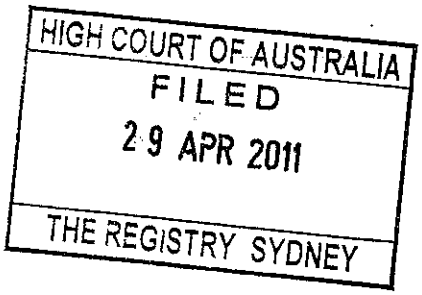
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

STATE OF SOUTH AUSTRALIA
Fourth Respondent

FIRST RESPONDENT'S SUBMISSIONS

Filed for the State of NSW on 29 April 2011
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Part I: Publication of Submissions

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

Part II: Statement of Issues

2. Are the provisions of the Division 3 of Part 4 of the Racing Administration Act 1998 (NSW) ("the Act) and/or Part 3 of the Racing Administration Regulation 2005 (NSW) ("the Regulation") inconsistent with s.49 of the Northern Territory (Self-Government) Act 1978 (Cth) (the "Self-Government Act"), and invalid by operation of s.109 of the Constitution, when:

   (i) the provisions do not on their face discriminate against interstate wagering operators;

   (ii) the provisions do not, in their operation, have that effect; and

   (iii) the provisions do not contemplate that race field information use approvals will be granted in a manner contrary to s.49 of the Self-Government Act or s.92 of the Constitution, nor do they authorise such approvals?

3. In circumstances where all race field information use approvals respectively granted under the Act by the second and third respondents (collectively, "the Authorities") are subject to a uniform fee condition, can adjustments made to pre-existing burdens borne by intrastate wagering operators alone operate to invalidate approvals granted to interstate wagering operators on the basis that they conflict with s.49 of the Self-Government Act or s.92 of the Constitution?

4. Is the absence of any competitive disadvantage suffered by the interstate trader as a result of the imposition of the uniform fee condition relevant to determining whether the condition infringes s.49 of the Self-Government Act or s.92 of the Constitution?

Part III: Section 78B Notices

5. The first respondent has considered whether any notice should be given in compliance with s 78B of the Judiciary Act 1903 (Cth), and notes that Sportsbet has served notices under that section on each Attorney General.

Part IV: Material facts

6. The factual background is set out in detail in paragraphs [15]-[41] of the Full Court's reasons for judgment. Some of the material in those paragraphs is contained in Part V of Sportsbet's Submissions, but that factual summary is selective. Further factual findings made by the primary judge are referred to, and relied on, later in Sportsbet's Submissions, in particular at paragraph [32]. Given the extent to which Sportsbet's arguments depend upon its contention that certain findings made by the primary judge survived the Full

Court's decision, further elaboration is required of both the background to its challenges and the judgments at both first instance and on appeal.

7. In Australia a large and sophisticated wagering industry has developed, the main object of which is racing. The wagering industry obtains a substantial benefit from the racing industry – an object of wagering – without any corresponding obligation to pay for that benefit. The organisation and hosting of races costs substantial sums of money, including amounts associated with the maintenance of racetracks, the organisation of meetings, the provision of safe facilities for the benefit of participants in the industry and spectators, and prize money, so as to give appropriate incentives to owners, breeders and trainers to provide employment to jockeys and all of the others employed to look after horses.

8. It is in the interests of both the wagering and racing industries that the former be required to make some payments to the latter, so as ensure the continued ready availability of racing. For many decades the issue was dealt with in two main ways in NSW and elsewhere in Australia, both of which had a local focus whereby local wagering operators made payments to the local racing industry. This focus reflected the so-called "Gentleman's Agreement", which was described by the plurality in Betfair v Western Australia ("Betfair v WA") (2008) 234 CLR 418 at [69] as enabling all wagering operators to accept bets on events held in any State and Territory, with each polity (or racing clubs/bodies therein) collecting fees and taxes only from wagering operators which they have licensed.

9. The two aspects of this system in NSW were as follows. First, the largest contribution to the industry came from the TAB. In addition to being subject to betting taxes levied by the State, it paid a series of fees pursuant to the terms of the Racing Distribution Agreement ("RDA"), entry into which was a statutory condition to the grant to it of a licence under the Totalizator Act 1997 (NSW) (s.21A). Pursuant to the RDA, the TAB was given a right to use NSW racing information, in return for payment of product and other fees under the RDA (see cl 8.2 – eg found at Full Court [24]). Contrary to Sportsbet's Submissions (at [51]), the entitlement conferred by cl 8.2 of the RDA was not the use of race field information on a "royalty free" basis. The clause obliged the racing authorities to procure race field information for the TAB; if it were necessary to procure that information by licence, the authorities had to procure a licence for the TAB on a royalty free basis, so that the TAB was not paying any more for the information than it was already paying under the terms of the RDA.

10. Secondly, on-course bookmakers had long paid a fee to the race clubs at which they fielded, which fee was calculated as a percentage of turnover. Until the enactment of the race fields legislation the fee was generally 1% of turnover at metropolitan clubs, and a lower amount at regional clubs (referred to by the primary judge eg at [66(a)] and [77]). Such fees were imposed around Australia (and overseas). The existence of these types of requirements was referred to – and the legitimacy thereof was implicitly assumed – in the

joint judgment in Betfair v WA at [107]. The joint judgment there noted that bookmakers in Western Australia were required to pay 2% of betting turnover on racing to racing clubs, and they also had to pay a turnover fee to the State Commission: see at [80]-[81], also at [55].

