IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

No. S118 of 2011

BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 612)
Appellant

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

APPELLANT'S SUBMISSIONS

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Filed on behalf of the Appellant by:
Fitzpatrick Legal
Level 16, 190 Queen Street
Melbourne VIC 3000

Contact: David Fitzpatrick
File Ref: DJF:LB:080030
Telephone: (03) 9602 5444
Facsimile: (03) 9602 5094
Email: djf@fitzpatricklegal.com.au

Part I: Publication of Submissions

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

Part II: Statement of Issues

2. The issues raised in the appeal are:

(a) For the purposes of s 49 of the *Northern Territory (Self Government) Act* or s 92 of the Constitution, can the practical effect of a statutory fee that is imposed on both interstate and intrastate traders for the right to use vital information in their businesses be determined without taking account of offsetting reductions in existing fees that are payable by intrastate traders only for the right to conduct their businesses within the State;

(b) Is it necessary for an applicant alleging interference with interstate trade, commerce and intercourse to establish that it has a competitive advantage over intrastate traders that derives from its place of origin in another State or Territory, and that the impugned measure imposes a discriminatory burden that adversely affects that competitive advantage;

(c) Is a statutory fee which discriminates in favour of intrastate trade and against interstate trade to be characterised as a protectionist burden if:

(i) the fee was imposed with the intention of protecting the intrastate trader from competition from the interstate trader;

(ii) the purpose or object for the imposition of the fee is protectionist; and/or

(iii) the fee cannot be justified as reasonably appropriate or adapted to the achievement of a non-protectionist objective.

(d) Where the impugned measure combines a statutory prohibition with an absolute administrative discretion to relax that prohibition, either absolutely or on conditions requiring payment and the discretion is conferred on control bodies that form part of, and represent, the intrastate industry:

(i) how should courts approach the question whether the measures cast a discriminatory burden on interstate traders compared to intrastate traders; and

(ii) is it relevant or determinative that the State and the control bodies intend at all relevant times that the discretion will be exercised so as to protect intrastate traders against competition from, and a loss of revenue to, interstate traders.

Part III: Section 78B Notices

3. The appellant has considered whether any notice under s 78B should be given and notices have been served on each Attorney General.

Part IV: Citation

4. The judgment of the primary judge is reported at (2010) 186 FCR 226. The judgment of the Full Court is reported at (2010) 274 ALR 12.

Part V: Statement of Facts

5. There is a national market for wagering services and for internet and telephone wagering[1]. Within the market, Sportsbet competes with TAB and other interstate totalizators through fixed price betting including various totalizator matching products. Sportsbet also competes with New South Wales bookmakers including harness racing bookmakers[2].

6. Since 11 December 1997, TAB Holdings Ltd (**TAB**), Racing New South Wales (**RNSW**), Harness Racing NSW (**HRNSW**), Greyhound Racing NSW (**GRNSW**) and Racingcorp Pty Ltd (**Racingcorp**), or their predecessors, have been parties to commercial arrangements known as the Race Distribution Agreement (the **RDA**), by which TAB provides substantial funding for the NSW racing industry which is paid to Racingcorp[3] as agent for the racing control bodies, and then distributed to each code. The commercial relations are required as a condition of TAB's exclusive totalisator licence[4]. Each of RNSW, HRNSW and GRNSW represent their respective racing codes and use the funds provided by TAB to fund their industry. The amount of revenue derived by them under the RDA is a proportion of the revenue derived by TAB under its exclusive licence.

7. From 1 July 2008, s 33 of the *Racing Administration Act* 2005 (NSW) (the **Act**) prohibited a wagering operator from "publishing", and from 3 December 2008, from "using"[5], NSW race field information[6] unless authorised by an approval and the operator complies with the conditions of approval. Section 33A(2)(a) of the Act, when read with reg 16 of the *Racing Administration Regulations* (the **Regulations**) gave each racing control body (RNSW, HRNSW and GRNSW) the power to grant the approval and impose conditions including the imposition of a fee of 1.5% of wagering turnover. Regulation 14 defined "wagering turnover" as the total amount of wagers on the backers' side of the wagering transactions.

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1 Perram J at [21]
2 Perram J at [22] and [24]
3 Racingcorp (originally NSW Racing Pty Ltd) was appointed by the three industry bodies – RNSW, HRBNSW and GRNSW- as their agent for the purpose of meeting their obligations and securing their entitlements: Reasons for Judgement Perram J: para [34]
4 s 43A *Totalizator Act* 1997 (NSW); Reasons for Judgement Perram J: para [33]
5 The relevant provisions (Pt IV Div 3) as initially implemented prohibited the "publication" of race fields. Commencing on 3 December 2008, the prohibition against "use" was introduced. Section 32A gives an extended meaning to "use NSW race field information"
6 Defined in s 27 of the Act;

8. On 18 June 2008, the Board of RNSW determined that a fee of 1.5% of wagering turnover should be imposed on wagering operators subject to a threshold of $5 million[7]. On 15 August 2008, RNSW granted Sportsbet an approval subject to a fee condition of 1.5% of wagering turnover[8]. It also granted TAB an approval in the same terms.

9. On 23 September 2008, the Board of HRNSW determined that a fee of 1.5% of wagering turnover should be imposed on wagering operators subject to a threshold of $2.5 million[9]. Both Sportsbet and TAB were granted harness racing approvals.

10. Before the commencement of the race fields scheme, on-course bookmakers in New South Wales paid a fee of 1% of the turnover to the metropolitan racing clubs where they stand. After July 2008, the metropolitan racing clubs lowered their fee from 1% to 0.33% on the first $5 million and zero thereafter.

11. In the result:

    (a) by reason of the RNSW threshold, at least 95% of NSW Registered Bookmakers were not required to pay any fee for approval to use NSW Thoroughbred Race Fields. Taking into account the reduction in fees from the Race Clubs, no bookmaker was worse off unless his or her turnover was more than $11.7 million; and

    (b) by reason of the harness racing threshold, none of the New South Wales Registered Bookmakers were required to pay any fee for approval to use NSW Harness Race Fields.

12. Sportsbet, like other interstate bookmakers, was required to pay the fee without regard to the fees that it pays as a condition of its licence in its home jurisdiction of the Northern Territory.

13. In about November 2009, after Sportsbet had commenced its proceeding in the Federal Court, TAB was paid the sum of $13,882,935 in relation to RNSW and $2,587,724 in relation to HRNSW. The payments are recorded in a Deed of Release dated 25 November 2009. The sum paid was equal to the amounts paid by TAB by way of race fields fee to each of RNSW and HRNSW in the period 1 September 2008 to 30 June 2009. In effect, therefore, TAB did not bear the economic burden of the new fee.

