IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S116 of 2011

ON APPEAL FROM FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

BETFAIR PTY LIMITED
ACN 110 084 985

Appellant

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AND

RACING NEW SOUTH WALES
ABN 86 281 604 417

First Respondent

HARNESS RACING NEW SOUTH WALES
ABN 16 962 976 373

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Second Respondent

ORIGINAL

ATTORNEY GENERAL (NEW SOUTH WALES)

Third Respondent

APPELLANT'S SUPPLEMENTARY SUBMISSIONS IN RESPONSE TO THE HIGH COURT'S LETTER DATED 8 SEPTEMBER 2011

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1. The court's questions address a number of overlapping issues. In answering those questions, it will be necessary to develop a number of underlying themes, and those themes will be addressed first.

2. The starting point must be the fact that s 92 is a constitutional protection that was "intended to apply to the varying conditions which the development of our community must involve".[1] Neither the text of s 92 nor the Convention debates, nor for that matter any of the recent cases, suggest that s 92's guarantee should be approached from a narrow geographical perspective. In particular, nothing suggests that trade, commerce and intercourse among the States should always be segmented into rigid classifications of 'interstate' and 'intrastate' trade, or that there should be any particular difficulty in applying s 92 to a national market for goods or services: *Betfair v WA* at 480-481 [114]-[122].

The purpose and function of Section 92

3. Section 92's historical purpose was to ensure,[2] and the text of s 92 assumes, the development of a national market "among the states". As described by the Court in *Cole v Whitfield* (at 391):

> The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.

The same purpose is revealed by a passage which Sir Samual Griffith wrote in relation to the proposed constitutional provision prior to the 1897-98 Conventions, which the Court quoted in *Cole v Whitfield*:[3]:

> I apprehend that the real meaning is that the *free course of trade and commerce* between the different parts of the Commonwealth *is not to be restricted or interfered with* by any taxes, charges or of imposts (emphasis in original).

4. Similarly, the joint judgment in *Betfair v WA* states that the purpose and function of s 92 is to create and foster national markets in goods and services in furtherance of national unity: at 452 [12].

5. The task of identifying the kind of interference with trade and commerce among the States that will attract the protection of s 92 is greatly assisted by the joint judgment's analysis of the United States Supreme Court's negative commerce clause jurisprudence. The joint judgment reveals (adopting the relevantly applicable Supreme Court analysis) that:

   (a) s 92's focus is on "economic barriers" to interstate trade, the existence of a "national economic unit" and the protection of "the free market forces" in that union: *Betfair* 461 [39];[4] and

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[1] See *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 (***Betfair v WA***) at [19], citing O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at [367]-[368]; see also *North Eastern Dairy Co. Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 615 per Mason J.

[2] See *Cole v Whitfield* (1988) 165 CLR 360 (***Cole v Whitfield***) at 387 to 393.

[3] (1988) 165 CLR 360 at 389. The quoted passage is from La Nauze, "A Little Bit of Lawyers' Language. The history of 'Absolutely Free' 1890-1900 in Martin ed, *Essays in Australian Federation* (1969) at 84 quoting Griffith, "Notes no the Draft Federal Constitution Framed by the Adelaide Convention of 1897". Queensland Legislative Council *Journals* (1897) vol 47 at pt 1 p 12. See also Sir Isaac Isaacs Convention Debates Melbourne 1898 p 1015.

[4] See also *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 at 468-470.

(b) s 92's application is so that "no State has the power to make a law or regulation which ... will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction": at 462 [40].[5]

6. As is recognised by the joint judgment in *Betfair*,[6] the development of the United States negative commerce jurisprudence (which in turn assisted in the framing of s 92) was:

> ...in response to an apparent, albeit at times inconvenient, truth. This is that legislators in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers.[7]

10 7. The negative commerce clause ensures that a "State may not promote its own economic advantages by curtailment or burdening of interstate commerce".[8] Similarly, the guarantee in s 92 is to ensure that national markets are created and fostered with commerce flowing through the Commonwealth, without competitive restriction or interference of the relevant kind.