11. The advent of internet and telephone betting facilitated the development of the national market to which this Court referred in Betfair v WA, led to the erosion of the Gentlemen's Agreement, and prompted the development of legislation pursuant to which the local racing industry could obtain a return for its product, in the form of race field information, from all wagering operators. It was not in dispute that the market share of wagering operators outside the State was growing as the national market developed. Given that the two means of raising revenue for the NSW racing industry were based on only on levying bets made by local wagering operators, the revenue raised for the racing industry was falling. That fall was not due to any less use being made of NSW races as objects of wagering, for operators outside the State offered wagers on these.

12. There was thus a need to come to terms with the new reality (see primary judge at [30]). To have failed to act would have led to continuing falls in revenue for the NSW racing industry, to the detriment not only of that industry but also of wagering operators around Australia who used NSW races as an object of gambling. Moreover, the situation was discriminatory against NSW wagering operators – who were bearing the burden of supporting the NSW racing industry, whilst other wagering operators who made the same use of NSW racing products made no such payments. The means selected by the NSW Parliament to ensure that wagering operators would pay a fair price for the racing industry's product was the imposition of a licensing regime for the use of race field information. The primary judge described Division 3 of Part 4 of the Act as exhibiting a familiar structure of prohibiting an activity, lifting the prohibition under licence and imposing fee obligations upon the issue of that licence (at [49]).

13. In introducing the relevant amendments to the Act, the Parliamentary Secretary stated that the main purpose of the provisions was to "address the issue of wagering operators free riding on New South Wales racing events", by using NSW race fields to make a profit without paying a fair price for them: Parliamentary Debates, Legislative Assembly, 20 October 2006 at 3116. The term "free rider" is apt. It is a familiar economic problem that in some instances it will be in the interests of all market participants that something from which they all benefit be supported, paid for or cared for (eg a commons or a fishery), but in the interests of no particular participant that they be the one who bears the burden of doing so. Where only some participants bear the burden, the others may be regarded as free riders. It is a situation calling for regulation.

14. The key provisions of the Act and the Regulation are set out at [29]-[34] of the Full Court's reasons. Of central importance is cl.16(2)(a) of the Regulation, which sets a maximum cap on the fee that a racing control body can charge for a race field information

use approval by reference to a percentage of "wagering turnover" (see cl.14), namely 1.5%.

15. Before the race field regime commenced, the boards of the Authorities determined to set a standard fee condition for the use of race field information in the terms described by Sportsbet (at [8]-[9]) ("the Turnover Condition"). The boards resolved to apply the Turnover Condition to all approvals granted under the regime, to interstate and intrastate wagering operators alike, and it has been so applied.

16. With the advent of this new legislative regime, the metropolitan race clubs decided to reduce the pre-existing contribution that on-course bookmakers were obliged to pay to them. It also gave rise to a claim by the TAB under the RDA, which was ultimately settled, on the basis that it was entitled to, and already paying for, the racing information pursuant to that Agreement.

Sportsbet's challenge and the primary judge's decision

17. Sportsbet contended that the provisions of Div 3 of Part 4 of the Act and Part 3 of the Regulation were invalid on the basis that their legal or practical effect was to authorise the imposition of fee conditions which infringed s.49 of the Self-Government Act. It argued in the alternative that the provisions were infected by the State's subjective (and impermissible) intention that, in the words of the primary judge, the provisions be "used to rein in the free riding interstate corporate bookmakers" (at [155]). The primary judge rejected both of those arguments (at [156]; see also [153]).

18. Sportsbet also challenged the approvals respectively granted to it by the Authorities on the basis that they infringed s.49. In upholding this challenge, the primary judge held that the contravention lay in the practical operation of the Turnover Condition together with a series of arrangements and understandings of which the approvals were "but an integer" (at [101]-[104]). The three factors which were integral to his Honour's reasoning in this regard were (see [65], [104]):

    (i) the Authorities and the TAB had reached "an agreement, arrangement or understanding" whereby the TAB would be refunded the full amount of the fee it was obliged to pay under the terms of its race field information use approval;

    (ii) the Authorities had also reached "an agreement, arrangement or understanding" with NSW on-course bookmakers, who would be relieved of the obligation to pay the fee through a combination of the operation of "an apparently equal $5 million of turnover" (or $2.5 million in the case of HRNSW) and "a rebate to them constituted by a reduction in fees paid by them to racing clubs"; and

    (iii) the Authorities had agreed to compensate the race clubs for reducing the fees that they imposed on the on-course bookmakers.

19. The presence of this "package" of arrangements, deliberately formulated by the Authorities, was critical to his Honour's core conclusion that both Turnover Conditions had the practical effect of protecting almost all NSW wagering operators from the economic burden of the fee (at [117]; [152]). Underlying his Honour's conclusion was the view that the High Court's decision in Bath v Alston Holdings Pty Ltd (1988) 165 CLR 411 meant that "equalisation" measures, of which he considered the regime in this case to be an example, were impermissible (at [44(c)], [129]-[134]).

The decision of the Full Court

20. The Full Court dismissed Sportsbet's appeal against the primary judge's rejection of its challenge to the validity of the Act and Regulation, and it allowed the Authorities' appeal against the primary judge's ruling that the approvals were invalid. In reversing the primary judge's decision on the invalidity of the approvals, the Full Court held as follows:

(i) The primary judge's findings as to agreements, arrangements and understandings between, first, the Authorities and the TAB and, secondly, the Authorities and the racing clubs, could not be sustained (see eg at [83], [87]).

(ii) The primary judge failed to recognise that all wagering operators bore the same burden imposed via the Turnover Condition, whatever their state of origin and, with that being the case, it was immaterial that the burdens had previously been borne only by intrastate trade, as was the circumstance that adjustments to the previous burdens could be expected to, and did, occur to ensure intrastate trade did not bear the old burden and the new uniform burden (at [96]; [101]).

