IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S118 of 2011

BETWEEN:

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

ATTORNEY-GENERAL
FOR SOUTH AUSTRALIA

Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I

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

PART II

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III

3. Not applicable.

Date of document: 13 May 2011
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PART IV

4. The applicable constitutional, statutory and regulatory provisions are included in the annexure to the submissions of the appellant, as supplemented by the first respondent.

PART V

Summary

5. In this appeal the appellant challenges ss 33 and 33A of the *Racing Administration Act 1998* (NSW) (**the impugned provisions**), the regulations made thereunder, and the approvals to publish race fields that were issued by the second or third respondents on the basis that they are contrary to s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) and s 109 of the Constitution. The combined effect of the latter provisions is to replicate the operation of s 92 of the Constitution in relation to trade and commerce between the States and the Northern Territory.[1] Accordingly, in these submissions references to the "States", "interstate trade or commerce" and s 92 of the Constitution (**s 92**) should be read as including references to the "Northern Territory", "trade or commerce between the Territory and the States" and s 49 of the *Northern Territory (Self-Government) Act*, respectively.

6. The Attorney-General for Victoria relies on his submissions in *Betfair Pty Ltd v Racing New South Wales & Ors* (S116 of 2011) in relation to the general principles that are applicable in proceedings concerning s 92.

7. In addition to those submissions, the Attorney-General makes three additional submissions in this appeal. In summary, those submissions are:

   (a) *Bath v Alston Holdings Pty Ltd* (***Bath v Alston***)[2] permits a State to impose a uniform fee on interstate and intrastate trade and commerce and does not make it a condition of validity that such a fee be imposed at a single time or by a single provision. Further, nothing in that case prevents the removal of pre-existing burdens on intrastate trade and commerce imposed by State law or administrative action.

   (b) State legislation that confers an administrative discretion in general terms and that is capable of being exercised conformably with s 92 is properly read as authorising only decisions which conform with s 92. So read, the legislation does not contravene s 92. However, if the discretion is exercised in a way that imposes a discriminatory burden on interstate trade of a protectionist kind, that exercise of discretion will not be authorised by the legislation and will be invalid on that ground.

   (c) Where the racing industry of a State is funded predominantly by contributions from intrastate wagering service providers, legislation that empowers racing controlling bodies to exact a contribution from interstate wagering service

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1 *AMS v AIF* (1999) 199 CLR 160 at 175–176 [36]–[37], 180 [49], 192 [96], 211–212 [152]–[153], 232–233 [221].

2 (1988) 165 CLR 411.

providers who take bets on the industry's races cannot properly be characterised as "protectionist".

8. By way of background specific to Victoria:

(a) Victoria has a large and vibrant racing industry that is funded by similar mechanisms to those employed to fund the racing industry in New South Wales.[3]

(b) The impugned provisions are similar to the Victorian provisions that regulate the use and publication of Victorian race fields.[4] The Victorian provisions are, however, different in several important respects, including that:

(i) under the Victorian provisions, the requirement to hold an approval to use or publish race fields information in Victoria does not apply to:

(1) Tabcorp Holdings Ltd (**Tabcorp**), the company that holds the single licence to conduct a totalisator in Victoria (which was required, as a condition of its licence, to enter into a commercial arrangement with the racing industry pursuant to which it makes substantially greater financial contributions to the Victorian racing industry than any other wagering operator); or

(2) bookmakers registered in Victoria (who need not be resident in Victoria, but who are required to make financial contributions to the racing industry pursuant to a bookmakers levy);[5]

(ii) full merits review is available of decisions to refuse to grant race fields approvals or to impose conditions (other than fee conditions) on race field approvals.[6]

(c) Sportsbet has challenged the Victorian race fields provisions in a proceeding that is presently part-heard in the Federal Court.[7] That proceeding raises issues that do not arise in this appeal. It concerns a provision of Victorian legislation that authorises the imposition of a burden on bookmakers unless they are registered in Victoria. However, the burden imposed pursuant to that provision is the same or less than the burden imposed on bookmakers registered in Victoria pursuant to other Victorian laws or on Tabcorp pursuant to commercial arrangements that were made a pre-condition to the grant of rights to Tabcorp.