Interfering with trade and commerce among the States

8. The question of what is "interference of the relevant kind" may be approached in two ways which are not mutually exclusive.

9. First, does the measure restrict competition in the national market in pursuit of a narrow economic interest? That interest will usually be associated with the economic interests of a
20 particular State, but may equally involve the economic interests of a combination of States or the Commonwealth.

10. Alternatively, can the measure be justified as reasonably necessary for the achievement of a legitimate legislative object? If the legislative or executive measure interferes with trade or commerce among the States, and is not reasonably necessary for the achievement of a legitimate object, it may show or at least tend to show that the measure offends s 92.[9] The pursuit of a narrow economic interest by means dependent upon the geographical reach of State legislative power, both within and beyond State borders and in ways which discriminate against the free flow of trade and commerce among the States, will not qualify as a legitimate object.

30 **Geographical Descriptions**

11. In *Betfair v WA*, the joint judgment identified the shortcomings of a purely geographical approach to the application of s 92 in the modern internet age: at 452 [14]-[15], 453 [18], 474 [89]-[90] and 475-476 [97]. Notions such as "domestic industry", "the people of the

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[5] *Brown v Houston* 114 US 622 at 630 (1885), as quoted by Barton J in *Fox v Robbins* (1908) 8 CLR 115 (***Fox v Robbins***) at 122-3.

[6] 455 [22]. See also Ely, *Democracy and Distrust* (1980) at 83-84 (describing the development of the Supreme Court's negative commerce clause jurisprudence in the nineteenth century as an example of "*the protection of geographical outsiders, the literally voteless*"), *Betfair* at 460 [35] referring to Professor Tribe in American Constitutional Law, 3rd ed, vol 1 (2000) pp 1051-1052 (and see also 1057)) and *Baldwin v GAF Seelig Inc*; and at 462-4 [42]-[46] referring to *Guy v Baltimore*.

[7] *Betfair v WA* at 459 [34].

[8] *Hood & Sons v Du Mond* 336 US 525 at 532 (1948) referring to Cardozo J's opinion in *Baldwin v GAF Seelig Inc* 294 US 511 (1934).

[9] See *Betfair v WA* at 477-478, [102]-[105], and at 483-484, [131] and [134]; and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-2, 477 and 480.

State" and "local commerce" discounted "the significance of the movement of persons across Australia and of instantaneous commercial communication"; they looked back "to a time of the physically distinct communities located within colonial borders and separated by the tyranny of distance": at 453 [18]. Just as importantly, localised notions of that kind will not encompass much modern State regulatory legislation in the new economy, particularly that dependent on the long-arm territorial reach of a State, that can be deployed to interfere with trade and commerce among the States: at 474 [90].[10]

12. Neither of the approaches to the application of s 92 advocated by Betfair requires the identification of a protected intrastate trader in a geographic sense, that is, a "local trader". Rather, the analysis must proceed from an economic perspective.

13. Applying labels such as 'interstate trade' and 'intrastate trade,' although sometimes convenient; can be apt to mislead because the use of those labels (which are not to be found in the text of s 92) may mask the complexities of the economic issue being considered, and the more fundamental considerations of national unity which underpin s 92: *Betfair* at 455 [23], 460 [35].

14. If these labels are to be used, their limitations must be recognised. In s 92 jurisprudence, 'interstate' trade means no more than trade among the States, often as part of a national market. It does not mean merely the physical movement of goods across geographic boundaries, but the free flow of commerce throughout the Commonwealth.

15. Likewise, 'intrastate' trade is not confined to a localised geographic area within State borders. Rather, in the context of s 92 it can be identified as a class of transactions that has been constrained in some way by State legislative or executive action in pursuit of localised economic interests. As the joint judgment said in *Betfair v WA* at 480 [116]:

> The effect of the legislation of Western Australia is to restrict what otherwise is the operation of competition in the stated national market by means dependent upon the geographic reach of its legislative power within and beyond the State borders.