(iii) Even assuming a universal expectation, on the part of all persons responsible for the implementation of the race field regime – that the TAB and NSW on-course bookmakers would not be required to continue to bear the burdens of their previous obligations to support NSW racing, as well as the extra burden of the fee under the new scheme – the existence of such an expectation afforded no basis for concluding that the TAB and NSW on-course bookmakers were not truly required to bear the burden of the fee in common with interstate traders (at [86]).

(iv) Nothing in the circumstances of "the milieu" (a description adopted by Sportsbet in oral argument) in which the new regime was implemented was apt to attract the reasoning of the majority in Bath v Alston. Further, nothing in the circumstances supported the primary judge's conclusion that the TAB and NSW on-course bookmakers would be relieved of their liability to also pay the fee in accordance with its terms (at [88]).

(v) The regime did not infringe the Court's reasoning in Bath v Alston, properly applied (as to which see [97]-[101]).

(vi) To the extent that the primary judge's reasoning depended on the proposition that a law or executive measure imposing equal burdens on interstate traders can be consistent with s.92 only if it commences contemporaneously with the law or executive measure which first subjects intrastate trade to competitive disadvantage relative to interstate trade, that proposition was not supported by any decision of the High Court, and it elevated form over substance, fettered legislative power to change an unsatisfactory state of affairs in which intrastate trade is unequally burdened and, if accepted, would mean that private commercial arrangements could fetter the legislative power of the New South Wales Parliament (at [102]).

21. Sportsbet contends that the "key features in the implementation of the scheme", as found by the primary judge and as outlined in paragraph [32] of its Submissions, survived the Full Court's decision. The Full Court, however, rejected the existence of a "scheme" accompanying the introduction of the uniform fee condition, in the sense of agreements, arrangements or understandings reached between the Authorities and local wagering operators. It did not accept that the Authorities had deliberately adopted the "measures" to which Sportsbet refers in paragraphs (a), (b) and (c) of paragraph [32], which measures were critical to the primary judge's finding that the practical effect of the Turnover Condition was to impose a discriminatory burden on interstate wagering operators (see eg at [152]).

22. Sportsbet's further contention (at [34]) that the Full Court did not deal with the purpose and effect of the relief that on-course bookmakers were granted in relation to stand fees overlooks the fact that there was no need for the Full Court to expressly overturn the primary judge's findings when its conclusions rendered them nugatory. As the Court stated (at [110]):

> The complaints made by RNSW and HRNSW about the other findings made by the primary judge pale into insignificance, and, indeed, irrelevance, once it is accepted, as we think it must be, that any difference between TAB and NSW on-course bookmakers on the one hand, and Sportsbet on the other, under the race field information scheme is nothing more than a recognition of entitlements which are not conferred under the scheme and which Sportsbet does not enjoy for the non-discriminatory reason that it has not ever paid for them. These circumstances do not exhibit the features of a discriminatory law identified by Gaudron and McHugh JJ in Castlemaine Tooheys at 478....

23. In so far as Sportsbet refers to matters of intention as having indirect relevance (at [32(e)] and [32(f)]), that was not a matter that the primary judge addressed; his Honour went no further than holding that the intention of the Authorities in making the arrangements he found to exist did not have any direct consequences in s 92 jurisprudence in terms of establishing discriminatory protectionism (at [153]). It was unnecessary for the Full

Court to consider in detail the role of purpose in the context of s.92, although it agreed with the primary judge's statement as to the relevance of intention (at [112]).

24. In so far as the purpose of the State in introducing the legislative regime for race field information use approvals is concerned, the primary judge initially characterized that purpose as protectionist, because it sought to catch "free riders" all of whom were interstate traders (at [44]-[46]), but later accepted that this may be a legitimate legislative object (at [147]). Sportsbet has emphasised the former (at [24]-[27]) without referring to the latter.

Part V: Applicable Constitutional provisions, statutes and regulations

25. The first respondent accepts that the provisions referred to by the appellant in Part VII of its submissions are relevant to the appeal, but would add the following:

(i) Interpretation Act 1987 (NSW), ss.31, 32;

(ii) Racing Administration Regulation 2005 (NSW), regs.17, 20.

Part VI: The first respondent's argument

26. It is appropriate first to discuss the notion of protectionist discrimination, then to address Sportsbet's challenge to the approvals, then its attack on the legislative provisions.

Discrimination of a protectionist kind

27. In Cole v Whitfield (1988) 165 CLR 360 this Court identified that the trade and commerce limb of the s.92 guarantee was directed to discriminatory measures of a protectionist kind. The understanding of the notions involved was advanced by this Court's decision in Betfair v WA. Relevantly, for current purposes, the following points were explained there:

(i) The term "protection" is "concerned with the preclusion of competition" (joint judgment at [15]). Specifically, it is concerned with precluding competition from traders from outside the State (or Territory) in question. Section 92 prevents "the use of State boundaries as trade borders or barriers for the protection of intrastate players in a market from competition from interstate players in that market" (at [36], see also [27] and [102]).

(ii) Such prohibited protection "occurs in a market for goods or services" (at [15]). Thus an understanding of the relevant market is required. This involves consideration of matters which go to delineate markets, such as substitutability of goods/services and cross-elasticity of demand (see at [4] and [115]). It is in this sense that s.92 is concerned with goods/services "of the same kind" (see at [121], referring to Cole at 407-8, Barley Marketing Board for NSW v Norman (1990) 171 CLR 182 at 204-5).

(iii) The guarantee takes account of both the supply-side and the demand-side, as the section operates to the benefit of consumers in creating and fostering national markets (see at [4], [12], [26], [39], [102], [121]-[122]).