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[3] The New South Wales arrangements are set out in the reasons of the Full Court at 456-458 [22]–[26] [**AB ?**].

[4] *Gambling Regulation Act 2003* (Vic) Chapter 2, Part 5, Division 5A.

[5] *Gambling Regulation Act 2003* (Vic) s 2.5.19B(2). The bookmakers levy is imposed pursuant to s 91B of the *Racing Act 1958* (Vic).

[6] *Gambling Regulation Act 2003* (Vic) s 2.5.19E.

[7] Proceeding NTD 9 of 2009.

(a) *Bath v Alston*

9. The imposition of a uniform fee that applies equally to interstate and intrastate trade and commerce does not contravene s 92 of the Constitution.[8] The Full Court was correct in holding that:[9]

> If all wagering operators are now subject to the same burdens, whatever their State of origin, the fact that the burdens had previously been borne only by intrastate trade is immaterial. Equally immaterial is the circumstance that adjustments to the previous burdens ... could be expected to occur, and did occur, to ensure that they did not bear the old burdens, as well as the new uniform burdens. *Bath v Alston* did not decide otherwise.

10. *Bath v Alston* concerned the validity of the *Business Franchise (Tobacco) Act 1974* (Vic).[10] That Act prohibited any person from carrying on "tobacco wholesaling" unless they were the holder of a "wholesale tobacco merchant's licence" (s 6(1)) or from carrying on "tobacco retailing" unless they were the holder of a "retail tobacconist's licence" (s 6(2)). Tobacco wholesaling was relevantly defined to mean "the business of selling tobacco in Victoria for the purposes of resale" (s 2(1)). Tobacco retailing was relevantly defined to mean "the business of selling tobacco by retail in Victoria" (s 2(1)).

11. To obtain either form of licence a fee was required to be paid. The fee for a wholesale tobacco merchant's licence was a flat fee plus an amount equal to 25% of the value of tobacco sold by the licensee in Victoria over a certain period other than to the holder of a wholesale tobacco merchant's licence (s 10(1)(a), (b)). The fee for a retail tobacconist's licence was a flat fee plus an amount equal to 25% of the value of tobacco sold by the licensee in the course of tobacco retailing over a certain period other than tobacco purchased in Victoria from the holder of a wholesale tobacco merchant's licence (s 10(1)(c), (d)). These provisions were all introduced at the one time as part of a single law.

12. The above legislation was challenged by a Victorian retailer who purchased tobacco from a wholesaler in Queensland. The majority focused on ss 10(1)(c) and (d) – the provisions concerning the retail licence – and concluded that those provisions discriminated on their face against interstate wholesalers in tobacco because they exempted tobacco purchased in Victoria from the holder of a wholesale tobacco merchant's licence from the ad valorem retail licence fee. The majority held that, "if viewed in isolation", those provisions discriminated against interstate trade, because they allowed Victorian retailers to avoid a 25% ad valorem licence fee by choosing to purchase from Victorian wholesalers.[11]

13. The majority expressly put aside the fact that Victorian wholesalers were required by s 10(1)(a) and (b) to pay a 25% ad valorem fee on sales of tobacco to holders of retail tobacconist's licences. Their Honours considered that the fact that interstate

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[8] So much was recognised in *Fox v Robbins* (1909) 8 CLR 115 at 124 and *Bath v Alston* (1988) 165 CLR 411 at 424-425, 429-430, 433.

[9] At 476 [96] **[AB ?]**.

[10] The case was decided prior to the decision in *Ha v New South Wales* (1997) 189 CLR 465, when licence fees of this kind were held to contravene s 90 of the Constitution.

[11] (1988) 165 CLR 411 at 425.

wholesalers were not required to pay the Victorian wholesale licence fee tended to "underline, rather than remove, the protectionist character of the discrimination at the retail level effected by the provisions imposing the tax". [12] Their Honours reasoned that: [13]

> If wholesalers of tobacco products in another State already pay taxes and bear other costs which are reflected in wholesale prices equal to or higher than those charged by Victorian wholesalers, the practical effects of the discrimination involved in the calculation of the retailer's licence fee would be likely to be that the out of State wholesalers would be excluded from selling into Victoria and that the products which they would otherwise sell in interstate trade would be effectively excluded from the Victorian market. On the other hand, if out of State wholesalers pay less taxes and other costs than their Victorian counterparts, and in particular if they pay no (or a lower) wholesale licence fee, the effect of the discriminatory tax upon retailers will be to protect the Victorian wholesalers and the Victorian products from the competition of the wholesalers operating in the State with the lower cost structure.

