HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

BETFAIR PTY LIMITED APPELLANT

AND

RACING NEW SOUTH WALES & ORS RESPONDENTS

Betfair Pty Limited v Racing New South Wales [2012] HCA 12
30 March 2012
S116/2011

ORDER

1. *Appeal dismissed.*

2. *The appellant pay the costs of the first and second respondents.*

On appeal from the Federal Court of Australia

Representation

N J Young QC with C L Lenehan and K C Morgan for the appellant (instructed by Gilbert + Tobin Lawyers)

J T Gleeson SC with N J Owens, J S Emmett and G E S Ng for the first and second respondents (instructed by Yeldham Price O'Brien Lusk)

M G Sexton SC, Solicitor-General for the State of New South Wales and J K Kirk with A M Mitchelmore for the third respondent (instructed by Crown Solicitor (NSW))

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with L K Byers intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with S P Donaghue and P D Herzfeld intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R M Mitchell SC, Acting Solicitor-General for the State of Western Australia with E M Heenan intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

CATCHWORDS

Betfair Pty Limited v Racing New South Wales

Constitutional law (Cth) – Operation and effect of Constitution – Freedom of interstate trade, commerce, and intercourse – Validity of fees imposed for use of NSW race field information – Practical effect of fee structure – Prejudice upon trade and not upon particular traders – Competitive disadvantage – Whether *Racing Administration Act* 1998 (NSW), s 33A(2) must be read as not authorising provisions in Racing Administration Regulation 2005 (NSW) obnoxious to s 92 of Constitution – Whether demonstrating greater financial impact on appellant relative to competitors sufficient to establish protection of intrastate trade from interstate competition.

Words and phrases – "competitive disadvantage", "discrimination", "protectionism".

Constitution, s 92.
Interpretation Act 1987 (NSW), s 31.
Racing Administration Act 1998 (NSW), ss 33, 33A.
Racing Administration Regulation 2005 (NSW), cll 16, 20.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND BELL JJ. This appeal from the Full Court of the Federal Court of Australia (Keane CJ, Lander and Buchanan JJ)[1] was heard in this Court concurrently with that in *Sportsbet Pty Ltd v New South Wales*[2] and the reasons in *Sportsbet* should be read with those in this appeal. The Full Court dismissed an appeal against the decision of a Judge of the Federal Court (Perram J)[3].

2 There is a developed market for the provision throughout Australia of wagering services in respect of horse racing and other sporting events. Those events may take place in one State, the customer may be located in another State and the provider of the wagering services may do so from a third State. This geographic separation is reduced not only by telephony but also by the omnipresence of the internet and the ease of its use. In the earlier litigation which is reported as *Betfair Pty Ltd v Western Australia*, it was observed in the joint reasons[4]:

> "All Australian States provide for the licensing of corporate bookmakers, for licensed bookmakers to bet by telephone or over the internet with persons not on a racecourse, and for licensed bookmakers to bet on sporting events. All States also allow [totalizator] betting to be accepted by telephone or over the internet and to be placed on sporting events."

3 The appellant ("Betfair") is incorporated in Australia and has its head office in Victoria. Betfair provides wagering services in respect of events including horse races by operation of a betting exchange call centre at its premises near Hobart. It provides these services to customers dealing with it from anywhere in Australia, including New South Wales. Betfair is the only betting exchange operator located in Australia[5].

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1 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356.

2 [2012] HCA 13.

3 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723.

4 (2008) 234 CLR 418 at 465 [53]; [2008] HCA 11.

5 (2010) 268 ALR 723 at 739 [59].

4 The first respondent ("RNSW") and the second respondent ("HRNSW") are authorities established by New South Wales statute[6]. They are independent of the executive government of New South Wales and are respectively responsible for the regulation of thoroughbred and harness racing in that State. Each is a "relevant racing control body" for the purposes of Pt 4 of the *Racing Administration Act* 1998 (NSW) ("the Act"). Part 2, Div 1 (ss 5-11) of the Act deals with the licensing of racecourses and Pt 4 (ss 27-33F) with the use of betting information and advertising.

