as a condition for the use of New South Wales race field information by wagering operators. Such information was vital for Betfair's business in respect of races held in New South Wales. The Fee was fixed at the rate of 1.5% of the "wagering turnover" of the wagering operator. It was imposed uniformly on all wagering operators, irrespective of their domicile.

Betfair brought proceedings against the NSW Racing Authorities alleging that the Fee was discriminatory. It also submitted that its practical effect was to protect New South Wales based wagering operators, particularly TAB, from interstate competition. Betfair argued that the Fee discriminated against it as a low-margin operator relative to a higher-margin operator such as TAB. It further submitted that the Fee contravened section 92 of the Constitution.

The primary judge, Justice Perram, agreed that the Fee discriminated against Betfair in that the impost was a greater percentage of its commission than that of TAB. His Honour however concluded that Betfair had not established that this differentiation was "protectionist discrimination" so as to engage the operation of section 92 of the Constitution. Accordingly, his Honour dismissed Betfair’s claim. On appeal, Betfair argued that Justice Perram should have concluded that the Fee was of a protectionist character.

On 17 November 2010 the Full Federal Court (Keane CJ, Lander and Buchanan JJ) dismissed Betfair's appeal. Their Honours found that Justice Perram was correct to conclude that Betfair had failed to demonstrate a breach of section 92 of the Constitution. His Honour was also correct to conclude that Betfair had failed to establish that the Fee deprived it of a competitive trade advantage.

The grounds of appeal include:

- The Full Court erred in failing to find that for the purposes of section 92 of the Constitution, each of the impugned fee conditions imposed a discriminatory burden of a protectionist kind on the interstate trade of Betfair.

On 24 March 2011 a notice pursuant to section 78B of the *Judiciary Act* 1903 (Cth) was filed in this matter. The Attorneys-General for the Commonwealth, Victoria, Queensland, South Australia & Western Australia have advised the Court they will be intervening.

On 7 April 2011 the NSW Racing Authorities filed a summons, seeking leave to file a notice of contention out of time. The grounds in that proposed notice include:

- The impugned fee was not proven to discriminate against Betfair or interstate trade.

- Betfair led no expert economic evidence, or other appropriate evidence, to seek to establish that gross revenue (as defined by Betfair) was the only criterion, or at least a better criterion than turnover, by which to set a fee for the use of a product which did not impede competition or burden interstate trade.