14. The key to the majority's reasoning appears to rest in the fact that s 10(1)(c) and (d) and s 10(1)(a) and (b) imposed burdens in two different markets – the retail and the wholesale market – which existed at different stages in the chain of distribution of goods.[14] The majority insisted that the analysis must focus on the effect of a burden in the particular market in which that burden is imposed, because otherwise protectionist measures (including border duties) could have been justified as measures to equalise the effects of burdens imposed on local goods at earlier stages in the distribution chain. The case therefore demonstrates that the imposition of the same fee at different stages of the chain of production and distribution may contravene s 92 because the imposition of the fee may operate in a protectionist way within different markets along that chain.

15. In *Bath v Alston* the advantage enjoyed by interstate wholesalers existed because of a combination of the following facts:

(a) Queensland had not imposed a wholesale licence fee on Queensland wholesalers;

(b) Victoria had imposed a wholesale licence fee on Victorian wholesalers; and

(c) Victoria had not imposed an equivalent licence fee on interstate wholesalers (which it could not do, because the fee was structured as a fee to carry on

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[12] (1988) 165 CLR 411 at 426 (emphasis added). By focusing just on s 10(1)(c) and (d) in determining whether there was "discrimination" against interstate trade, it is arguable that the majority failed to take into account a relevant difference that explained the different treatment of Victorian and Queensland wholesalers by the retail provisions (the difference being s 10(1)(a) and (b), which applied only to – or "discriminated against" – Victorian wholesalers). To that extent, *Bath v Alston* may be inconsistent with the analysis undertaken by Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd v South Australia*: (1990) 169 CLR 436 at 478.

[13] (1988) 165 CLR 411 at 426.

[14] (1988) 165 CLR 411 at 428-430 (including, particularly, 428.9). See also *Armco v Hardesty* 467 US 638 (1984), where the US Supreme Court held that a tax on interstate traders at the wholesale level is not equivalent to a tax on local traders at the manufacturing level.

business rather than as a tax upon goods in order to avoid the effect of s 90, and Victoria could not charge a fee for the right of a wholesaler to carry on business in Queensland).

16. The majority's reasoning focused on the fact that the retail licence fee negated a competitive advantage that Queensland wholesalers enjoyed by reason of the first of the above facts. Thus, the majority said:

> The fact that taxes paid by a wholesaler in one State are higher than the taxes paid by a wholesaler in a second State may provide an inducement for the first State to protect local goods and local wholesalers by the imposition of an "equalizing" tax upon its retailers in respect of their purchases of products from that other State ... [T]o hold that a law which protects local goods by imposing a discriminatory tax on interstate goods at the retail level is consistent with s 92 because the law equalizes in favour of the local goods an advantage which the interstate goods enjoy in their State of origin in the course of manufacture or distribution would be to disregard the critical constitutional purpose which the section is designed to serve.

17. In *Castlemaine Tooheys Ltd v South Australia*, *Bath v Alston* was characterised as demonstrating that "the imposition of an equalization tax by a State upon retailers in respect of products from another State so that the interstate goods lose a competitive advantage that they would otherwise enjoy because the other State levies a tax upon the goods at a lower rate than does the legislating State upon the domestic product is a contravention of s 92".[15] However, that is not this case. This is a case in which New South Wales did not, prior to the challenged legislation, levy any charge on out-of-State bookmakers for the use of New South Wales race fields, whereas it did levy charges on New South Wales bookmakers.

18. Where State legislation imposes a burden on intrastate trade or commerce that is not imposed on interstate trade or commerce of the same kind, the State may repeal that legislation and thereby remove that burden.[16] The fact that the repeal may adversely affect interstate traders does not engage s 92 if, having regard to the operation of the State's law after the repeal, that law does not discriminate against interstate trade or commerce. Section 92 does not compel a State which has burdened intrastate trade or commerce to maintain that burden simply because its removal may disadvantage interstate trade or commerce.