5 The lawful use of New South Wales race field information is necessary for the conduct throughout Australia by Betfair and other wagering operators of their businesses with respect to racing events held in that State. This litigation concerns the system established previously by Pt 4 of the Act which came fully into effect in 2008[7]. This provides that RNSW and HRNSW, each as a relevant racing control body, may impose and receive a fee as a condition for the use by wagering operators of that field information. It will be necessary to say something more respecting that licensing system later in these reasons.

6 This litigation is a sequel only in a general sense to that in this Court in *Betfair*[8]. The Act, unlike the legislation of Western Australia which was in contention in the earlier case, does not erect against a betting exchange operator a barrier to entry by making it an offence for a person in New South Wales to make by telephone or electronic means a bet with a betting exchange outside that State, or by forbidding such a betting exchange to deal by those means with customers in New South Wales[9]; nor does the Act forbid, subject only to an illusory approval system, the publication by an out of State wagering operator of State field information[10]. Betfair does not make a case that it wishes to set up and operate a betting exchange sited in New South Wales and that s 92 of the

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6 *Thoroughbred Racing Act* 1996 (NSW) (RNSW); *Harness Racing Act* 2002 (NSW) and *Harness Racing Act* 2009 (NSW) (HRNSW).

7 The introduction and commencement of the system was traced by Perram J: (2010) 268 ALR 723 at 749 [90]-[92].

8 (2008) 234 CLR 418.

9 cf *Unlawful Gambling Act* 1998 (NSW), s 8.

10 The relevant Western Australian legislation as it stood at the time of *Betfair* was *Betting Control Act* 1954 (WA), s 24(1aa) and s 27D(1).

Constitution renders invalid any law of that State which would stand in the path of it doing so[11]. Rather, the dispute concerns the validity of the fees imposed by and payable to RNSW and HRNSW for use of New South Wales race field information. It is in this respect that Betfair places reliance upon s 92.

7 The New South Wales Attorney-General is the third respondent, and the Commonwealth, Victoria, South Australia, Queensland and Western Australia intervened on the appeal.

The New South Wales licensing scheme

8 For the purposes of Pt 4 of the Act, a "wagering operator" is defined in s 27 to mean each of "a bookmaker, a person who operates a totalizator or a person who operates a betting exchange". A "wagering operator" who answers that definition will use "NSW race field information" by publishing it in Australia or elsewhere by means including an on-line communications system such as the internet or subscription TV. This is provided by s 32A of the Act and its territorial reach to publication beyond New South Wales is significant. It is the definition in s 27 of "NSW race field information" which supplies the connecting factor with that State; the information includes that which is capable of identifying the name or number of a horse taking part in an intended race at a race meeting on a racecourse in New South Wales which is licensed under Pt 2 of the Act, or of identifying a horse which has been scratched or withdrawn from such an intended race.

9 These provisions of the Act thus are directed to engagement by wagering operators in a particular species of transaction, one which involves the publishing in Australia (or elsewhere) of specified information which is sourced in New South Wales in the manner just described. It is in this way that the New South Wales legislation responds to the circumstance that there is a developed market throughout Australia for the provision of wagering services.

10 Section 33 of the Act makes it an offence for a wagering operator to use NSW race field information unless it is authorised to do so by an approval under s 33A and the operator complies with any conditions to which the approval is subject. Section 33A states:

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11 cf (2010) 268 ALR 723 at 747 [84].

"(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. [emphasis in original]

(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). [emphasis added]

(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. [emphasis added]

(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)."

11 The New South Wales scheme thus turns on the prohibition imposed by s 33A and s 33 of the Act upon the use of the NSW race field information, howsoever made in a geographic sense, and the operation of the licensing system by relevant racing control bodies which is established under sub-s (2) of s 33A.