28. Protectionist measures distort the operation of markets – to the detriment of consumers – by burdening interstate traders in a discriminatory way. Thus since Cole this Court has looked to the effect of impugned measures on competition – specifically, asking whether the measure confers competitive advantages on local traders vis-à-vis interstate traders, and/or imposes competitive disadvantages on interstate traders vis-à-vis locals: Cole at 409; Bath v Alston at 427; Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 458-9, 464, 467-8; Norman at 202-3; Betfair v WA at [118]-[122].

29. This approach is consistent with that part of the United States case law dealing with the "negative" commerce clause relating to discrimination. The negative aspect relevantly "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors": New Energy Co of Ind. v Limbach, 486 US 269 (1988), 273-4; approved eg West Lynn Creamery Inc v Healy, 512 US 186 (1994), 192.

30. Although s.92 must be understood as taking account of demand-side concerns, it nevertheless only operates to prohibit measures which discriminate in a protectionist way against interstate trade or commerce. The section does not prevent measures which operate to burden local traders in a discriminatory way: see eg Norman at 202. The Court there upheld an agricultural marketing scheme even though one of its effects was to disadvantage some local border barley growers vis-à-vis their interstate competitors, and even though this disadvantaged interstate purchasers (as well as local purchasers) whose relative bargaining power against barley producers was altered by the scheme.

31. Measures imposing a discriminatory burden on local traders were commonplace prior to Cole, as it was often perceived as being necessary to exempt interstate traders from regulatory schemes. Further, even since Cole some regulatory schemes only burden locally based traders, perhaps because that is substantially sufficient to achieve the regulatory goal, or because it is impractical to try to regulate those operating outside the State, or because of the legal limits of State power. Even so, as developed below, the demand-side protection rendered by s.92 certainly counts against any argument that a State is somehow restricted from removing any such discrimination against local traders.

32. This approach to s.92 applies, mutatis mutandis, to s.49 of the Self-Government Act, although invalidity then arises by reason of s.109 of the Constitution: AMS v AIF (1999) 199 CLR 160 at [36]-[37], [153], [221].

Sportsbet's challenge to the approvals

33. Sportsbet's first argument appears to involve a claim that the Full Court did not consider the practical effect of the repayments made to the TAB and the reduction in fees charged

to local bookmakers by metropolitan racing clubs (submissions at [40]-[50]), but rather focused on just the legal operation of the race field measures. That claim is incorrect, as a fair reading of [83]-[111] makes clear. Indeed, at [111] the Court stated in terms that "[t]he discussion thus far has proceeded on the assumption that the primary judge was correct in having regard to the arrangements made by the parties to the RDA and by racing clubs and on-course bookmakers to recognise, as a matter of common sense and fairness, if not of legal entitlement, the need not to doubly burden intrastate trade upon the introduction of the race field information scheme". The Full Court went on to note at [111] that it was arguable that the contractual arrangements were outside the purview of s.92, but said it was unnecessary to reach a view on that. The problem with Sportsbet's case is that taking all of the other matters into account there was and could be no breach of s.49.

34. In its submissions to this Court Sportsbet has shied away from dealing squarely with the proposition which was, and remains, central to its case. As the Full Court correctly noted at [109], the "distinction at the very heart of Sportsbet's case and the decision of the primary judge ... is that it is permissible under s.49 of the Act, or s.92 of the Constitution, to impose equal burdens on intrastate trade and interstate trade, and it is permissible to relieve intrastate trade of burdens which do not apply to interstate trade, but it is not permissible to do both at once".

35. The imposition of a new regulatory framework in an existing industry is inevitably going to involve adjustment of what went before. The primary judge accepted, at the level of principle, that abolishing the previous State scheme and starting again with a fee imposed equally on all wagering operators would be constitutionally permissible (at [148(d)]-[149]). His Honour also accepted that the State was entitled to remove burdens which only in-State operators were burdened by and not contravene s.92 (at [136]).

36. These conclusions must be correct. Section 92 does not entrench the status quo nor freeze the evolution of the law. Any suggestion to the contrary would be redolent of now rejected notions of immunity of interstate traders from local regulation (cf Cole at 402-3, also Norman at 201), and would be inconsistent with notions of representative government that underlie the principle given effect in Kartinyeri v Commonwealth (1998) 195 CLR 337 (see at [13]-[14] and [57]). The contrary view would mean that one Parliament's hands could be tied by its predecessors, and potentially even be fettered by private commercial arrangements (see Full Court at [102]).

37. Sportsbet's contention is, however, that it is not permissible to focus on the Turnover Condition to the exclusion of the adjustments which were made to pre-existing burdens levied on the intrastate wagering operators. That contention involves a limitation on the above principles which, as the Full Court observed (at [109]), is not supported by any authority of this Court. It rests on the proposition that if existing fees or charges payable only by local traders in connection with undertaking a certain activity are replaced by fees

payable by all traders who undertake that activity, that breaches s.92 of the Constitution and s.49 of the Self-Government Act because the relative position of local and interstate traders can be seen to have changed in a manner that is adverse to the latter.

38. In effect, Sportsbet's case is that if local traders are currently at a disadvantage vis-à-vis interstate traders, because the local State authorises or permits discriminatory burdens to be imposed on local traders, then this situation cannot be altered – at least by removing the discriminatory burdens and applying a new equal burden – because to do so removes a relative competitive advantage of interstate traders, namely that they were not subject to the discriminatory burden.