19. The burden may be removed by being ameliorated rather than repealed. For example, in *Boardman v Duddington,*[17] interstate and intrastate commercial goods vehicles were required by Queensland legislation to pay a road charge for the use of Queensland roads. Another Queensland Act required vehicles other than vehicles used in interstate trade to obtain a licence and charged a licence fee. The latter Act therefore burdened intrastate vehicles only. An amending Act provided that if a vehicle paid the road charge, the liability to pay the licence fee was reduced by a corresponding amount. The amending Act therefore operated to eliminate a burden

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[15] (1990) 169 CLR 436 at 468 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also the Full Court at 479 [101] **[AB ?]**.

[16] The same is true where State legislation confers a benefit on interstate trade or commerce (such as an exemption from some regulation) not conferred on intrastate trade or commerce of the same kind.

[17] (1959) 104 CLR 456.

imposed by Queensland legislation only on intrastate trade. The road charge continued to apply equally to all vehicles, whether interstate or intrastate. In those circumstances, the Court held that the fact that Queensland vehicles were no longer subject to an additional burden that had previously applied only to them did not attract s 92. That was so despite the fact that the removal of the licence fee would have improved the competitive position of Queensland vehicles.

20. In *Boardman v Duddington*, the legislation imposing the road charge on both interstate and intrastate vehicles pre-dated the legislation imposing the licence fee on intrastate vehicles only. However, logically the analysis would have been the same if the order had been reversed, because the requisite comparison is not between the position of interstate trade or commerce before legislation is passed and afterwards. It is between the position, after legislation is passed, of intrastate trade or commerce and that of interstate trade or commerce.[18]

21. *Bath v Alston* provides no support for the proposition that a State cannot impose a uniform fee on all participants in the same market. On the contrary, the majority expressly accepted that a licence fee could have been imposed directly on all retail sales of tobacco in Victoria: [19]

> [T]he imposition of the fee would not contravene s 92 since it would not differentiate between tobacco purchased in Victoria and tobacco purchased outside Victoria; a fortiori it would not discriminate in a protectionist sense against the purchase of tobacco outside Victoria.

22. Once it is accepted that a uniform burden on trade or commerce in a particular market can validly be imposed by a single law, then unless form is to prevail over substance it must be possible for such a burden to be imposed by two or more provisions that, read together, impose the same burden.[20] That must be true even if some provisions deal exclusively or predominantly with interstate trade, while others deal with intrastate trade.[21]

23. *Bath v Alston* does not require individual provisions in legislation that operate in relation to a single market to be characterised without regard to the legislative context (including the operation of other legislation in the relevant area). It would be a perverse elevation of form over substance if a single law that applied to all traders in a market was valid, but separate provisions that imposed an identical burden on interstate and intrastate traders in the same market were invalid because, viewed in isolation, the provision concerning interstate trade "discriminated against" that trade. Moreover, such a result would have the effect of giving preference to interstate trade at the expense of intrastate trade, which is quite contrary to the purpose of s 92.

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[18] A point made clear in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 202-203.

[19] (1988) 165 CLR 411 at 424-425. See also 428-429.

[20] See, to similar effect, South Australia's submissions, paragraphs 28-31.

[21] See, e.g., *Mansell v Beck* (1956) 95 CLR 550, where a challenge to provisions prohibiting foreign lotteries failed, in part because of separate provisions in the relevant Act that imposed the same prohibition on local lotteries (subject to a single monopoly operated by the State).

(b) The validity of legislation conferring wide administrative discretion

24. The appellant challenges the validity of the impugned provisions on the basis that, having regard to the width, nature and character of the discretionary power they confer on racing control bodies (who are said to have an interest in protecting the local racing industry), they cannot "lay claim to the neutral regulatory character"[22] that Brennan J held to be essential to validity in *Miller v TCN Channel Nine Pty Ltd* (***Miller***).[23]

25. That submission relies upon the authorities[24] discussed and distinguished in *Miller* to the effect "that a statutory provision which forbids a person to carry on an ordinary trade without a licence, and gives the licensing authority an uncontrolled discretion to refuse to grant a licence, cannot validity apply to interstate trade, by reason of s 92 of the Constitution". In *Miller*, Brennan J confined that principle to cases where the burden on interstate trade was not an aspect of a regulatory regime applicable to all traders.