12 Clause 16(2) of the Racing Administration Regulation 2005 ("the Regulations"), made under the Act, deals with the imposition of fees by relevant racing control bodies. It provides:

> "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." (emphasis added)

The term "wagering turnover" is defined in cl 14(1) to mean "the total amount of wagers made on the backers side of wagering transactions made in connection with that race or class of races".

13 Clause 20 of the Regulations also should be noted. It contains provisions manifesting some caution, lest the relevant racing control body take into account matters apt to attract scrutiny in the light of s 92. The clause so operated that RNSW and HRNSW were required not to take into account that Betfair had its head office in Victoria and its principal place of business in Tasmania; nor could they take into account that Betfair, while holding a licence to carry out its wagering operations in Tasmania, did not do so under the New South Wales legislation. This followed from pars (b)(ii) and (c) of that clause. Clause 20 reads:

> "In determining an approval application, the relevant racing control body:
>
> (a) must take into account whether:
>
> (i) the applicant is a fit and proper person to hold the approval, and
>
> (ii) granting the approval will undermine the integrity of the conduct in New South Wales of the racing relevant to the control body concerned, and

(b) *must not take into account the location in Australia* that the applicant:

(i) resides in or carries out his or her activities (in relation to an individual), or

(ii) *has its head office or principal place of business* (in relation to a corporation), and

(c) in relation to an applicant that is a wagering operator, *must take into account whether or not the applicant holds a licence* or authority (however described) *under State or Territory legislation to carry out its wagering operations* (whether in New South Wales or *elsewhere*), and

(d) in relation to an applicant that is a licensed wagering operator, must not take into account whether the applicant is licensed under the legislation of New South Wales as opposed to the legislation of another State or Territory." (emphasis added)

Section 92 of the Constitution

14 The statement in s 92 that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free" imposes a limitation, among other things, upon the legislative powers of the States. Betfair relies upon that operation of s 92 to seek relief from the obligation to pay to RNSW and HRNSW the fees, payment of which is imposed as a condition of their approval and in exercise of the power conferred upon them by par (a) of cl 16(2) of the Regulations. Betfair also seeks to recover fees which it has paid under this system, apparently as money had and received to its use[12].

15 RNSW has standard conditions for approvals for the use of NSW race field information. Clause 2.1 thereof includes under the heading "Fees" sub-cl (a) as follows:

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12 See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; [2001] HCA 68; *Sportsbet Pty Ltd v New South Wales* (2010) 186 FCR 226 at 268 [158]; *Recovery of Imposts Act* 1963 (NSW), s 4(1).

> "The Approval Holder must pay to [RNSW] a fee of an amount equal to 1.5% of the Approval Holder's Net Assessable Turnover in respect of the Approval Period."

HRNSW imposes similar conditions[13].

16 As noted above, s 33A(2) of the Act confers upon each of RNSW and HRNSW power to grant approval to use NSW race field information subject to a condition that the holder of the approval pay a fee of an amount and in a manner prescribed by the Regulations. The case for Betfair appears to be: first, that for s 33A(2) to be valid, and as required by s 31 of the *Interpretation Act* 1987 (NSW), the sub-section must be read as not authorising provisions in the Regulations which are obnoxious to the freedom required by s 92 of the Constitution; and, secondly, that the fees imposed upon Betfair were obnoxious in this sense and as a consequence were beyond the power conferred by the Regulations upon RNSW and HRNSW[14].

17 It is with respect to this second step that the case presented by Betfair involves something of a conundrum. This was emphasised in submissions by RNSW and HRNSW. It is cl 16(2) which specifies wagering turnover as the basis for assessment by the relevant racing control authority of the fee it imposes. Betfair (i) emphasises that "wagering turnover" should not be confused with "gross revenue"; and (ii) complains that a greater percentage of the price of and revenue from its wagering operations is taken by the fee than is taken from wagering operators with higher margins. The conclusion would appear to follow that in order to avoid the operation of s 92, the Regulations must provide for differential fee structures between wagering operators. Yet no challenge is made to the Regulations themselves, as distinct from the particular exercises of power thereunder by RNSW and HRNSW.