14. Perram J rejected an attack on the validity of the legislation[10] and regulation but held that the practical operation of the fee conditions imposed a protectionist burden or disadvantage on Sportsbet's interstate trade, commerce and intercourse which was not, in substance, imposed on intrastate commerce of the same kind. The Full Court upheld the validity of the legislation and overturned the decision of the primary judge in relation to the approval conditions.

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7 Reasons for Judgement Perram J: para [93]
8 Reasons for Judgement Perram J: para [94]
9 Reasons for Judgement Perram J: para [96]
10 Reasons for Judgment Perram J at [156]

Part VI: Statement of the Argument

Section 49 of the NT Self Government Act

15. Section 49 of the *Northern Territory (Self Government Act)* replicates the words of s 92 of the Constitution so as to protect free trade between the Northern Territory and the States. Section 49 is to be given an ambulatory interpretation to follow the course of decisions construing s 92[11].

16. Section 92 prohibits a legislative or administrative measure that burdens interstate trade, commerce and intercourse in a protectionist sense[12]. Section 92 guarantees absolute freedom of interstate trade and commerce from all interstate border duties and other discriminatory fiscal charges levied on transactions of interstate trade and commerce[13].

17. The object of s 92 is the elimination of "protection", which means the preclusion of competition in a market for goods or services[14]. In the context of an internet business operating across a national market, measures that seek to define and protect a "domestic industry" that depend on the geographic dimension given by State boundaries are inconsistent with s 92[15]. State legislation that restricts what otherwise is the operation of competition in a national market by means that depend on the geographical reach of its legislative power engages s 92[16].

18. By reason of the combination of s 49 of the NT Act and s 109 of the Constitution, a State Act is inconsistent with Commonwealth law and therefore invalid to the extent that it imposes, or purports to authorise the imposition of, a discriminatory burden of a protectionist kind on trade between the Northern Territory and the State. It matters not that an economic burden of that kind is imposed by a statutory delegate rather than by the legislation itself; any burden purportedly imposed under statutory authority in a manner that is inconsistent with s 49 of the NT Act will be invalid.

19. The primary judge found that the fee conditions were in conflict with s 49, and therefore invalid by force of s 109 of the Constitution.[17]

The Race Fields Scheme

20. In the case of a State law, the starting point is a consideration of the nature of the law impugned, a process of characterisation that looks to the object or "aim"

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11 *AMS v AIF* (1999) 1999 CLR 160 at [36] Gleeson CJ, McHugh and Gummow JJ
12 *Betfair v Western Australia* (2008) 234 CLR 418 at [118]; *Cole v Whitfield* (1988) 165 CLR 360 at 408;
13 *Cole v Whitfield* (1988) 165 CLR 360 at 394-395
14 *Betfair v Western Australia* (2008) 234 CLR 418 at [15]
15 *Betfair v Western Australia* (2008) 234 CLR 418 at [15], [18], [90], [116]
16 *Betfair v Western Australia* (2008) 234 CLR 418 at [116]
17 Full Court at [6]; Perram J at [107], [108], [112], [113], [117] and [145]

of the law[18]. The "aim" of the law is to be determined objectively having regard to the entire context, including where relevant, extrinsic material[19].

21. In the case of an administrative measure made in the exercise of a statutory power, the appellant submits that the inquiry is broader: where actual purpose can be discerned it will be relevant to the character of the measure[20].

The Statutory provisions

22. The race fields regulatory scheme is set out by the Full Court in [29]-[34]. The scheme had these features:

    (a) the power to grant approval on conditions and to impose fees as a condition of approval was vested in the racing control bodies (s 33A(1) and (2));

    (b) any fees they imposed became a debt due to the racing control bodies, available for distribution at their discretion to participants in the intrastate racing industry, including the TAB (s 33A(3));

    (c) the racing control bodies were not independent regulators; they were representatives of local industry and had a vested commercial interest in maximising and protecting the revenue of intrastate wagering operators including the TAB and NSW bookmakers.

23. The true object of the scheme, which in order to be effective required a combination of the Act, Regulations and administrative decision, is revealed by the following contextual matters.

24. **First**, the mischief at which the scheme was aimed was interstate wagering operators which were causing "a leakage of revenue away from wagering operators in New South Wales and consequently away from the racing industry as well"[21].

25. Although the effect of the prohibition in s 33(1) on the use of NSW race fields is to prohibit altogether wagering on NSW races by a "wagering operator" on the basis that it is impossible to conduct a wagering business without using race fields, it was never intended that the use and publication of race fields should be prohibited generally; nor was it intended to outlaw wagering in NSW. The use of race fields itself was not a vice that the legislation aimed to suppress: the Act does not prevent NSW race field information being freely available and only applies to wagering operators. Moreover, the imposition of the fee conditions had nothing to do with issues of integrity or probity.

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18 *Cole v Whitfield* (1988) 165 CLR 360 at 408; *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at [416] per Hayne J

19 *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at [423]; *Rowe v Electoral Commissioner* (2010) 85 ALJR 213 at [166] per Gummow and Bell JJ

20 *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 192, 215, 221-222

21 Full Court at [28]; see also Perram J at [44]-[48] and [153].

26. The purpose of the prohibition on the use of race fields was to provide a foundation for the imposition of the fees on interstate traders, and immunise local traders from the economic burden of those fees. The control bodies achieved these ends by a combination of steps. The overall aim of the legislative and administrative scheme was to avoid or reduce revenue leakage away from the local industry to interstate operators. The primary judge rightly held that this was a protectionist purpose[22].

27. There is no dichotomy between the existence of a protectionist purpose and the targeting of "free riders". The "free riders" to which the legislation was directed were all interstate traders[23] who conducted business across the national market using the internet. New South Wales relied on its "long arm" territorial reach to attempt to create offences on the use and publication of race fields throughout the Commonwealth with a view to protecting its local industry[24]. In the context of a national market that operates without regard to State boundaries, the object of preventing revenue moving from intrastate traders to interstate traders is protectionist. As Perram J held, the concern that led to the imposition of the scheme was not free riders in the abstract, but the loss of revenue felt by TAB and local bookmakers as a result of competition from interstate traders.