16. Retaining the focus on the economic rather than the geographic avoids the irrelevancy of geographic distinctions at a time when internet commerce and the "new economy" operate without reference to such geographic boundaries, as identified by the Chief Justice at T206.9088; see also *Betfair v WA* at 452 [14]-[15], 474 [90] and 476[97].

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

17. There is no difficulty in applying the concept of free trade in relation to a national market for services. It involves no tension with the text of s 92 or the decisions of the Court. It precisely accords with s 92's role and function in creating and fostering national markets.

18. *Betfair* provides a clear example of the application of s 92 to a national market for services without any apparent difficulty.

[10] The joint judgment also quoted Professor Tribe's statement about the Commerce Clause in the United States Constitution that the problem of interference with interstate trade is "most acute when a state enacts commercial laws that regulate extra territorial trade so that unrepresented outsiders are affected even if they do not cross the State's borders": see *Betfair v WA* at 460 [35].

19. In *Betfair v WA*, the first plaintiff (Betfair) and the Western Australia 'sited'[11] wagering operators (RWWA and WA licensed bookmakers) were all engaged in the supply side of the national market for wagering,[12] as were each of the TABs and bookmakers licensed in each State who were also authorised to accept bets over the telephone or the internet.[13] The second plaintiff, Mr Erceg, was engaged in the demand side of that same market.[14]

20. Immediately before the enactment of the impugned Western Australian legislation, Mr Erceg was able to make bets with bookmakers and totalisator organisations authorised under the laws of Western Australia and also with those authorised or licensed under the law of other States and Territories. Similarly, he was able to place bets with the betting exchange operated by Betfair. After the enactment of the Western Australian legislation, Mr Erceg was prohibited from making bets with Betfair, and Betfair was prohibited from operating its betting exchange on Western Australian racing events. In other respects, the position was unchanged in that bookmakers and the totalisator organisation authorised under the laws of Western Australia continued to compete in the national market, as did bookmakers and totalisator organisations authorised under the laws of other States and Territories.

21. Section 24(1aa) of the *Betting Control Act 1954* (WA) interfered with the national market in wagering in 2 ways:

    (a) it prohibited persons, such as Mr Erceg, located in Western Australia from participating in the national market in wagering by using a betting exchange: *Betfair v WA* at 470 [69]; and

    (b) it did not permit, Betfair, a supplier in national market to offer its product in Western Australia: *Betfair v WA* at 480 [114],

    Thus, as a result of the prohibition, Betfair could not compete for revenue from consumers present in Western Australia who were participating the national market: 482 [122].

22. Section 27D interfered with the national market:[15]

    (a) "directly" by denying "Betfair the use of an element in Betfair's trading operations"; and

    (b) "indirectly by denying Betfair's registered players receipt and consideration of the information respecting the latest WA race fields by access to Betfair's website or by communication with its telephone operators".

23. The local or narrow economic interests that Western Australia chose to advance by means of its legislative power at the expense of unrestricted trade in the national market were represented by the Western Australian-sited wagering operators and by their economic contributions to the Western Australian racing industry, and the Western Australian Government. Specifically:

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[11] See 469 [66].
[12] 471-2 [75] and at 480 [114]-[116].
[13] At 465 [53].
[14] At 470 [69].
[15] At 470 [69] and 481 [118].

(a) RWWA - the statutory authority which had established totalisator agencies in Western Australia, and which engaged in trade with customers in other States and Territories by means of a telephone call centre and an internet facility for the making of wagers on races and sporting events in Western Australia and elsewhere: *Betfair v WA* 471-1, [75]. RWWA paid 5% of its revenue from totalisator wagers and 11.91% in respect of off-course wagers as a Western Australian State tax: *Betfair v WA* 472 [78]. It was also obliged to allocate its funds in the manner specified by legislation, including the provision of grants and loans to racing clubs and payments or credits to thoroughbred, harness and greyhound racing clubs registered with RWWA: *Betfair v WA* 472 [79]; and

(b) Western Australian-licensed bookmakers accept bets at race courses in Western Australia. Some also accept bets over the telephone or the internet from persons in Western Australia and elsewhere: *Betfair v WA* 466 [56]. They are required to pay an annual licence fee calculated as a percentage of annual turnover, and a "betting levy" to the Western Australian racing club on whose racecourse the licensee carried on business: *Betfair v WA* 472 [80].