18 It will be unnecessary to resolve this puzzle, because in any event the reliance by Betfair upon s 92 will be shown to be misplaced.

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13 (2010) 189 FCR 356 at 364-365 [28]-[30].

14 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 611-612; [1986] HCA 60; *Wotton v Queensland* [2012] HCA 2.

Wagering operators

19 Something more now should be said respecting the three species of the genus "wagering operators". The New South Wales legislation provides for a licensing system with respect to bookmakers and totalizators, but not with respect to betting exchanges. In 2006 Betfair established at its Tasmanian premises a telephone call centre and a computer server system connected to the internet. These activities in Tasmania are conducted under a licence granted under the *Gaming Control Act* 1993 (Tas); this fixes 5% as the maximum commission on net winnings. As indicated above, like other wagering operators, Betfair seeks to attract customers from all areas in Australia.

20 A "betting exchange" is so defined in s 27 for the purposes of Pt 4 of the Act (dealing with betting information) as to exclude facilities (including electronic facilities) for the placing of wagers with a bookmaker or a totalizator; otherwise, a "betting exchange" includes a facility, electronic or otherwise, for the placement or acceptance of wagers which, on acceptance by the operator of the facility, are matched with opposing wagers placed with and accepted by that operator.

21 The term "bookmaker" is defined in s 4(1) of the Act to include "any person who ... gains, or endeavours to gain, a livelihood wholly or partly by betting or making wagers". Part 3A (ss 26A-26I) of the Act[15] establishes a system for the authorisation required to carry on business as a bookmaker. Section 16 of the Act[16] provides for the acceptance and making of bets by a licensed bookmaker using telephonic or electronic means, while the bookmaker is at a licensed racecourse and at a time when it is lawful for betting to take place there.

22 The company known as TAB Limited ("TAB") was established by the *Totalizator Agency Board Privatisation Act* 1997 (NSW) ("the Privatisation Act"). Its ultimate holding company, TABCORP Holdings Limited

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15 During the currency of this litigation, and with effect from 31 December 2010, Pt 3A of the Act was amended by *Wagering Legislation Amendment Act* 2010 (NSW) ("the 2010 Act"). Item [14] of Sched 1 repeals ss 26A-26F and items [15] and [16] amend s 26I.

16 Section 16 of the Act has been amended by items [3], [4] and [5] of Sched 1 to the 2010 Act.

("Holdings"), is located in Melbourne. TAB has its servers and call centre location in Sydney. By virtue of s 14 of the *Totalizator Act* 1997 (NSW) ("the TAB Act"), TAB holds an exclusive licence to conduct an off-course totalizator in New South Wales in respect of betting on events or contingencies scheduled to be held at a race meeting at any racecourse within or outside Australia. A person, other than a licensee, who conducts a totalizator in New South Wales is guilty of the offence created by s 9 of the TAB Act. For the purposes of the TAB Act, "totalizator" means a system, and any device through which the system is operated, used for investment of moneys on predictions of specified outcomes on events or contingencies, with the money left after deductions of commission to be divided among those investors whose prediction was successful (s 6).

23 By force of an agreement made in 1997 between parties including TAB, Holdings, RNSW and HRNSW, and known as the Racing Distribution Agreement ("the RDA"), TAB is obliged to pay between 4.5% and 5% of its wagering revenue to RNSW and HRNSW as a contribution to the costs associated with the racing industry. Bookmakers also are required to contribute but Betfair is not so required[17].