28. The Full Court said that the purpose of the scheme was to protect against the hazard of fraud and financially irresponsible operators. [25] That object is not revealed by the text of the relevant provisions or the extrinsic material which focused on revenue leakage. The imposition of a fee based on turnover, as contemplated by the Act and Regulations, was not addressing questions of probity or integrity.

29. **Secondly**, the protectionist purpose is confirmed by the legislative choice to confer on the control bodies the discretionary power to approve the use of race fields and to impose fee conditions. Both RNSW and HRNSW were contractually tied to the commercial fortunes of the TAB, the largest wagering operator in NSW and in a position to adjust the commercial arrangements under which the TAB operated. Further, as the funder of race clubs, through revenue derived under the commercial arrangements with the TAB, they could effectively control the arrangements under which NSW bookmakers operated their businesses on race tracks in NSW.[26]

30. The Full Court ought to have concluded as Perram J did, that the purpose of the legislation was to authorise the control bodies to impose a burden on interstate traders that was not to be suffered by local traders.

The implementation of the scheme

31. The protectionist purpose was mirrored in the result: by reason of the thresholds, which immunised local bookmakers, and payments made by the

22 Perram J at [46]
23 Perram J at [45]-[46]
24 *Betfair v Western Australia* at [90]
25 Full Court [135], [138]
26 See Perram J's findings at [37] and [48].

control bodies out of the fee proceeds to TAB and the racing clubs, none of the intrastate wagering operators had to bear the economic burden of the uniform fee.

32. Key features in the implementation of the scheme, as reflected in the primary Judge's findings, were:

(a) in June 2008, when they decided to impose the fee conditions, RNSW and HRNSW each intended and understood that the TAB would be economically insulated from the fee because RNSW would refund any fees paid by the TAB pursuant to the fee condition back to it[27];

(b) when it decided to impose the fee conditions, RNSW intended and understood that NSW on-course bookmakers would be economically insulated from the fee by the imposition of a $5 million fee-free threshold and, to the extent that a small number of on-course bookmakers may not fall within that threshold, by RNSW procuring the racing clubs to reduce standing fees and other levies they imposed on on-course bookmakers on the basis that RNSW would fund this reduction in fees by making an equivalent distribution to the racing clubs out of the race field information approval fees it receives[28];

(c) at the time it decided to impose the fee conditions, HRNSW intended and understood that the imposition of a $2.5 million fee free threshold would ensure that no NSW on-course bookmakers would be required to pay the fee[29];

(d) but for the measures referred to in sub-paragraphs (a), (b) and (c) above, RNSW and HRNSW would not have imposed the fee conditions on an apparently uniform basis on interstate and intrastate wagering operators[30];

(e) to the extent that intention was indirectly relevant to the characterisation of the fee conditions, each of the State of NSW, RNSW and HRNSW intended to engage in discriminatory protectionism[31]; and

(f) the purpose, object or intention of the fee conditions was to protect the revenues of the TAB and on-course bookmakers in NSW by protecting them from competition from interstate traders.

33. The Full Court did not disturb any of the findings listed in paragraph 33, except to the extent that it concluded that the later payment of money by RNSW to the

27 Reasons for Judgment Perram J at [65], [66] and [101]
28 Reasons for Judgment Perram J at [101]
29 Reasons for Judgment Perram J at [104]
30 Reasons for Judgment Perram J at [102]
31 Reasons for Judgment Perram J at [44]

TAB was not a refund of race field fees but a payment of compensation under the RDA[32].

34. The Full Court did not deal at all with the purpose and effect of the thresholds or the relief that on-course bookmakers were granted from standing fees and other levies. The Full Court judgment does not contain any suggestion that the factual findings of the primary judge as recorded in paragraph 33 above were incorrect.

35. Although the primary judge regarded the allegations as "abundantly proved"[33] the Full Court gave several reasons for rejecting his conclusions:

(a) first, the adjustment of existing imposts was immaterial to s 92;

(b) secondly, the offsetting payments to the TAB were made under the Deed of Release, which was not a sham[34], and Sportsbet did not seek to sustain the primary judge's finding that the Deed was not what it seems to be;

(c) thirdly, the scheme did not erode any competitive advantage enjoyed by Sportsbet by reason of its place of origin and therefore *Bath v Alston* (1988) 165 CLR 411 did not apply[35].

Relief from existing burdens

36. The principal point of departure between the primary Judge and the Full Court lies in the latter's holding, at [96], that the adjustment of existing imposts was immaterial to s 92 provided that the local traders were "in truth" required to pay the race field fee.

37. Perram J held that the imposition of the fee condition was part of an inseverable package of three measures taken by the regulators[36]. The first were actions of State regulators in paying the fee raised by them pursuant to their statutory powers back to one of the fee payers, the TAB. The second was the decision made by State regulators to impose thresholds on the levels at which the fee would be payable. The third was the decision of RNSW, a regulator, to recompense clubs the amount by which it had persuaded them to reduce the levies that they imposed on local bookmakers.

38. His Honour regarded those elements as essential to his assessment of the practical and substantive effect of the fee conditions.[37] From that perspective, his Honour concluded that the practical effect was shown by the fact that Sportsbet had to pay a substantial impost from which its intrastate competitors have been released[38]. Taken together, the three measures were characterised by

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32 As explained below this represents a distinction that is entirely formal
33 Perram J at [117]
34 Full Court at [87]
35 Full Court at [89] and [101]
36 Perram J [102] [137]
37 Perram J [119],
38 Perram J [126]

the primary judge as "*the collection of a fee by a regulator and the rebate thereof for the purposes of protecting State industry*"[39]. In short, the practical effect included, "*by reason of their inseverable nature the accompanying rebating arrangements*"[40].

39. The Full Court held that the adjustment of existing imposts was immaterial because:

    (a) first, both Tabcorp and NSW bookmakers were subject to the prohibition in s33, each required approval, and on their face the approval conditions were uniform[41].

    (b) secondly, the source of the liabilities and burdens that were adjusted was not the race field scheme itself and the Full Court found or assumed that there was a reasonable expectation that they would be adjusted. The payments that were made to TAB arose from an insistence on its right under the RDA and on course bookmakers obtained relief from existing levies imposed by the racing clubs[42]. This conclusion was said to be supported by *Boardman v Duddington* (1959) 104 CLR 456[43].

    (c) thirdly, because the two measures, namely the alteration of contractual payments and the imposition of a uniform fee, could be done separately there could be no difficulty in doing them at the same time[44].

40. The first two points focus on the legal operation of the measures to the exclusion of their substance and practical effect and can be dealt with together. The reasoning is reflected in the Full Court's observation that the answer to the "crucial issue" was that "*TAB was, in truth, liable to pay the fee and did pay it*"[45]. That conclusion wrongly focuses on the legal operation of the provision rather than its practical effect.