39. If that proposition were correct, a Parliament would have to reform an existing regulatory structure in steps by wiping the regulatory slate clean, waiting for some indeterminate period of time, then introducing the new scheme – all in aid of avoiding an accusation of engaging in "equalisation". The Full Court correctly acknowledged that acceptance of such a proposition promoted the triumph of form over substance (at [102] and [109]). As Betfair correctly notes in its written submissions to this Court (at [53]), s.92 is not directed to "the preservation of a particular state of the market".

40. Moreover, not only is the argument contrary to basic constitutional principles relating to the freedom of Parliaments to change the law from time to time, it is contrary to the demand-side concern of s.92. As noted above, it is in the interests of consumers in national markets to have the benefits of competition in a market which is not distorted by regulation which precludes competition. That interest of consumers extends to having vigorous competition from local traders as well as those from interstate.

41. Section 92 is concerned with protecting competition on an equal basis: eg Cole at 399, also 391.8 and 396.2. The position of interstate trade is not to be privileged above intrastate trade: cf Cole at 402-3, also Norman at 201. Prior to Cole, regulatory schemes often had specific exceptions for interstate trade so as to avoid conflict with the then prevailing view of s.92 (noted eg Norman at 200). The effect of Sportsbet's argument here is that a repeal of those exception provisions after Cole would have been invalid. Acceptance of that argument would mean that one of the imperatives leading to the decision in that case – namely ending the distorting preference given to interstate trade – would have failed.

Bath v Alston

42. The primary judge (at [129]-[151]) relied on the majority judgment in Bath v Alston in a manner that was not supported by the reasoning in that case.

43. Under the legislative scheme considered in Bath v Alston (which was decided prior to Ha v NSW (1997) 189 CLR 465), in order to obtain a retail tobacco licence under the Business Franchise (Tobacco) Act 1974 (Vic), an applicant was required to pay a flat fee of $50 or $10 together with an ad valorem amount of 25% of the value of tobacco sold by

the applicant in the course of tobacco retailing in the relevant period, other than tobacco purchased in Victoria from the holder of a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence. For such tobacco purchased in Victoria local taxation (of an equivalent amount) would already have been paid at the wholesale level. The majority of the Court observed that viewed in isolation the provisions of the Act discriminated against interstate purchases of tobacco in favour of purchases in Victoria, which was "undeniably protectionist in both form and substance" (at 425):

> In form, the provisions...select the fact that tobacco was 'purchased in Victoria' from a licensed wholesaler as the qualifying condition for exemption from inclusion in the products by reference to which liability to ad valorem tax is calculated. In substance, those provisions protect local wholesalers and the tobacco products they sell from the competition of an out of State wholesaler whose products might be cheaper in some other Australian market place for a variety of possible reasons, eg that the laws of the State in which he carries on his business as a wholesaler either do not require that he hold a licence at all or exact a licence fee comparatively lower than the fee exacted from a Victorian wholesaler.

44. The majority considered that the operation and effect of the provisions of the Act imposing the retail tobacconist's licence fee (leaving aside the minor flat fee) were discriminatory against interstate trade in a protectionist sense. Their effect was to discriminate against tobacco products sold by wholesalers in the markets of another State and to protect both Victorian wholesalers and the products they sold from the competition of out of State wholesalers and their products (at 426). That was so because tobacco purchased from Victorian wholesalers was not subject to retail-level taxation, whereas tobacco purchased from wholesalers elsewhere was.

45. Critically, however, the majority made it clear that if the fee had been applied to tobacco retailers without differentiating between tobacco bought within and outside Victoria then the measure would have been valid. Their Honours stated at 424:

> If the tax had been imposed directly on all retail sales of tobacco products in Victoria, it would not have infringed the injunction of s.92 of the Constitution. It would have been a tax which applied without differentiation or discrimination to interstate and intrastate products and transactions.

46. Their Honours then reiterated the point at 424-425:

> If the Act imposed the ad valorem licence fee by reference to the value of all tobacco products sold by a retailer in the relevant period, the 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.

47. These statements were not prefaced with the caveat of "so long as there was no prior fee payable only by locals", and it was implicit that any such caveat was rejected. Thus had the Victorian law taken the approach of simply applying at the retail level then cigarettes imported from Queensland would have been subject to equal taxation, and this would have been valid. It is for this very reason that three members of the Court dissented, for they could see no difference in substance between an equalising tax imposed at wholesale level and one imposed equally at retail level. For the majority the fact that there was facial discrimination was sufficient to establish a breach of s.92. It is not necessary to enter that dispute here (the case is discussed, informatively, in Zines, The High Court and the Constitution (5th ed, 2008), 183-6). It suffices to emphasise that the Court indicated that the imposition of a new equal taxation measure does not contravene s.92.

The present case

48. The fee conditions at issue in the present case were of the character that the majority in Bath v Alston considered would not have contravened s.92 of the Constitution. The Full Court noted that by contrast with the fee at issue in Bath – which was invalid because its "equalizing" effect operated to burden interstate wholesale purchases of tobacco products which, but for the impugned law, would have enjoyed a competitive advantage over its Victorian counterparts – here, all wagering operators granted a race field information use approval, whatever their state of origin, were subject to the same fee (at [101]). As it later observed (at [112]):

> TAB was, in truth, liable to pay the fee and did pay it. The same is true of NSW on-course bookmakers whose businesses were so large as to take them above the fee-free threshold.

49. In order to impugn the fee condition, Sportsbet has to rely on adjustments that were made to the economic burdens that were borne by the intrastate operators alone prior to the implementation of the race fields regime.