24 In the *Sportsbet* appeal, but not in this appeal, there is an issue taken as to the significance of any entitlement of TAB against RNSW and HRNSW for damages for breach by them of the RDA, and of the payment made to TAB in settlement of their dispute under the Deed of Release dated 25 November 2009.

Betfair's case

25 It will be apparent that between those on the demand side and the supply side of wagering services with respect to horse racing there is cross-elasticity of demand and thus close substitutability between the various methods of wagering[18].

26 That is so, notwithstanding the presence of differences between the conduct of the businesses of a bookmaker, a totalizator and a betting exchange, so that, for example, profit margins may be assessed in varying ways. It is upon the differing business models with respect to profit margins that Betfair lays a foundation of its case.

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17 (2010) 189 FCR 356 at 362 [19].

18 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 480 [115].

27 That such differences in business models are to be expected is apparent from the following passage from the joint reasons in this Court in *Betfair*[19]:

> "One form of betting lawfully conducted in Australia has been pari-mutuel or totalisator or 'TAB' betting. This is commonly called 'starting price' betting. It involves the determination of dividends in respect of a particular event by reference to the size of the betting pool (less the commission charges of the operator) and the number of successful bets[20]; one consequence of this system ... is the absence of risk to the totalisator relating to the outcome of the event.
>
> Another form of betting is 'fixed odds' betting which is conducted by licensed bookmakers ...
>
> The evidence shows that, at the present day, when provided by bookmakers, 'fixed odds' involves the punter always placing a 'back' bet that an outcome (a win or place) will occur, whilst the bookmaker is always 'laying' the bet by betting that the outcome will not occur; however, the bookmaker may seek to balance the 'book' (and reduce risk) by 'betting back', that is to say, by placing bets with another bookmaker in favour of the result which has been wagered not to occur."

28 In *Betfair*[21], it further was observed in the joint reasons:

> "An essential difference between fixed odds betting conducted by Betfair and that conducted by bookmakers is that Betfair does not 'hold a book' and does not carry any risk on the outcome of the event. Another is that whilst punters cannot back an entrant to 'lose' when placing bets with a bookmaker (or on a [totalizator system]), they can do so with Befair.
>
> Betfair uploads on to its computer server information about each racing and sporting event in Australia on which wagers may be placed; the information includes, with respect to racing, the race field. Betfair

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19 (2008) 234 CLR 418 at 465 [50]-[52].

20 See the discussion by Hale J in *Totalisator Agency Board v Wagner* [1963] WAR 180 at 190-191.

21 (2008) 234 CLR 418 at 466 [57]-[58].

> charges a commission of generally between 2 and 5 per cent of net winnings, which is provided by registered players. Betfair requires registered players to deposit sufficient funds to cover the bets they wish to make. Betfair uses its computer program to match opposing bets by other registered players which have not been previously matched. Payments are made from a 'Hobart account' of Betfair to the nominated bank account in Australia of the registered player concerned."

29 The standard fee for use of NSW race field information is imposed by RNSW and HRNSW by reference to the total amount of wagers made on the backers side and has several distinct characteristics. First, on its face, the fee is neutral as between the various wagering operators, the bookmakers, totalizators such as TAB and Betfair. Secondly, the fee is imposed without distinction between the activities of wagering operators and customers located in New South Wales or elsewhere. Thirdly, no distinction is drawn between use of NSW race field information in wagering activities which form part of trade between the States and those which do not do so. It will be necessary later in these reasons to refer further to this facial neutrality of the standard fee.

30 In the course of the litigation Betfair abandoned its contentions that the burden of the fee is such that it cannot continue profitably to offer wagering services on New South Wales thoroughbred racing and harness racing and that it is likely to exit from that market. Indeed, in cross-examination, the Chief Executive Officer of Betfair, Mr A J Twaits, agreed that Betfair had not reduced the number or type of horse races in New South Wales upon which it seeks wagers, nor had the licence fee affected the odds offered; changes by Betfair in its business strategy had not been driven or impacted by the introduction of the fee. Perram J made the following findings[22]:

> "The respondents alleged that as at September 2008 and at the time of the trial Betfair would continue to take steps to expand its betting exchange system in relation to many different kinds of events. Mr Twaits accepted this in cross-examination and I find it to be the fact.
>
> The respondents alleged that it was likely that Betfair would conduct its business with a view to building a customer base and increasing goodwill across the whole of that integrated business and, again, Mr Twaits agreed that this was so and I so find.