24. In *Betfair v WA,* the joint reasons concluded that s 24(1aa) and s 27D operated to the competitive disadvantage of Betfair and to the advantage of RWWA and the other Western Australian wagering operators: 481-2 [118], [122] and were contrary to s 92. It was not suggested that the fact that there were no "purely local" traders was an impediment to the engagement of the constitutional guarantee. Any such suggestion would be at odds with the Court's overall analysis, including its discussion of the US cases and the need for an economic rather than a geographic approach to the application of s 92.

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?**

25. Protectionism can be a label for, or a conclusion about, particular examples of discriminatory burdens imposed by State legislative or executive action that restrict or preclude commerce among the states in the relevant sense identified above. So understood, 'protectionism' applies to trade carried on in a national market without reference to state borders because it applies in an economic not geographic sense.

26. Thus, s 92's guarantee is to ensure commerce among the states is not restricted or precluded by anti-competitive measures in the pursuit of narrow economic interests. Those narrow economic interests may serve one State, a combination of States or even the Commonwealth, but in serving the narrow economic interests they impinge upon the creation and fostering of national (or at least interstate) markets, and thus engage s 92's guarantee.

27. The mere fact that traditional examples of 'protectionism' can be defined in purely geographic terms, such as custom duties at the border or State legislation that discriminates in favour of a purely in-State trader in goods, is no reason why the concept of protectionism should not be applied as an economic concept.[16] That is especially so when much modern State regulatory legislation in the new economy, often founded on the State's

[16] See also *Cole v Whitfield* at 408-9.

long arm territorial jurisdiction, seeks to cast a protective net around a set of economic interests or a class of transactions that are not defined in purely geographic terms.

28. Various cases illustrate this point. In each such case, the national market can be identified by identifying the transaction or thing which attracts the relevant burden (as required by *Bath v Alston Holdings* (1988) 165 CLR 411 (***Bath***) at 428):

(a) in *Fox v Robbins,* the national market for wine was restricted by the imposition of a discriminatory impost on the sale in Western Australia of wine made from non-Western Australian grapes;

(b) in *Vacuum Oil Co Pty Limited v The Commonwealth* (1934) 51 CLR 108, the national market for petroleum fuel for use in motor vehicles was restricted by a provision which required, in effect, that those who imported petroleum fuel for sale in Queensland must purchase specified quantities of power fuel produced only in Queensland (see also *Vacuum Oil Co Pty Limited v Queensland (No 2)* (1934) 51 CLR 677);

(c) in *Tasmania v Victoria* (1935) 52 CLR 157, the national market for potatoes was interfered with by prohibiting the importation into Victoria of potatoes from Tasmania (see at 168 per Gavan Duffy CJ, Evatt and McTiernan JJ referring to the effect of the proclamation being to "terminate for an indefinite period that species of trade among the States which consists in the marketing by Tasmanians of their potatoes within the State of Victoria" - see also Rich J at 172 and Dixon J at 179, 181);

(d) in the passage from Barwick CJ's reasons in *Samuels v Readers' Digest Association Pty Limited* (1969) 120 CLR 1 at 98, cited with approval in *Betfair* at 451 [11], the national market for the sale of records was interfered with by measures banning the discounting practices of interstate traders;

(e) in *North Eastern Dairy Co Limited v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559, the interstate market in pasteurized milk was restricted by the imposition of the prohibition of the sale in New South Wales of milk not pasteurized in New South Wales;

(f) in *Bath v Alston,* the national tobacco market was restricted when Victorian retailers were taxed when they sourced their tobacco from non-Victorian wholesalers, but not when they sourced it from Victorian wholesalers;