26. *Miller* was decided prior to *Cole v Whitfield*.[25] The effect of *Cole v Whitfield* is that much of the discussion in *Miller*, including the examination of the distinction between regulatory and other laws, has little or no ongoing relevance.[26] That follows because, applying the reasoning in *Cole v Whitfield*, a law cannot impose a discriminatory burden of a protectionist kind simply because a discretion is conferred which might be exercised so as to impose such a burden.

27. Further, the authorities upon which the appellant relies have been deprived of relevance by developments in administrative law that mean that courts familiarly review administrative discretions to ensure that they remain within the boundaries of the power conferred.[27] As a result of these developments, it is no longer necessary to hold a provision that purports to confer a wide discretionary power to be invalid in order to ensure that the power is not used to contravene s 92. Instead, the Court will simply hold any attempt to exercise the power in a way that would contravene s 92 to be invalid.[28]

28. In *Miller*, Brennan J explained the correct approach as follows:[29]

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[22] Sportsbet's submissions, paragraph 88.

[23] (1986) 181 CLR 556.

[24] See, e.g., *Boyd v Carah Coaches Pty Ltd* (1979) 145 CLR 78 at 84 (Gibbs J); *Hughes & Vale Pty Ltd v New South Wales* (1954) 93 CLR 1.

[25] (1988) 165 CLR 360.

[26] To the extent that it remains relevant, the laws under consideration in this appeal should be characterised as regulatory laws for the reasons explained by the Full Court at 488-490 [135]–[139] [**AB ?**]. However, the better view is that the distinction has no ongoing relevance.

[27] *Miller* (1986) 181 CLR 556 at 614. See, in particular, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[28] See, e.g., *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331 at 346 [54]–[57], 350 [84], 354 [108].

[29] (1986) 181 CLR 556 at 613–614. See also *Bath v Alston* (1988) 165 CLR 411 at 430, where the majority read down the impugned law so that it did not authorise the imposition of the ad valorem component of the licence fee, but was otherwise valid.

> Of necessity, the area of the discretion must be large: the nature of the subject to be regulated requires that the discretion be wide. But it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account. Nor can the discretion be exercised to discriminate against interstate trade, commerce and intercourse. That is because a discretion must be exercised by the repository of a power in accordance with any applicable law, including s 92, and, in the absence of a contrary indication, "wide general words conferring executive and administrative powers should be read as subject to s 92" ... In *Inglis v Moore [No 2]*, St John J and I stated the relevant rule of construction:
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> > "[W]here a discretion, though granted in general terms, can lawfully be exercised only if certain limits are observed, the grant of the discretionary power is construed as confining the exercise of the discretion within those limits. If the exercise of the discretion so qualified lies within the constitutional power and is judicial examinable, the provision conferring the discretion is valid."
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> ... The discretion is effectively confined so that an attempt to exercise the discretion inconsistently with s 92 is not only outside the constitutional power — it is equally outside statutory power and judicial review is available to restrain any attempt to exercise the discretion in a manner obnoxious to the freedom guaranteed by s 92.

29. The above reasoning was approved by this Court in *AMS v AIF*.[30] It was also applied, correctly, by the Full Court in this case.[31]

30. In the context of s 92, the approach in *Miller* would derive further support from s 31 of the *Interpretation Act 1987* (NSW), given that s 92 imposes a constraint on State legislative power that would trigger the operation of that section. For the reasons advanced by the Attorney-General for South Australia,[32] s 31 of the *Interpretation Act* does not assist in a case involving s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth). However, s 109 of the Constitution produces the same result by invalidating State legislation that would infringe s 49 only "to the extent of the inconsistency".