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22 (2010) 268 ALR 723 at 793 [318]-[320].

The respondents alleged that Betfair would consider which decisions to make in response to the race fields fee and, again, Mr Twaits agreed that this was so only if, however, Betfair was unsuccessful in these proceedings. I so find."

31 As it is likely that there will be continued participation by Betfair in interstate wagering transactions using NSW race field information, it is for Betfair to point to a relevant differential treatment which it can show is likely to discriminate in a protectionist sense between interstate and intrastate wagering transactions which utilise NSW race field information.

32 The Full Court identified the basis of Betfair's complaint as follows[23]:

"*Betfair argues that a fee [of 1.5%] calculated as a percentage of the amount wagered necessarily has a greater impact on it in comparison with operators with higher margins*. That is because a greater percentage of the low margin operator's price and revenue from the wagering operation is taken by the 1.5% fee. Thus, so it is said, the uniform imposition of a fee of 1.5% of the amount wagered discourages low margin operators and price competition to the benefit of high margin operators.

HRNSW imposes similar conditions on its approvals. The effect of these provisions is to require all those who used New South Wales race field information, including bookmakers, the TAB, and Betfair, to pay 1.5% of the total value of all back bets associated with New South Wales race events. This fee is subject to a fee-free threshold of $5 million for RNSW approvals and $2.5 million for HRNSW approvals." (emphasis added)

33 Their Honours in the Full Court said of this emphasis upon Betfair as a low cost operator[24]:

"Because the price of a wagering operator's services is relative, it is more accurate to speak of Betfair as a *lower* cost operator than its competitors. In order to demonstrate that the fee is likely to diminish the competitive advantage enjoyed by Betfair, it would be necessary to demonstrate that

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23 (2010) 189 FCR 356 at 364-365 [29]-[30].

24 (2010) 189 FCR 356 at 386 [96].

> the fee which is imposed at a uniform rate on all wagering operators taking bets on horse races in New South Wales is likely to operate in fact to disturb Betfair's low margin operation relative to the other wagering operators. This Betfair did not do." (emphasis in original)

Discrimination and s 92

34 If, despite the submissions by RNSW and HRNSW, it was accepted that the licence fee had a greater impact upon the business Betfair conducted than upon those of its non-betting exchange competitors, this might tend to support a proposition that the fee is discriminatory. It would be so in the sense of treating alike the impact to be expected upon all species of wagering operators, whereas the nature of the business of a betting exchange operator differs, in particular, from that of totalizator operators[25]. This proposition seemed to be the gravamen of Betfair's case. But it should be emphasised immediately that it would not necessarily follow from acceptance of the proposition that there was any engagement of s 92 of the Constitution.

35 No doubt the term "discrimination", in its legal sense of "discrimination against"[26], may be applied where there is a relevant difference between the entities or activities which are the object of a law, yet the law applies as if there is no such difference. But in order for Betfair to make good its case for the engagement of s 92, RNSW and HRNSW correctly submit, with the support of various interveners, that Betfair must do more.

36 Not every measure which has an adverse effect between competitors will attract the operation of s 92. The "confined area" in which s 92 operates was emphasised in *Cole v Whitfield*[27]. Betfair must establish that the fee conditions imposed upon it by RNSW and HRNSW were unauthorised because their practical effect is to discriminate against interstate trade and thereby protect

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25 With respect to reliance by Betfair upon any differential effect upon Betfair and bookmakers, as distinct from TAB. RNSW and HRNSW contend that in any event this falls outside the scope of the appeal. It is unnecessary to determine whether their contention is correct.