50. The first of these adjustments, involving the TAB, was the product of a settlement of a contractual dispute. Although Sportsbet contends that it was "far from clear" that the enactment of the new regime triggered a right to compensation under the RDA (at [52]), the evidence before the primary judge showed that the TAB was given a right under the RDA to use NSW racing information, in return for payment of product and other fees under the RDA (see cl 8.2 of the RDA). Requiring the TAB to continue paying the full product fees under the RDA for usage now separately dealt with – and required to be paid for – under the information use approvals gave rise to a dispute under the RDA, which was ultimately resolved by agreement. As the Full Court stated (at [90]):

> TAB was subject to a real liability to pay the 1.5% fee imposed on it as a condition of its approval. It paid that fee. Had it not done so, it would have been in breach of this condition of its approval and it would have been at risk of the loss of its approval and prosecution for an offence. It was because it was, in truth,

obliged to pay and did pay the licence fee to RNSW that RNSW was in breach of the RDA. Prima facie, the measure of damages payable by RNSW by way of compensation for that breach was the amount of the fee, because that was the amount TAB was now obliged to pay in order to use the race field information to which it was already entitled under the RDA. Under the RDA, RNSW had bound itself to ensure that TAB had that benefit without any further payment.

51. It cannot be said the that the settlement resulted in the TAB being insulated from paying a fee for the use of race field information; the burden it was relieved of, as a result of the settlement, was paying for the same information twice. There is no doubt, and the Full Court correctly held (at [112]), that, as a matter of form and of substance, the TAB was in fact paying the race fields fee. That may have involved no new net economic burden in light of the settlement of the TAB's claim under the RDA, but that is a different point, which leads one back to consideration of "equalisation" measures and the decision in Bath v Alston. Further, the TAB continued to pay very substantial sums under the RDA; it was, incidentally, those additional substantial sums payable by the TAB to which the Full Court was referring at [94] (cf Sportsbet's Submissions at [53]). Thus, despite the new scheme, the TAB continues to be subjected to very substantial competitive disadvantages not imposed on interstate traders.

52. The second adjustment was the product of a decision on the part of third parties, namely the metropolitan clubs, to reduce the stand fees paid by NSW on-course bookmakers from 1% to 0.33% in respect of turnover up to $5 million, and to abolish those fees to the extent that a bookmaker's turnover exceeded that amount. There was no evidence as to what if any reduction the provincial or country clubs gave as a result of the race field regime (see primary judge at [77]).

53. As one group of beneficiaries of the new income flowing from the race field regime, the decisions of the metropolitan race clubs to reduce the fees they previously levied upon on-course bookmakers was both entirely unsurprising and entirely appropriate. By reason of the introduction of the new scheme, the clubs did not need to levy fees of the magnitude previously levied on the on-course bookmakers, who were also, and at the same time, subject to the new regime. It was clear from the second reading speech that the fees collected from intrastate and interstate wagering operators were intended to flow to the industry through the Authorities, those bodies being well placed to know where the funds would best be spent. It was always inherent in the scheme that significant portions of this money would go to the race clubs, which organise and hold the race meetings, and provide prizes for the winners of races.

54. Even if the clubs' decisions had been taken pursuant to discussions or an arrangement with the Authorities, this again would be neither surprising nor improper. The regulatory scheme – which involved both the Authorities and the racing clubs – had been altered in fundamental ways. It would have been entirely appropriate for discussions to have been

held between about the way in which the new system was to operate, including how much money the race clubs were to receive under the new scheme, what the needs of the race clubs were, how much money they had been receiving under the old system, and whether they planned to continue imposing levies on bookmakers to raise such funds.

55. Still less can the decisions of the metropolitan clubs to reduce the fees levied upon on-course bookmakers be characterized as a means by which intrastate wagering operators were to be relieved of the burden of the new fee. To the extent that on-course bookmakers fielding at racing events hosted by the metropolitan race clubs had a turnover of less than $5 million, they continued to pay the clubs a fee in the order of 0.33% of their turnover (a detrimental burden not imposed on interstate bookmakers). For on-course bookmakers with a turnover of more than $5 million, they paid the 0.33% up to that figure, and beyond that they paid the race field fee, from which the clubs would derive a share. Accordingly, whatever their level of turnover, the New South Wales on-course bookmakers continued to make a contribution to the industry beyond that made by the interstate wagering operators.

56. Sportsbet also relies on the operation of the thresholds to which the Boards of RNSW and HRNSW decided the application of the fee conditions would be subject. Viewed independently of the other arrangements that the primary judge found to exist, neither of the fee conditions set by RNSW or HRNSW imposed, on its face, a discriminatory burden on interstate wagering operators. The RNSW condition operates as follows:

    (i) Without exception, the fee is calculated as a percentage of a wagering operator's turnover.

    (ii) All wagering operators have the benefit of the fee exemption, comprising the first $5 million of turnover.

    (iii) Local wagering operators with a turnover of less than $5 million are not liable to pay the fee, but neither are interstate wagering operators whose turnover does not rise above the level of the threshold.

    (iv) To the extent that wagering operators licensed in NSW have a turnover in excess of $5 million, they pay the fee, as do the interstate wagering operators. The Authorities tendered evidence in support of their contention that approximately the same percentage of intrastate and interstate wagering revenue was subject to a race fields fee (see Attachment B to the Authorities' submissions in the Full Court).

57. The fee condition set by HRNSW operates similarly to that imposed by RNSW, albeit with a difference as to how the fee is calculated once the threshold is reached:

    (i) In relation to the condition imposed by HRNSW, only wagering operators with a turnover over $2.5 million are liable to pay the fee.

(ii) Intrastate wagering operators with a turnover of less than $2.5 million are not liable to pay the fee, but neither are interstate wagering operators whose turnover does not rise above the level of the exemptions.

(iii) To the extent that wagering operators licensed in NSW had a turnover in excess of $2.5 million on NSW harness racing, they paid the fee on the entire amount of turnover, as did the interstate wagering operators.