41. The process of characterisation requires attention to both the legal and practical effects of the measure. In the context of ss 49 or 92, the test requires close examination of the practical and economic effect[46] of the new fee on the traders on whom it is imposed. In turn, this necessitates a comparison of the real or substantive effect of the fee on interstate traders compared to local traders. That

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39 Perram J [137]
40 Perram J at [141]
41 Full Court [112]
42 Full Court [96], [109], [110]
43 Full Court at [103]. The Full Court also said that Sportsbet did not seek to sustain the finding by the primary judge at [65]-[69] of his reasons that RNSW had reached an agreement, arrangement or understanding with the TAB that the TAB would be refunded the full amount of the race fields fee it was obliged to pay under the terms of any approval granted to it: see Full Court at [9], [73] and [83]. This matter is addressed below at [67]-[71]
44 Full Court [102], [109]
45 Full Court at [112], see also [112] Tab was "*truly liable to pay*" [86] no basis for concluding TAB and bookmakers "*not truly required to bear*"; [90] TAB had a "*real liability to pay*" and was "*in truth obliged to pay*";
46 *Cole v Whitfield* (1988) 165 CLR 360 at 401

issue is to be examined as a matter of substance and not form[47] and the protection of s 92 is not to be circumvented by "drafting devices" or indirect means[48].

42. The means by which a domestic industry or trade may be protected or advantaged are legion.[49] Obviously, those means can include a set of interconnected legislative and administrative measures. Once that is recognised, the practical effect of the fee on interstate traders, compared to local traders, cannot be limited to those that flow from the immediate legal rights, duties or obligations that the impugned law imposes. As a matter of substance, measures may operate alone or in combination to make interstate dealings more difficult or expensive or impossible. The narrow approach adopted by the Full Court is inconsistent with an examination of the practical as well as legal effect of an impugned measure. It represents a retreat to formulism and erroneously assumes that the means of protecting local industry from interstate competition are confined to the realm of legally enforceable obligations.[50].

43. The necessity to look at matters of substance is especially important in this context. The impugned burden involves the imposition of a fee within a national market. The fee is imposed administratively pursuant to a broad discretionary power that has been conferred on control bodies that are part of local industry and are bound by statute to maintain commercial arrangements with the State's largest wagering operator, the TAB. The structure of the industry and the identity of the administrative decision-maker, mean that the opportunity and means by which the discriminatory treatment can be effected are greatly increased.

44. The primary judge was correct to find that the burden of the fee condition did not fall indiscriminately. TAB's legal liability to pay a race fields fee was only part of the picture. To understand the extent to which TAB was in fact burdened by the fee, it was necessary to take into account the declared willingness of the State regulators to adjust other fees payable by TAB by an exactly corresponding amount.

45. The Full Court also ignored the effect of the thresholds on the NSW bookmakers, which meant that none of the NSW bookmakers were burdened by the fee condition. It is not necessary to show that the law discriminates in favour of all intrastate traders or against all interstate traders. A law that targets a single interstate trader or class of trader will offend s 92[51]. Here, the targets were corporate bookmakers in the Northern Territory and the Australian Capital Territory. They had a sufficiently large, and growing, turnover as to present a real competitive threat to both TAB and NSW bookmakers.

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47 *Bath v Alston Holdings* 165 CLR at 426; *Cole v Whitfield* 165 CLR at 408; *Castlemaine Tooheys* (1990) 169 CLR 436 at 466-467 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; Betfair 234 CLR at 481[118]

48 *Ha v New South Wales* (1997) 189 CLR 465 at 498; *Cole v Whitfield* (1988) 165 CLR 360 at 402; *Rowe v Electoral Commissioner* (2010) 85 ALJR 213 at [151] per Gummow and Bell JJ

49 *Cole v Whitfield* (1988) 165 CLR 360 at 393, 408-9

50 *Cole v Whitfield* (1988) 165 CLR 360 at 408

51 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 475

Universal Expectation

46. The Full Court accepted or assumed, at [86], the existence of a "universal expectation", including on the part of "those responsible for the implementation of" the scheme, that TAB and NSW bookmakers would not be required to bear both the burden of their previous obligations as well as the new fee. In other words, there would be an adjustment of existing imposts in the amount of, or fully reflecting, the race fields fee.

47. The concept of expectation does not adequately describe the prevailing circumstances. Nor does it acknowledge the conflicted role of the control bodies. Each racing body had the regulatory powers conferred by s 33A and could decide to whom an approval was to be given and on what conditions. Further, by reason of their commercial arrangements with the TAB and, through their funding of race clubs, the control bodies were in a position to control and adjust existing fees payable by local traders. Given that position of power and control, it is inapt to describe the racing bodies' understanding and intention as to what would occur as a mere expectation. The offsetting adjustments were both planned and intended.

48. Further, it is impossible to treat the commercial arrangements between the control bodies and TAB as private contractual arrangements that are divorced from the regulatory context[52]. The RDA was required by s 21A of the *Totalizator Act* 1997 (NSW) and the TAB was obliged to comply with its terms under its licensing conditions. The RDA formed part of the regulatory framework within which the State had given exclusive rights to TAB. The same is true of stand fees which were payable by NSW bookmakers in return for the rights to stand at licensed race courses in NSW.

49. Any proper analysis of practical effect needs to take full account of the primary judge's findings, including findings as to the capacity of the control bodies to impose a fee as a condition of approval and simultaneously to use the fee proceeds at their discretion to adjust existing burdens; the RNSW analysis of the revenue impact that the fee would have[53]; the pursuit by TAB of the introduction of race fields fee on "all corporate bookmakers"[54]; the common commercial interest of TAB, RNSW and HRNSW to ensure that revenues of the TAB are maximised[55]; the findings of the primary Judge as to protectionist purpose[56]; and the existence of an "unavoidable conflict of interest"[57] on the part of the control bodies. These findings demonstrate that the concept of "expectation" does not capture the true situation and that the primary judge was correct to frame the analysis in terms of intention, understandings, or arrangements.