(g) in *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 the national beer market was restricted by the imposition in South Australia of higher bottling costs on (certain) interstate traders. Those higher costs arose from higher deposits on non-refillable bottles and collection depot requirements affecting those traders. Those higher costs would also potentially discourage further entrants from trading in South Australia (bottle washing facilities not being consistently available within South Australia and, even if they were, necessarily involving additional comparative expense for an out of state entrant in terms of transport costs to enable refilling – see case stated [76] at 449). It was no impediment to s 92's application that the major interstate trader, CUB, was not adversely affected because it used refillable bottles in South Australia: at 475. CUB competed in the national market. It had agreed to form a joint venture with SAB, so to that extent its interests were aligned with SAB:

at 438-9, point 8 of the case stated. The South Australian-based brewers, SAB and Coopers, representing the narrow economic interests advanced by the legislative requirements, both participated in the national market: see case stated [6] at 438. The fact that CUB, SAB and Coopers all participated in the national market, in competition with Castlemaine Tooheys, afforded no reason for not applying s 92;

(h) in *Betfair v WA*, the measures were aimed at the provision of betting services by Betfair in the national market or on Western Australian events;

(i) in *Guy v Baltimore*,[17] the wharfage fees imposed on all vessels with non-Maryland products interfered with the interstate trade in non-Maryland products;

(j) in *Minnesota v Barber*,[18] the requirements that meat could not be sold in Minnesota that had not been inspected by Minnesota inspectors prior to slaughter interfered with the interstate market in meat;

(k) in *Baldwin v G A F Seelig Inc*, the interstate market in milk was interfered with by imposing prohibiting the sale of milk in New York unless producers had been paid New York's minimum price;

(l) in *Hood & Sons v Du Mond*,[19] the interstate market in pasteurized milk was restricted by the New York decision to deny additional facilities to acquire and ship milk;

(m) in *Pike v Bruce Church Inc*, the interstate market in cantaloupes was interfered with by Arizona imposing obligations on growers of cantaloupes in Arizona to pack the goods in Arizona before shipping to California "for interstate shipments to markets throughout the Nation".[20]

(n) in *Hunt v Washington State Apple Advertising Commission*[21] the interstate market in apples bearing Washington's superior grading system was interfered with by North Carolina requiring apples to comply with that State's labelling and grading system; and

(o) in *C&A Carbone v Clarkestown*[22] the interstate market in waste was interfered with because of the imposition of a requirement that waste had to be processed at the local plant.

Question 3: **In the context of trade, carried on in the 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. The question leaves it unclear whether the assumed measure discriminates between the interstate trader and other traders, and whether those other traders include those who only

[17] 100 US 434 (1879).
[18] 136 US 313 (1890).
[19] 336 US 525 (1948).
[20] 397 US 137 at 139 (1969).
[21] 432 US 333 (1977).
[22] 511 US 383 (1994).

trade within the boundaries of the State as well as those who trade both intrastate and interstate. The discussion that follows addresses the significance of discrimination.

30. Section 92 prohibits measures which impose a competitive disadvantage on a trader in the national economy by discriminating against that trader when compared with other traders representing narrow economic interests.

31. It is not sufficient that a trader in the national economy is burdened in some way. The measure must interfere with the free flow of trade among the States through the imposition of a discriminatory burden. Discrimination requires a comparison. In former times, this may have involved identifying purely local traders. In the internet age, it is more likely to involve an identification of the economic interests that the legislative or executive measure is advancing or protecting. Either form of discrimination warrants the imposition of the epithet "protectionist" (see Crennan J at T82.3531-4 and Kiefel J at T19.742-5 and T138.6065-9). That does not mean, however, that establishing protectionism is an additional step in the analysis of the application of s 92. Rather, it is part of assessing whether the interference with trade among the states has the purpose or effect of advancing local economic interests (see also the "larger principle or proposition" identified by French CJ at T.206.9082).