31. A statutory discretion cannot be read in the manner suggested by Brennan J if, when construed in the context of the Act as a whole, a power is conferred in terms that require it to be exercised in a way that would discriminate against interstate trade or commerce in a protectionist sense. That was the reason that s 27D of the *Betting Control Act 1954* (WA) was held to be invalid in *Betfair Pty Ltd v Western Australia* (***Betfair v WA***).[33] The appellant contends that the same reasoning applies in this case,[34] but the situation in *Betfair v WA* was far removed from the present because:

    (a) The discretion conferred on racing control bodies to issue race fields approvals is not required to be exercised in the context of a statutory regime that seeks to prohibit betting exchanges, that being the main factor that led to the discretion

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[30] (1999) 199 CLR 160 at 176 [37], 227 [201].

[31] At 490 [140] [**AB ?**].

[32] Submissions of the Attorney-General for South Australia, paragraphs 64-67.

[33] (2008) 234 CLR 418 at 481 [118]–[119], 486 [140], 488 [146]. See also the Full Court at 491 [142] [**AB ?**].

[34] Sportsbet's submissions, paragraph 90.

in *Betfair v WA* being characterised as "illusory" in so far as it related to Betfair Pty Ltd.[35]

(b) The impugned provisions in this proceeding, and the regulations made under them, expressly contemplate that approval to use race fields will be conditional on payment of a fee to the racing control body (meaning that the terms of the legislation contemplate that a purpose of the provisions is to ensure that all wagering service providers make a contribution to the cost of putting on the races from which those wagering service providers profit).[36]

(c) The terms of any conditions of the grant of an approval are set by a racing control body, not a body that is itself a wagering service provider.[37] The fact that the racing control bodies have an indirect entitlement to receive funding from TAB Ltd does not place them in a position comparable to that of RWWA in *Betfair v WA* (which was in direct competition with Betfair).

(d) The decisions of the racing control bodies are subject to judicial review.[38]

32. Where judicial review of a decision is available, the fact that the decision-maker may have some interest in the outcome is a less relevant factor in considering whether the law has a tendency to impose a protectionist burden than it would be if the decision were unreviewable. That is even more clearly so where a decision is subject to merits review and the production of reasons for decision can be compelled.[39]

33. Accordingly, even if the appellant establishes that the impugned provisions on their face would authorise a racing control body to impose protectionist burdens, for the reasons set out above those provisions must be construed as not authorising such a result.

34. Further, even if the appellant establishes that the racing control bodies had purported to exercise their power under the impugned provisions in a manner that is protectionist, the consequence, at its highest, would be that the decisions of those control bodies would be invalid. The validity of the impugned provisions would be unaffected.

(c) Funding the racing industry

35. By paragraph 7 of their notice of contention, the second and third respondents contend that the impugned approvals were reasonably appropriate and adapted to the achievement of a legitimate objective.

36. Perram J accepted, at least at a high level of generality, that it may be a legitimate object of a State law to seek from all wagering operators a fee sufficient to fund the

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[35] cf *Betfair v WA* (2008) 234 CLR 418 at 481 [119].

[36] cf *Betfair v WA* (2008) 234 CLR 418 at 488 [146].

[37] cf *Betfair v WA* (2008) 234 CLR 418 at 486 [140].

[38] cf *Betfair v WA* (2008) 234 CLR 418 at 486 [140].

[39] cf *Gambling Regulation Act 2003* (Vic), s 2.5.19E; *Victorian Civil and Administration Tribunal Act 1998* (Vic), s 46; *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331 at 346 [56]-[57] (CA).

racing industry.[40] The Full Court did not need to decide that question, because it held that the uniform turnover condition imposed pursuant to the impugned provisions did not impose a discriminatory burden on interstate trade or commerce.

37. The racing industry in New South Wales, as in other Australian States, has historically been funded in large part by contributions extracted by or under State legislation from wagering operators based in the State and who take bets on races that occur within the State.

38. Prior to the introduction of the impugned provisions, wagering operators not based in New South Wales did not make any financial contribution to the cost of putting on races in New South Wales, despite the fact that they profited from wagering on those races.

39. The emergence of a national wagering market had the consequence that more wagering started to occur with providers who did not make a financial contribution to the racing industry, threatening the funding of that industry. In that factual context, the enactment of legislation designed to provide funding to the New South Wales racing industry, by authorising racing controlling bodies to impose a requirement that all wagering operators make a financial contribution to the State's racing industry by reference to the bets taken by them on races within the State, is reasonably necessary to the ongoing funding of the racing industry and so cannot be characterised as protectionist.