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52 Perram J [139]; cf the Full Court at [111]
53 Perram J at [66(a)]
54 Perram J at [66(c)]
55 Perram J at [66(e)]
56 Perram J at [45]
57 Perram J at [48]

50. The Full Court[58] was influenced by its conclusion that the payments made to TAB were nothing more than a recognition of entitlements conferred under the RDA which Sportsbet does not enjoy because it has not paid for them[59] and that the racing control body had the power to adjust those payments at any time. Likewise, the stand fees were payable for valuable rights that the on-course bookmakers and TAB enjoyed and which the interstate operator did not enjoy[60]. These facts do not obviate the need to inquire into the payments that the control bodies made out of the proceeds of the race field fees, including whether the practical effect of those payments was to shield the TAB and NSW bookmakers from the economic burden of the new fees.

51. In relation to TAB, the right conferred by the RDA was the supply of race field information "royalty fee" so that TAB could use the information in its wagering operations[61]. The use of race fields did not require any permission at the time of the RDA. The substantial fees paid by TAB under the RDA related generally to the exclusive rights it was granted under the legislation and the RDA.

52. From 1 July 2008, TAB was prohibited from using race field information without approval and, in that regard, stood in the same position as all other wagering operators including Sportsbet. The creation of a statutory prohibition on the use of race fields had the consequence that all wagering operators including the TAB were no longer free to publish and use race fields. It is far from clear that the enactment of this legislation constituted a breach of the RDA or triggered a right to compensation[62].

53. The finding of the Full Court that the payments made to TAB were "much less" than the race fields[63] fee was wrong. In fact the amount paid to TAB was exactly the same as the fees paid by it for the period to which it related.

54. The Full Court's analysis ignores the causal nexus between the imposition of the fee conditions in apparently uniform terms, and the steps that the control bodies tool to immunise the TAB and local bookmakers from the economic burden of the new fee: see para 59 below.

Boardman v. Duddington

55. The Full Court's reliance on *Boardman v. Duddington*[64] was misplaced. That decision was either overruled by *Cole v. Whitfield* or alternatively it can be distinguished.

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58 Perram J at [101]-[104]
59 Full Court [110]
60 *Boardman v Duddington* (1959) 104 CLR at 469 per Dixon CJ
61 cl 8.2 of the RDA granted the TAB a non-exclusive royalty fee licence to use race field information
62 *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 18 (Latham CJ McTiernan J agreeing at 32), at 31 per Dixon J; *Port of Portland Pty Ltd v State of Victoria* [2009] VSCA 282
63 Full Court at [94]
64 (1959) 104 CLR 456

56. *Boardman* is an application of the criterion of operation doctrine that examines legal impact rather than the practical effect of the provisions. It cannot survive the judgment of the Court in *Cole v. Whitfield.*

57. In any event, the existing fees payable by the TAB under the RDA and by NSW bookmakers for the right to stand at NSW racecourses were fees payable for the acquisition of valuable rights[65]. They were not mere taxes of the kind discussed by the Court in *Boardman.* There was, moreover, no evidence in *Boardman* to the effect that the licence fee would not have been introduced in the absence of offsetting payments or adjustments in favour of intrastate traders[66].

Timing

58. The third point relied on by the Full Court assumes that there was no nexus between the imposition of the fee conditions and the adjustment of other fiscal burdens borne by intrastate operators, other than timing. However, the relationship between the scheme, the adjustment of other imposts and the creation of carefully calibrated thresholds was not simply that they occurred at the same time. Rather, as the primary Judge found, the fee condition would not have been imposed uniformly without also taking the three measures that protected local industry[67].

59. The reasoning adopted by the Full Court has been considered and rejected by the US Supreme Court. In *West Lynn Creamery Inc v Healy*[68] the US Supreme Court considered a tax on wholesale sales of milk in Massachusetts imposed by a pricing order. The tax collected, which was payable on all milk, was applied to the benefit of local producers. On its face the tax was not discriminatory.

60. The order required every "dealer"[69] in Massachusetts to make a monthly "premium payment" into the "Massachusetts Dairy Equalization Fund." Each month the fund was distributed to Massachusetts producers. Each Massachusetts producer received a share of the total fund equal to his proportionate contribution to the State's total production of raw milk.

61. The Court held that the pricing order violated the negative Commerce clause and was invalid[70]. Writing for the majority, Stephens J concluded that although the tax also applied to milk produced in Massachusetts, its effect on Massachusetts producers was entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers[71]. His Honour concluded that while the fee was facially neutral, it operated like an ordinary tariff that was effectively imposed only on out-of-state products.

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65 see paragraphs [51] to [54] above
66 cf Perram J at [102], [104], [136], [137] and [141]
67 Perram J at 102]-[104], [136]-[137] and [141]
68 512 US 186 (1994); applied by the US Supreme Court in *CSX Transportation, Inc. v. Alabama Dept. of Revenue* not yet reported No 09-520 (2011) 22 February 2011
69 Defined as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer."
70 512 US at 188, 194
71 512 US at 194

62. The Court specifically considered and rejected the argument[72] that because each component of the program—a local subsidy and a non-discriminatory tax— is valid, the combination of the two is equally valid. Emphasising the importance of approaching the negative Commerce Clause as a substantive protection, the majority observed that it was the "entire program"—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favour of local producers.

63. The Court emphasised that its Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce[73]. The Court "*eschewed formalism for a sensitive, case-by-case analysis of purposes and effects*". Taken together, the two measures: fee and rebate violated the negative commerce clause.

64. Scalia J, with whom Thomas J concurred, arrived at the same conclusion but by a narrower path of reasoning[74]. His Honour held that there was no material distinction between, on the one hand, a tax upon the industry that is non-discriminatory in its assessment, but that has an "exemption" or "credit" for in-state members and, on the other hand, a non-discriminatory tax upon the industry, the revenues from which are placed into a segregated fund, which fund is disbursed as "rebates" or "subsidies" to in-state members of the industry[75]. The difference between the two methods is immaterial; the money is taken and returned rather than simply left with the local taxpayers in the first place.

65. It is submitted that the approach taken by the US Supreme Court is both correct and applicable here. It is built on a course of decisions of the Supreme Court, including *Guy v Baltimore*[76], which this Court has held are helpful in construing s 92[77]. The principle applied, namely that protection is to be discerned as a matter of substance not form, accords with authority in this Court. The primary judge was correct to find a system of integrated measures that immunised the local traders from the impact of the statutory fee and to assess the existence of a protectionist burden by reference to the entire program that the statutory delegates implemented. His Honour's conclusion should be restored.