32. As Mr Young QC noted at T206.9090, there may be a need to further articulate the notion of 'protectionism'. It may be, perhaps, that 'protectionism' in a geographic sense of protecting one State's domestic trade is the classic example of the anti-competitive restrictions that may burden the flow of commerce in the national economy; just as customs duties were the archetype of 'protectionism' at the time of the Convention Debates. However, those examples do not exhaust the reach of s 92 (see similarly *Cole v Whitfield* at 408-9 and *Betfair v WA* at 453-4 [19]-[20]). This may mean no more than 'protectionism' (to the extent it is an ongoing requirement) is not to be narrowly defined, and is to be understood as an economic concept concerned with the preclusion or restriction of competition in the national economy or, in some cases, interstate economies.

33. This analysis falls a step short of the European jurisprudence, where the *Treaty Establishing the European Community* has come to be understood as proscribing measures creating anti-competitive effects or obstacles to intra-community trade, regardless of whether there exists a "domestic" industry which gains an identifiable competitive advantage from the imposition of those obstacles.[23] In that context the primary issue is whether the measure is proportionate to a legitimate object.[24] Nonetheless, the European approach is instructive for its embrace of economic rather than geographic concepts.

Application to Betfair v Racing NSW & Ors

34. Applying the principles discussed above in this case, the impugned fees restrict the free flow of commerce among the states: they place a discriminatory burden on Betfair as the means to advance the economic interests of the TAB (and through it, the NSW racing

[23] It is notable, in that regard, that for the purposes of art 28 of the *Treaty Establishing the European Community*, it is unnecessary to demonstrate that domestic industry gains an advantage from "quantitative restrictions upon imports" or "measures having equivalent effect". It is sufficient for invalidity that a particular measure creates "barriers" or an "obstacle" to intra-community trade: *Cinéthèque SA v Fédération Nationale des Cinémas Français* (C-60 and 61/84) [1985] 4 ECR 2605 at [21]-[22]. See also, writing in an extra-curial capacity, The Hon Justice Susan Kiefel "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives", delivered as the *Seventeenth Lucinda Lecture* at Monash University on 19 November 2009.

[24] See C Staker "Section 92 of the Constitution and the European Court of Justice" (1990) 19 *Federal Law Review* 332 at 326-31 and the authorities there referred to.

industry). Further, those measures have a protectionist character. This is so because the six times greater impost on Betfair is damaging to its competitive position in the national market and advantageous to its NSW licensed competitors, in particular the TAB, upon whose revenues the State of NSW and the NSW racing industry are heavily dependent. Moreover, the differential impost cannot be justified as reasonably necessary to the achievement of any legitimate objective.

35. This analysis holds good whether the terminology of interstate/intrastate traders is retained, or whether a broader economic approach is adopted of the kind that Betfair has advocated. If the dichotomy between interstate and intrastate trade is to be retained, then relevantly Betfair is to be regarded as a representative of interstate trade (as it was in *Betfair v WA*) and the TAB is to be regarded as a representative of the intrastate trade that is being advantaged and protected by the differential impost.

36. In the current proceedings, TAB's participation in the national market was raised as a reason why it may not be the relevant intrastate comparator for the purposes of s 92.[25] In Betfair's submission, the real question is not whether the relevant comparator is to be defined geographically as a local trader, but whether the relevant State legislative or executive action has constrained trade in the national market in pursuit of localized economic interests: *Betfair v WA* at 480-1 [116], [118] and [122]. The "localised economic interest" in the current case is the TAB (and through it, the New South Wales racing industry) because:

(a) the only wagering operators licensed under the laws of New South Wales are the TAB, NSW-licensed bookmakers and on-course totalizators;[26] and it is not possible for Betfair to be licensed under the laws of New South Wales;[27]

(b) the TAB has the monopoly licence in NSW for operating retail wagering stores[28] for its off course totalizator and fixed odds betting on racing and sporting events. It pays betting tax to the New South Wales government of 19.11% of its revenue from the totalizator and 10.91% of its revenue from its fixed odds wagering on racing and sporting events;[29]

(c) the TAB is the dominant wagering operator in NSW. For example, in the 2007/2008 racing season, 78.96% of all money wagered on NSW thoroughbred races (from any location) was wagered on the TAB's off course totalizator;[30] and