58. There is no constitutional inhibition on setting a threshold below which a person is exempt from paying a fee, provided it does not rely on or otherwise draw a distinction between interstate and intrastate traders. Indeed, the regulatory imposition of such thresholds is relatively commonplace, of which income tax and customs duties are but examples. The exemption set by RNSW gave all wagering operators the benefit of the first $5 million of turnover on NSW races, and only applied to an operator's turnover in excess of that amount.

59. The imposition of a threshold operated to the benefit of smaller wagering operators, be they licensed in NSW or interstate. As the CEO of RNSW stated in his report for the board meeting of 19 May 2008, which was extracted by the primary judge (at [70]), the envisaged net impact of the exemption was "that most inter-state on-course bookmakers will pay no fees as the turnover of most of those bookmakers on NSW thoroughbred racing will not exceed the $5m threshold" (emphasis added).

60. In relation to the fee set by HRNSW, the fact that there were no interstate operators with a turnover of less than $2.5 million on New South Wales harness racing did not of itself have the result that the practical effect of the fee was to impose a discriminatory burden on interstate wagering operators competing in the harness racing market which was protectionist in character. The reality of the market for wagering in harness racing was that, outside of NSW, the turnover of its participants was more closely aligned with that of the TAB, being by far the largest local operator; and the TAB paid the fee.

West Lynn Creamery Inc v Healy

61. The thresholds and the adjustments made to the pre-existing burdens born by local wagering operators are not of the same nature as those on the basis of which State legislative action has been held by the United States Supreme Court to contravene the negative Commerce Clause. In the case of West Lynn Creamery Inc v Healy, on which Sportsbet relies (at [59]-[65]), the legislative scheme at issue involved two elements. The first was an order requiring every dealer in Massachusetts to make a monthly "premium payment" into the "Massachusetts Dairy Equalisation Fund". The second was the distribution of the Fund to Massachusetts producers, in proportion to each producer's contribution to the State's total production of raw milk. In rejecting the State's argument that the legislation must be valid because it comprised two elements which were independently valid, Stevens J observed (at 194-5):

Its avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States. The 'premium payments' are effectively a tax which makes milk produced out of State more expensive. Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers. Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products. The pricing order thus allows Massachusetts dairy farmers who produce at higher cost to sell at or below the price charged by lower cost out-of-state producers.

62. The case is quite different from the present situation, and does not offer Sportsbet the comfort it seeks. As noted above, the Full Court here did not simply ignore the practical effects of the adjustment measures which followed the enactment of the race fields scheme – it just found that, taken together, there was no breach of s.49. Moreover, the challenge in West Lynn was quite different to that made here. There is a superficial similarity, in that a levy was imposed on downstream market participants (milk dealers), to be rebated to local upstream producers (milk producers), just as here downstream wagering operators betting on NSW races are levied for the benefit of the upstream NSW racing industry. However:

(i) The entirely evident protectionist effect in West Lynn was in the upstream market – it protected local milk producers from interstate milk producers. Here, Sportsbet's claim is that downstream market participants – the TAB and local bookmakers – are being protected. No case has ever been made that the NSW racing industry is somehow being protected from other racing (or perhaps entertainment) producers.

(ii) The measures there were discriminatory because they were imposed on all milk sales in the State, wherever the milk came from, but the rebates went only to local milk producers. Here, the levy is imposed on all wagering operators with respect to bets on NSW race fields, and the benefits flow through to the industry which produces the races which are bet upon.

Validity of the Act and Regulation

63. Even if (contrary to the submissions just put) the approvals were invalid, neither the Act nor the Regulation imposes a discriminatory burden on interstate trade that can be characterized as protectionist, either on its face or as a matter of practical effect. The prohibition in s.33 of the Act on using race field information without authorisation applies to "a wagering operator or prescribed person". The definition of "wagering operator" draws no distinction between interstate and intrastate traders, and thus the prohibition in s.33 applies to interstate and intrastate traders alike. Similarly, s.33A of the Act, which makes provision for a control body to grant race field information use approvals, does not differentiate between interstate and intrastate applicants. The section enables the control

bodies to impose conditions on approvals, including in relation to the payment of a fee or a series of fees (s.33A(2)), but it does not stipulate what those conditions are to be in respect of any approval.

64. The neutrality of the Act is mirrored, and reinforced, in the Regulation. There is an express reference to s.92 in the note to cl.16. Further, cl.20 provides that control bodies, in deciding whether to grant an approval, are prohibited from considering:

(i) where an applicant resides or carries on business, or the location of an applicant corporation's head office (cl.20(b)); and

(ii) whether the operator is licensed under the legislation of NSW as opposed to the legislation of another State or Territory (cl.20(d)).

65. Clause 16 of the Regulation does not require that the fee be set as a particular percentage, or by reference to turnover, nor does it require that the same percentage, whether of turnover or otherwise, be fixed for each wagering operator. The clause imposes a cap on the maximum fee that can be charged, but otherwise it leaves the amount of the fee, and the manner of its calculation, to the discretion of the relevant control body.

66. As was the case in the courts below, Sportsbet's argument that ss.33 and 33A of the Act and cll.16 and 17 of the Regulation infringe s.92 of the Constitution requires the conflation of those provisions with the actions of the Authorities pursuant thereto (Sportsbet Submissions at [86], see also at [26]; [29]). In construing the provisions of a particular Act it may be appropriate to read it together with any subordinate legislation, where the Act and the regulations operate as a legislative regime: see, for example, Deputy Commissioner of Taxation v Ellis & Clark (1934) 52 CLR 85 at 89 per Starke J. It is quite another matter, however, to contend that an Act should be construed by reference not to subordinate legislation, but to administrative decisions made pursuant to its provisions by independent statutory authorities. An approach to statutory construction of that breadth is not supported by any authority of this Court.