The Case Below and on Appeal

66. The findings and conclusions of the primary judge, set out at paragraph 33 above, accorded with the pleaded case and the way it was conducted. Sportsbet pleaded that the legal or practical operation of the fee conditions imposed a burden or disadvantage on trade and intercourse between the States and Territories, which was not imposed on intrastate commerce of the same kind[78]. The particulars to paragraph 85(b) made clear that Sportsbet was alleging that the control bodies acted on the basis that the race fields fee payable by TAB would be offset by a payment, probably by way of compensation under the

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72 recorded at 512 US at 198
73 512 US at 201
74 512 US at 207 and 210
75 512 US at 211
76 100 US 434 (1880)
77 *Betfair v Western Australia* at [40], [42], and [47]
78 Perram J at [116] paras 90(b) and 85(b) of the Third Further Amended Statement of Claim

RDA, and that licensed NSW bookmakers would not be negatively impacted by the race fields fee.

67. Sportsbet pleaded that RNSW had taken steps in consultation with TAB to ensure that the payment of the race fields fee was either compensated under the terms of the RDA or the fees were returned to, or refunded to or credited to TAB. It also alleged that TAB is able to mitigate, absorb or offset any fees imposed on it under the race fields regime, and particularised the RDA, the Deed of Settlement, and the CEO Report to the RNSW Board of June 2008.[79]

68. Sportsbet's case at trial was that RNSW and HRNSW knew and intended, when it determined to impose the turnover fee, that TAB would not, in effect, pay any money under the race field provisions[80]. RNSW and HRNSW contested the case at trial in the knowledge and on the basis that Sportsbet was alleging that TAB paid nothing, in practical or economic terms, because of a "rebate arrangement"[81]. Before the Full Court, Sportsbet accepted that the existence of a concluded contract, arrangement or understanding between the control bodies and TAB to the effect that any fees would be refunded to the TAB was not a necessary part of its case, but submitted that the findings were open to be made[82]. At all times, Sportsbet maintained that when RNSW and HRNSW "implemented the scheme they intended to reimburse or repay any monies they received from the TAB pursuant to the race fields scheme"[83]. It also referred the primary judge to evidence recording RNSW's understanding and intention that any fee imposed on TAB would be offset by a compensation payment to TAB under the RDA.[84] Sportsbet never resiled from the proposition that in June 2008 when determining to impose the fee RNSW and HRNSW understood and intended that TAB would be economically insulated from the fee by RNSW refunding any fees paid by TAB back to TAB. And at all times it maintained that the primary judge's findings as to the practical effect of the measures were correct and should be decisive of the case.

69. Sportsbet also maintained that there was an arrangement or understanding between RNSW, the racing clubs and NSW bookmakers that racing clubs would reduce the stand fees payable by NSW on-course bookmakers and that this would be funded by RNSW from its receipts under the race fields regime. The contrary was never suggested by the Respondents during the course of the appeal. The Full Court misunderstood the position.

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79 See, inter alia, paras 68 and 68A of the Third Further Amended Statement of Claim

80 "Applicant's Submissions on and Summary of Facts" para 25 and 76; and in the Full Court "Sportsbet's Outline of Submissions in Reply to the Appellants' Submissions Dated 25 August 2010" para 45.

81 RNSW and HRNSW characterised this part of Sportsbet's case as the "Rebate case": see paras 25 and 69 to 81 of the "Second and Third Respondent's Closing Submissions" before Perram J; *Thomas v Mowbray* (2007) 233 CLR 307 at 515-517

82 "Sportsbet's Outline of Submissions in Reply to the Appellants' Submissions Dated 25 August 2010" para 40.

83 "Sportsbet's Outline of Submissions in Reply to the Appellants' Submissions Dated 25 August 2010" para 51. Transcript before the Full Court 1 October 2010 p 154 lines 35-40; 155 lines 35-40; 157 lines 10-15; 161 line 20 to 162 line 7

84 See eg, the evidence recorded by Perram J at [66](a) and [70]-[74]

70. The Respondents appreciated that Sportsbet alleged that there were rebate arrangements under which TAB could mitigate, offset or absorb the effect of the fee condition and that Sportsbet's complaint was, inter alia, "*that the practical effect of the fee includes, by reason of their inseverable nature, the accompanying rebating arrangements*"[85]. The primary Judge's treatment of the arguments at [137] to [142] records that the control bodies directly responded to the rebate case contended for by Sportsbet[86].

The Deed of Release

71. Sportsbet's acceptance in the Full Court that the Deed of Release was not a sham did not undermine the case it had presented at trial or the conclusions of the primary judge on the critical points.

72. The Deed of Release was made on 25 November 2009 and recorded a payment from the control bodies to TAB in an amount equal to the race fields fee that had been imposed. It gave effect to the understanding of the Board of RNSW in June 2008 that the amount of race fields revenue that would be derived from TAB would be nil.

73. The significance of the Deed is that it confirms that RNSW and HRNSW paid TAB a sum exactly equal to the amount of the new fees paid by the TAB. The fact of the payment confirms the primary judge's finding that, as a matter of substance, the payment removed the burden of the new fee that had been paid by TAB[87].

74. How the parties chose to characterise the payment in the Deed of Release, some 17 months after the decision of the control bodies to impose the fee, was of peripheral relevance, if any, in assessing the practical effect of the fee. The primary judge said he had some difficulty with the appellant's contention that the Deed of Release was precisely what it seems to be.[88] However, this observation was entirely incidental to his Honour's conclusion about the relationship between the imposition of the fee condition and the adjustment of existing burdens. It is clear that his Honour would have reached the same conclusion even if he held no doubts about the way in which the Deed of Release characterised the offsetting payment.

75. Specifically, Perram J's conclusions at [69], including the introductory words "Be that as it may," demonstrate that his reservations about the Deed of Release were not the basis for his finding that it was much more likely in fact that the TAB and RNSW had an in principle understanding or arrangement that the TAB will have the race fields fee refunded to it. The effect of the new burden on TAB was to be determined as a matter of substance and not form, as the primary judge expressly noted[89].

Competitive Advantage: State of Origin and Equivalence

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85 Perram J at [141]
86 Perram J [140]
87 Perram J at [135]
88 At [67]. This observation was entirely incidental
89 Perram J [117], [119], [120], 126], [135]

76. The Full Court held that s 92 was not engaged unless it could be shown that the impugned measure sought to neutralise a competitive advantage that interstate traders would otherwise enjoy by reason of their location[90]. It is submitted that this principle is wrong and it is not supported by *Bath v Alston*[91].