40. *Betfair v WA*[41] is consistent with that submission. In that case, after quoting a ministerial statement identifying the two reasons the Western Australian government was opposed to betting exchanges, namely that "they make no contribution to the racing industry in Australia" and they "allow punters to bet on any of the racing codes and lose", the plurality continued:[42]

> First, as to the absence of contribution to the racing industry in Australia, so far as that may be relevant. The evidence shows that by agreement with the Victorian regulator, Betfair undertook to return an amount equivalent to 1 per cent of the value of bets taken by it on races in Victoria; this is the same level of return as that required from bookmakers in that State. Betfair has been meeting that obligation. There is no reason to doubt the assertion by Betfair that it remains ready to undertake obligations of this kind in Western Australia and to ensure that the organisers of races in that State obtain a reward from Betfair as well as from other wagering operators in that State.
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> In its submissions Western Australia also contended that any practical effect of the impugned legislation in protecting the turnover of in-State operators from diminution as a result of competition from Betfair, with consequent prejudice to the return to the racing industry and in-State revenue provided by it, could not be protectionist in nature. But a proposition which asserts that an object of revenue protection of this kind may justify a law which discriminates against interstate trade is contrary to authority. And it is

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[40] Perram J at 265 [147] [**AB ?**].

[41] (2008) 234 CLR 418.

[42] (2008) 234 CLR 418 at 478-479 [107]–[108].

> contrary to principle, for such a justification, if allowable, would support the re-introduction of customs duties at State borders.

41. The first paragraph above was squarely directed to the permissibility of requiring contributions to be made to funding the racing industry. The plurality contemplates that such a requirement is acceptable at least if it is imposed at the same level on local and interstate operators. Heydon J likewise implicitly accepted the permissibility of this objective. His Honour referred to the objective "of ensuring that persons who seek to utilise the horse and greyhound races conducted in Western Australia for the purposes of a wagering business make a contribution to the persons who conduct those races", and rejected the argument based on that objective not because the objective was illegitimate, but because the impugned provisions were not appropriate to that end since they did not provide "in terms for a neutral contribution to the persons conducting Western Australian races".[43]

42. Read in the context of the first paragraph, the second paragraph quoted above is directed to the further object there identified, namely the protection of "in-State revenue". The report of the submissions of Western Australia makes clear that the revenue referred to was government taxation revenue.[44] It was that object which the second paragraph rejected as contrary to authority and principle. That is confirmed by the fact that the authorities referred to in a footnote to the second last sentence — *Bath v Alston*[45] and *Sportodds Systems Pty Ltd v New South Wales*[46] — were both concerned with measures directed to obtaining government revenue.

43. Indeed, in *Sportodds*, in a passage prior to that cited in *Betfair v WA*, the Full Court of the Federal Court expressly left open the possibility that funding the racing industry might provide an acceptable explanation or justification for a law impugned under s 92 of the Constitution, and distinguished such a law from a law protecting tax revenue. The Full Court said:[47]

> [T]he objective referred to in the Second Reading Speech would seem to be the protection of the "racing industry" in New South Wales. This may be a legitimate objective, notwithstanding that it may have different consequences and effects from the objective of regulating a social evil as discussed above. In *Cole v Whitfield* the High Court accepted that the protection of Tasmanian crayfish stocks was a legitimate objective in circumstances where the exploitation of those stocks was non-discriminatory.

44. A significant body of factual material would be relevant to determining the factual issues involved in this part of the case. Especially since the Full Court in this case did not make any findings in relation to this issue, it would be inappropriate for the Court to conclude in reliance on the analysis in *Betfair v WA* that funding the racing industry by means of a levy on the turnover of wagering providers cannot be a legitimate

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[43] (2008) 234 CLR 418 at 488 [146].

[44] (2008) 234 CLR 418 at 433.

[45] (1988) 165 CLR 411 at 426–427.

[46] (2003) 133 FCR 63 at 80 (FC). Though no paragraph number is cited in *Betfair v WA*, the plurality plainly intended to refer to [43].

[47] (2003) 133 FCR 63 at 79 [41] (FC).

objective for s 92 purposes. Any such finding would have sweeping ramifications for the funding of the racing industry throughout Australia.

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