67. There is no difficulty, so far as s.92 of the Constitution is concerned, with a legislature imposing a licensing requirement in respect of a particular activity, for which all persons wishing to carry out that activity are required to pay a fee. In Bath v Alston, for example, the majority did not take issue with the requirement that retailers of tobacco in Victoria be licensed, or with the flat fee that was levied in respect of such a licence (at 424, 426); it was the ad valorem component of the licence fee, calculated by reference to interstate trade, that was considered to contravene s.92. The decision in Cross v Barnes Towing and Salvage (Qld) Pty Ltd (2005) 65 NSWLR 331 also concerned a State licensing scheme, the validity of which was upheld.

68. Nor is there any difficulty per se with combining a prohibition with discretion to relieve a person from the effect of the prohibition. The conferral by the legislature of discretion on a decision-maker is commonplace. The mere fact that a decision-maker might exercise a

discretion so conferred in a way that imposes a discriminatory burden of a protectionist kind does not invalidate the legislation pursuant to which that decision was made.

69. Sportsbet suggests at [84] that where legislation confers a broad discretion on a matter that does not relate to any obvious regulatory function or purpose, the existence of a protectionist purpose should be sufficient to offend s.92. First, there was no such protectionist purpose or effect, for reasons explained above. Addressing the "free rider" problem is not a protectionist purpose.

70. Secondly, the discretion granted to the Authorities with respect to issuing approvals was for a regulatory purpose. As explained above, the main overall purpose of the scheme was to raise money from wagering operators betting on NSW races, equally, for the benefit of the NSW racing industry. However, the criteria for granting an approval include that the applicant is a "fit and proper person to hold the approval", whether to do so will undermine the integrity of the conduct of NSW racing, and whether the operator is licensed somewhere in Australia (cl.20 of the Regulation). Such criteria are commonplace in relation to approvals or licences in the betting and racing industries. They manifest a further regulatory purpose, to which the Full Court referred at [138]-[139].

71. Thirdly, as the Full Court correctly noted (at [140]-[141]), the discretion was not unfettered and is capable of judicial review (being an exercise of statutory power). Fourthly, whilst Sportsbet complains at [47] that the Authorities have a conflict of interest, the Authorities are not participants in the wagering market and are not competitors of Sportsbet (cf Betfair v WA at [140] and [146]).

72. Power is conferred on the Authorities to grant a race field information use approval, and to determine conditions for an approval, but neither the Act nor Regulation contemplates such approvals being granted in a manner contrary to s.92 of the Constitution, nor do they authorise such approvals. The application of the provisions of the Interpretation Act 1987 (NSW) are relevant in this context, with s.31 requiring legislation to be read down so as to fall within the limits of State legislative power, and s.32 requiring instruments to be read within the limits of the legislation from which the power to make the instruments derives. Sections 33 and 33A of the Act thus cannot be taken to authorise action in contravention of s.92 (or, in practical terms, its territorial counterpart). This type of reading down was illustrated in this Court's decision in AMS v AIF (1999) 199 CLR 160 at [37]-[38] and [158]. This view was adopted by the trial judge (at [156]), and implicitly accepted by the Full Court (at [133]-[144]).

73. The difficulty that arose in Betfair v WA in this context was the existence of a general prohibition, in s.27D(1) of the Betting Control Act 1954 (WA), on a person anywhere making available a Western Australian race field in the course of business unless authorised to do so by an approval granted by the relevant Minister. In considering

whether to grant an approval, the Minister was bound to have regard to the objects of the Act. The joint judgment held that in circumstances where one of the Act's objects was to prohibit betting through, and the establishment and operation of, betting exchanges in Western Australia, the prospect of Betfair obtaining approval "must be illusory" (at [119]). An application made by Betfair had, in fact, already been refused. No similar practical difficulty accompanies the exercise of the discretion under the Act and Regulation in this case, and indeed the evidence was that all applications for race field information use approvals have been granted. Here, Sportsbet's application was granted, on uniform conditions. Its complaint is that it does not like those conditions.

74. Sportsbet suggests at [83]-[85] that whilst purpose is relevant to "regulation of trade" in pursuit of some competing legitimate interest (which is plainly correct), it is also relevant to the prior question of whether a measure imposes a discriminatory burden of a protectionist kind, at least when administrative decisions are impugned. It cites in support passages in judgments in APLA Ltd v Legal Services Commissioner (2005) 224 CLR 322 at [38], [173]-[179] and [416]-[427], but the references in those passages to purpose mainly relate to the acceptable-justification level of analysis. Construction and characterisation of the measure in question is an essentially objective exercise: APLA at [178] and [423]. It is true that phrases such as "real object" have been employed (eg Cole at 408), but these are appropriate when considering whether a measure which has some protectionist effect might nevertheless be upheld because these effects are merely incidental to achievement of some non-protectionist purpose.

75. It is difficult to see why s.49 or s.92 would require invalidation of a measure because of some expressed protectionist purpose or motive where the measure in fact achieves no discriminatory protectionism either in legal operation or in practical effect. Of course, an expressed protectionist purpose or motive might be taken as one practical indicator of the effect of a measure, but that is a different point (as noted by the primary judge at [153], and in Betfair v RNSW [2010] FCA 603 at [212]).

Conclusion

76. For the reasons outlined above, the appeal should be dismissed with costs. Alternatively, if the Court were to reject the challenge to the validity of the legislative provisions but were to otherwise uphold the appeal, there should be no order as to costs between Sportsbet and the State.

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