(d) under the RDA, the commercial arrangement between the TAB and the racing control bodies (Racing NSW, Harness Racing NSW and Greyhound Racing NSW) imposed by statute as a condition on the grant of the monopoly licence (s 21A *Totalizator Act 1997*), the TAB is obliged to pay fees to the control bodies in respect of all its revenue streams (totalizator and fixed odds betting on both racing and sports events).[31] That TAB's revenue streams include revenue derived from trade outside the geographic boundaries of New South Wales does not detract from the conclusion that it is the relevant comparator, particularly having regard to the fact

[25] T168.7371-7378; T203.8942-63; T205.9045-6.
[26] Perram J at [280] 6 AB 2294.
[27] Perram J at [80]-[84] 6 AB 2237-8.
[28] Perram J at [35] 6 AB 2217; [60] 6 AB 2226; [282] 6 AB 2294.
[29] Perram J at [62]: 6 AB 2227; [289] 6 AB 2296.
[30] Perram J at [36]: 6 AB 2218.
[31] Perram J at [60]: 6 AB 2226; [291] 6 AB 2297.

that here, all such revenue streams are utilised in substantially funding the local (New South Wales) industry.

37. The trial judge summarised the role of the TAB for the NSW racing industry as follows[32]:

> It signifies that the NSW racing industry, in its various forms, derives profit not only from the gambling public's fascination with hound and horse races but also from the same public's gambling interests in other sporting activities having no connexion whatsoever with horse or hound. The amounts of money distributed are very large. In the years 2005 to 2008 the TAB distributed close to $900 million to the New South Wales racing industry.
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> ...
>
> the [New South Wales] racing industry has nearly as much economic interest in the profitability of the TAB as the TAB does.

38. Not surprisingly, the trial judge concluded that the New South Wales racing industry and the TAB had "*a profound economic dependence*"[33] and described the relationship as "*very close in an economic sense to a joint venture*"[34]:

> The industry promises to provide, on pain of damages, races; the TAB promises to provide on pain of damages, its off-course totalizator on each such race meeting. The parties share the bounty.

39. Betfair represents interstate trade (in the sense of the trade among the states) for the purposes of s 92 because it conducts its business from Hobart in Tasmania;[35] it is not permitted to operate as a betting exchange from New South Wales;[36] and most of its customers are located outside Tasmania (where it is regulated and licensed[37]). It necessarily follows that: "*there is an interstate dimension to the operation by Betfair of its betting exchange*".[38] Further, Betfair directly competes in the national wagering market with those wagering operators licensed in New South Wales (in particular the TAB) on whose revenues NSW depends.

40. In the analysis adopted above, s 92 is infringed if the flow of commerce among the states is restricted or precluded by a measure that relevantly interferes with national markets. Identification of "relevant interference" involves asking whether:

    (a) the measure restricts competition in the national market in pursuit of a "narrow economic interest"; and/or

    (b) whether the measure can be justified as reasonably necessary for the achievement of a legitimate object, the pursuit of narrow economic interests by discriminatory means not qualifying as such an object.

41. If the terminology of interstate trade, intrastate trade and protectionism is to be retained, the same result would follow by adopting an economic approach to the application of

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[32] Perram J at [61]: 6 AB 2227, citing in part the respondents' written submissions.
[33] Perram J at [67]: 6 AB 2230.
[34] Perram J at [68]: 6 AB 2230.
[35] Perram J at [4]: 6 AB 2206; [57]: 6 AB 2225.
[36] Perram J at [71]-[84]: 6 AB 2231-2238.
[37] Perram J at [57]: 6 AB 2225; [263] 6 AB 2288.
[38] *Betfair* at 448 [1].

those terms. Thus, s 92 would be infringed if a discriminatory burden is imposed on interstate trade, that burden is shown to be protectionist by the way in which it advantages intrastate trade, and the discriminatory burden is not reasonably necessary to any legitimate object.

42. On the application of either expression of s 92's guarantee, the impost in this case infringes s 92. The six times greater impost on Betfair is discriminatory and protectionist, and it cannot be, and has not been, justified as reasonably necessary.

Dated: 19 September 2011

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