77. The invalidity found in *Bath v Alston* did not depend on establishing that the interstate trader had a competitive advantage by reason of its location. The two examples given by the court at 426, which are further explained at 427, show that a protectionist burden may exist in relation to a trader who already pays taxes in its home State that are equal to or higher than those charged by Victorian wholesalers. The examples also show that a protectionist burden, in the form of discriminatory fees or imposts, can be imposed on an interstate trader that does not enjoy a competitive advantage by reason of its location.

78. The requirement to show a competitive advantage by reason of location is also inconsistent with a national economy that does not depend on geographic boundaries[92]. It requires an analysis based on separate and discrete economic centres which does not accommodate instantaneous commercial transactions in the new economy.

Intention and Administrative Decision Makers

79. In assessing both legislation and administrative decisions the question is whether the impugned measure warrants characterisation as protectionist[93]. That gives rise to a single question:[94] what is the legal and practical effect of the measure? Because it is necessary to look at the practical effect of the measure, viewed as a matter of substance and not form the answer may involve questions of fact and degree[95].

80. Where the impugned measure is an administrative decision, there is no reason why, as a matter of logic, human experience or past authority, the actuating intentions of the decision makers should not be relevant to that process of characterisation.

81. Perram J held that the actuating intentions that he had found to exist were relevant but not decisive[96]. It was relevant to his Honour's assessment of the relationship between the measures adopted by the control bodies and his conclusion that they were part of one inseverable package[97].

82. The Full Court held intention to be irrelevant[98].

83. The intention of the control bodies is relevant to the question whether the character of the fee condition reflects a regulation of trade in pursuit of the

90 Full Court [89] and [101]
91 (1988) 165 CLR 411
92 *Betfair v Western Australia* at [15] and [18]
93 *Cole v Whitfield* (1988) 165 CLR at 408
94 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR at 471
95 *Cole v Whitfield* (1988) 165 CLR at 409
96 Perram J at [153]
97 Perram J at [152], [153]
98 Full Court at [112]

legislative purpose indentified by the Full Court at [138] or, as Sportsbet contended, the imposition of a discriminatory and protectionist burden upon interstate traders.

84. Where the impugned measure is an administrative decision the purpose of the decision maker will be relevant to deciding whether the decision involves a burden of a protectionist kind. Often the existence of the burden will be clear but its character and its practical effect may be hidden at the level of administrative decision[99]. Where the legislation confers a broad administrative discretion on a matter that does not itself relate to any obvious regulatory function or purpose, the existence of a protectionist purpose on the part of the decision maker should be sufficient to offend s 92.[100] Otherwise the protectionist effect can be achieved "without anybody knowing anything about it"[101].

85. A long line of US decisions, including the decisions in *Baldwin v. G A F S Seelig*[102] and *Hood & Sons v. DuMond*[103] which this court considered to be useful guides to the proper interpretation of s 92,[104] supports the use of purpose to determine invalidity. Reference to the actuating purpose of the administrative decision-makers is also consistent with the approach that this court took to the intercourse limb of s 92 in *APLA Ltd v. Legal Services Commissioner of NSW.*[105]

The Validity of the Legislation

86. The features of the legislative scheme are identified in paragraphs 24 to 29 above. It is impossible to divorce the legislation from the identity of the decision makers in whom the power to grant approval has been reposed. The content and form of the legislation and regulations were developed jointly by the State and the control bodies. The powers were conferred on the control bodies knowing how they intended to act.

87. The scheme burdens the business carried on by interstate bookmakers by means of the internet and telephone communications. The discretion to impose fee conditions given to bodies that represent local industry and which have an inherent conflict of interest in acting as a regulator and as a participant in industry. The money raised by the fee conditions belongs to the racing control bodies and they can apply it at their discretion for the benefit of the local industry.

88. The width, the nature and character of these discretionary powers all ensured a tendency towards discriminatory treatment that operated to the advantage of

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99 *McCarter v Brodie* (1950) 80 CLR 432 at 499
100 *Guy v Baltimore* (1879) 100 US 434 at 443; *Betfair v Western Australia* (2008) 234 CLR 418 at [42]
101 *McCarter v Brodie* (1950) 80 CLR 432 at 499
102 294 US 511 (1934) at 519, 521, 522 and 527
103 336 US 525 (1948) at 530-2, 535
104 See *Betfair* (2008) 234 CLR 418 at 460 [35] and *Castlemaine Tooheys* (1990) 169 CLR 436 at 470
105 (2005) 224 CLR 322 at 353 [38], 392-4 [173]-[179] and 460-463 [416]-[427]

local traders and to the disadvantage of those outside of the State that wished to use NSW race fields in the course of their business[106]. That tendency, together with the purpose of the legislation to stem revenue leakage, means that the scheme cannot lay claim to the neutral regulatory character that Brennan J held to be essential to validity in *Miller v TCN Channel Nine Pty Ltd*[107].

89. As Perram J noted,[108] the control bodies were given regulatory functions by statute at a time when they were locked into a commercial arrangement with the largest intrastate operator which they regulate. The substantial commercial interest that the control bodies shared with TAB gave rise to an unavoidable conflict of interest and conferred a power of taxation "*in the hands of entitles dependent substantially for their funding on the commercial fortunes of one of the taxpayers*". That relationship meant that no sensible accommodation could exist between the commercial and regulatory considerations affecting the control bodies[109].

90. The prospect of the control bodies exercising their powers except for a protectionist purpose was as illusory as the prospect of the Minister approving Betfair's use of WA race fields in *Betfair v Western Australia*[110].

91. These matters deny the provisions a genuinely regulatory character and expose its protectionist nature.

Part VII: Legislation

92. The text of the relevant provisions are set out in the Annexure:

Constitution s 92; *Northern Territory (Self Government Act)* 1978 s 49

Racing Administration Act 1998 (NSW) ss 27, 32A, 33, 33A

Racing Administration Regulations 2005 (NSW) reg 14, 16

Part VIII: Orders Sought

1. The appeal be allowed with costs.

2. Set aside the judgment and orders of the Full Court of the Federal Court of Australia made on 17 November 2010 by which:

   (a) the Full Court dismissed Sportsbet's appeal and its Notice of Motion with costs;

   (b) the Full Court ordered that the appeal of Racing New South Wales and Harness Racing New South Wales be allowed with costs.

3. In lieu thereof order that:

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106 *Betfair v Western Australia* at [146]
107 (1986) 161 CLR 556 at 607
108 Perram J at [48]
109 *Neat Domestic Trading v AWB Ltd* (2003) 216 CLR 227 at 300 [63]
110 *Betfair v Western Australia* at [119] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ and [145]-[146] per Heydon J

(a) The appeal to the Full Court brought by Sportsbet be allowed with costs.