26 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-571; [1989] HCA 53.

27 (1988) 165 CLR 360 at 406-407; [1988] HCA 18.

intrastate trade of the same kind[28]. What is posited here is an essentially objective inquiry[29]. It is the concept of protectionism which supplies the criterion by which discriminatory laws may be classified as rendering less than absolutely free trade and commerce among the States. At various stages in its submissions, Betfair appeared, by emphasising notions of discrimination, to seek to diminish the requirement of protectionism.

37 It is important to note, as emphasised in *Cole v Whitfield*, that whether a facially neutral law in question is discriminatory in effect, and whether the discrimination is of a protectionist character, "are questions raising issues of fact and degree"[30].

United States decisions

38 In their joint reasons in *Castlemaine Tooheys Ltd v South Australia*[31], Mason CJ, Brennan, Deane, Dawson and Toohey JJ said that it was evident that the approach taken in decisions of the United States Supreme Court upon the Dormant Commerce Clause differed from that in *Cole v Whitfield*[32], and gave examples. These contrasted the determinative importance in Australia of the characterisation of the law in question as protectionist in nature.

39 Nevertheless, Betfair referred to *American Trucking Associations Inc v Scheiner*[33] as denying that a State flat tax must be upheld even if it has a clearly discriminatory effect upon interstate commerce. However, the Supreme Court added that[34]:

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28 *Cole v Whitfield* (1988) 165 CLR 360 at 407, 409.

29 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178], 462 [424]; [2005] HCA 44.

30 (1988) 165 CLR 360 at 407-408.

31 (1990) 169 CLR 436 at 471; [1990] HCA 1.

32 (1988) 165 CLR 360.

33 483 US 266 at 296 (1987).

34 483 US 266 at 296 (1987).

> "the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens".

40 In addition, as Queensland emphasised in its submissions, the Supreme Court decided *Scheiner* by reference to a criterion which has no counterpart in the doctrines associated with s 92. This was the "internal consistency" test, under which an unapportioned State flat tax must be of a kind which, if applied by every jurisdiction, would produce no impermissible interference with free trade[35]. Finally, it may be noted that the internal consistency test appears to have originated in 1983[36] and that recently the Supreme Court, tacitly if not explicitly, has disregarded this test[37].

41 Betfair also relied upon *West Lynn Creamery Inc v Healy*[38], but the significance of that authority is better assessed by reference to the issues in the *Sportsbet* appeal.

Individual rights?

42 There is a further difficulty in Betfair basing its case upon s 92. This is presented by its reliance upon the particular circumstances of its business activities, so as to characterise the fee as a protectionist measure which imposes a discriminatory burden on interstate trade. At times, and despite its disclaimers, in the argument presented by Betfair to this Court, it appeared to rely upon the "individual rights" theory of s 92 which was left behind in *Cole v Whitfield*[39].

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35 483 US 266 at 284 (1987).

36 *Container Corporation of America v Franchise Tax Board* 463 US 159 at 169 (1983). See, generally, Hellerstein, "Is 'Internal Consistency' Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation", (2007) 61 *Tax Law Review* 1 at 25-27.

37 *American Trucking Associations Inc v Michigan Public Service Commission* 545 US 429 at 436-437 (2005). The Opinion of the Court was delivered by Breyer J. In his concurring opinion Scalia J spoke of the "various tests from our wardrobe of ever-changing negative Commerce Clause fashions": 545 US 429 at 439 (2005).

38 512 US 186 (1994).

39 (1988) 165 CLR 360.