(b) Declare that ss 33 and 33A of the Racing Administration Act 1998 (NSW) and Pt 3 of the Racing Administration Regulation 2005 are invalid.

(c) Declare that the condition of approval granted by Racing New South Wales to Sportsbet on 15 August 2008 requiring the payment of fees is invalid.

(d) Declare that the condition of approval granted by Racing New South Wales to Sportsbet on 19 June 2009 requiring the payment of fees is invalid.

(e) Declare that the condition of approval granted by Harness Racing New South Wales to Sportsbet on 1 September 2008 requiring the payment of fees is invalid.

(f) vary order 2 of the Orders made by Perram J on 16 June 2010 by deleting the figures "2,061,000.00" and substituting the figures "6,188,122.00".

(g) The appeals brought by Racing New South Wales and Harness Racing New South Wales be dismissed with costs.

Dated: 8 April 2011

Neil J Young
Melbourne Chambers
Ph (03) 9640 3272
Fx (03) 9640 3101

T North
Aickin Chambers
Ph (03) 9225 7543

R M Niall
Melbourne Chambers
Ph (03) 9640 3285
Fx (03) 9640 3108

ANNEXURE 'A'

LEGISALTIVE PROVISIONS

Northern Territory (Self- Government) Act 1978

49 Trade and Commerce with States to be free

Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free

Racing Administration Act 1988 (NSW)

27 Definitions

"**licensed wagering operator**" means a wagering operator that holds a licence or authority (however described) under the legislation of this or any other State or Territory to carry out its wagering operations (whether in that State or Territory or elsewhere).

"**NSW race field information**" means information that identifies, or is capable of identifying, the name or number of a horse or greyhound:

(a) as a horse or greyhound that has been nominated for, or is otherwise taking part in, an intended race to be held at any race meeting on a licensed racecourse in New South Wales, or

(b) as a horse or greyhound that has been scratched or withdrawn from an intended race to be held at any race meeting on a licensed racecourse in New South Wales.

"**publish**" means disseminate, exhibit, provide or communicate by oral, visual, written, electronic or other means (for example by way of newspaper, radio, television or through the use of the Internet, subscription TV or other on-line communications system), and includes cause to be published

"**relevant racing control body**" means:

(a) in relation to horse racing other than harness racing—Racing New South Wales, and

(b) in relation to harness racing—Harness Racing New South Wales, and

(c) in relation to greyhound racing—Greyhound Racing New South Wales.

"**wagering operator**" means a bookmaker, a person who operates a totalizator or a person who operates a betting exchange.

32A Meaning of "use NSW race field information"

For the purposes of this Division, a person "uses NSW race field information" only if the person, whether in Australia or elsewhere:

(a) publishes any NSW race field information, or

(b) communicates any NSW race field information to a person (regardless of whether the person already knew the information), or

(c) acknowledges or confirms any NSW race field information communicated to the person (including acknowledging or confirming the information by accepting, or facilitating the making of, a bet), or

(d) makes a written or electronic record (such as a betting ticket, statement of account or notice) that contains or refers to any NSW race field information (regardless of whether the record is communicated to any person), or

(e) uses any NSW race field information in a manner prescribed by the regulations, or

(f) causes any of the activities referred to in paragraphs (a) – (e) to occur.

33 Use of NSW race field information restricted

(1) A wagering operator or prescribed person must not use NSW race field information unless the wagering operator or person:

(a) is authorised to do so by a race field information use approval and complies with the conditions (if any) to which the approval is subject, or

(b) is authorised to do so by or under the regulations.

Maximum penalty:

(a) in the case of a corporation – 500 penalty units, or

(b) in any other case:

(i) for a first offence – 50 penalty units or imprisonment for 12 months (or both), and

(ii) for a second or subsequent offence – 100 penalty units or imprisonment for 2 years (or both).

(2) It is a defence to a prosecution for an offence against this section if a wagering operator proves that the use of NSW race field information:

(a) did not occur in connection with the making or accepting of a bet (or the offer to make or accept a bet), and

(b) did not occur in the course of the business of the wagering operator.

(3) In this section, "prescribed person" means a person (or a person belonging to a class of persons) prescribed by the regulations.

33A Relevant racing control body may grant race field information use approvals

(1) The relevant racing control body in relation to an intended race (or

class of races) to be held at any race meeting on a licensed racecourse in New South Wales may grant approval to a person to use NSW race field information (a "**race field information use approval**") in respect of that race or class of races if the person has made an application for that approval under this Division.

(2) A relevant racing control body may (but need not) impose any of the following kinds of conditions on a race field information use approval that it grants:

(a) a condition that the holder of the approval pay a fee or a series of fees of an amount or amounts and in the manner specified in the approval (being a fee or fees imposed in accordance with any requirements prescribed by the regulations),

(b) such other conditions as may be specified in the approval (being conditions of a kind that are prescribed as permissible conditions by the regulations).

(3) Any fee that is payable under a race field information use approval is a debt due to the relevant racing control body that granted the approval and is recoverable as such in a court of competent jurisdiction.

(4) A relevant racing control body that grants a race field information use approval may, by written notice to the holder of the approval, cancel or vary the terms of the approval on any grounds prescribed by the regulations.

(5) If a relevant racing control body cancels or varies a race field information use approval, the body must provide the holder of the approval with written reasons indicating why the approval was cancelled or varied (as the case may be).

Racing Administration Regulation 2005 (NSW)

14 Interpretation

(1) In this Part:

... "wagering turnover", in relation to a race or class of races, means the total amount of wagers made on the backers side of wagering transactions made in connection with that race or class of races.

16 Fees for race field information use approvals: section 33A(2)(a)

(1) A relevant racing control body may impose a condition on an approval (in addition to any other condition relating to fees) that the holder of the approval must pay a fee to cover the cost of assessing the application for the approval.

(2) A relevant racing control body may impose a condition on an approval that the holder of the approval must pay the following fees:

(a) in relation to a use in Australia of NSW race field information

made in the course of the wagering operations of a licensed wagering operator – a fee that does not exceed 1.5% of the holder's wagering turnover that relates to the race (or class of races) covered by the approval plus any amount of GST payable in respect of the fee,

(b) in relation to any other use of NSW race field information – a fee determined by the relevant racing control body.

(3) In this clause, "GST" has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

Note: In granting race field information use approvals, and imposing conditions on those approvals, relevant racing control bodies are subject to section 92 of the *Commonwealth Constitution* (Trade within the Commonwealth to be free etc).