43 The relevant distinction here appears in the discussion by Professor Zines, writing in 1987, before *Cole v Whitfield*, in the 2nd edition of *The High Court and the Constitution*[40], of the treatment by the Privy Council in *The Commonwealth v Bank of New South Wales*[41] of the earlier triumph of Mr James in the Privy Council[42]. Professor Zines wrote:

> "On any view s 92 will invalidate some forms of legislation and thus give an individual the right to ignore it and in appropriate cases to seek judicial remedies if it is attempted to enforce the void legislation against him. *In that sense the individual is protected*, but the fact that James won his case does not mean that the Privy Council decided it on the basis that s 92 guaranteed a right to each individual to engage in interstate trade free from governmental control or even free from governmental control that does not constitute a 'regulation' of his trade. He might have won it (and it is thought he did) because the Commonwealth Act was aimed at restricting interstate trade in dried fruits." (emphasis added; footnote omitted)

44 It is in the limited sense indicated in this passage that one trader may be a surrogate or representative of a particular class of activity. Here Betfair conducts the only betting exchange based in Australia. In the joint reasons in *Castlemaine Tooheys*[43] their Honours observed that discrimination in the relevant sense against interstate trade is inconsistent with s 92, regardless of whether it is sustained by all, some or only one of the relevant traders. But that does not mandate an outcome driven by the particular business methods adopted by any particular trader.

45 In the present case, the Full Court pointed as follows to what it held was a fatal defect in Betfair's case[44]:

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40 At 101.

41 (1949) 79 CLR 497 at 635; [1950] AC 235.

42 *James v The Commonwealth* (1936) 55 CLR 1; [1936] AC 578.

43 (1990) 169 CLR 436 at 475.

44 (2010) 189 FCR 356 at 388 [104].

> "The relevant inquiry as to whether a law or other governmental measure operates in fact to impose a protectionist burden on interstate trade contrary to s 92 of the Constitution is not concerned to vindicate a right in individual traders to carry on their business as they wish. The inquiry is whether the individual trader, as a participant in interstate trade, is subject to a differential burden by reason of the operation of the law or measure in the common circumstances of the trade. The differential burden must be imposed by the law or executive measure in the common circumstances of the milieu in which the trade occurs: the inquiry is as to whether there is a denial by the law or measure of a competitive advantage in trade, not whether an individual trader's particular circumstances are such that its trade may be adversely affected by a law of general application to all traders".

46 In the course of argument in this Court, the emphasis by Betfair upon its particular circumstances attracted further submissions, particularly by Victoria, which should be accepted. First, emphasis upon the circumstances of particular traders, and upon features which may be accidental to those circumstances and to the interstate transactions in which the traders may engage, risks characterisation of the law in question not by its effect upon interstate trade, the constitutional issue, but by its effect upon particular traders.

47 Secondly, where a competitor, such as TAB in this case, engages in both intrastate and interstate commerce, the plaintiff does not clearly advance its case for invalidity of the law which applies both to it and to all the activities of the competitor by agglomerating those activities and asserting, as Betfair does of TAB, that the law gives TAB preferential treatment in a protectionist sense.

48 Thirdly, attempts to classify a trader, such as TAB, as an intrastate trader because its principal place of operation is located in one State and its business receives protection by the law of that State (here, New South Wales) are apt to yield inconclusive results. What, for example, is the significance of the position of TAB as the subsidiary of a Victorian listed public company?

49 The point may be illustrated by reference to what was decided in revenue cases such as *O Gilpin Ltd v Commissioner for Taxation (NSW)*[45]. The taxpayer in that case was incorporated in Victoria, where its central management and control was located. But it carried on business as a draper at retail shops in four

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45 (1940) 64 CLR 169; [1940] HCA 39.

States including Victoria and New South Wales. This Court held that where a business ordinarily consists of selling goods (and, it might have been added, of supplying services), the contracts with consumers are of the essence of the business[46]. The result was that, despite the location in Victoria of the central management and control, the taxpayer carried on trade in New South Wales where contracts were made and it derived income in that State. Thus the central management and control, in the sense used in these revenue cases, of a trader may be in one State but the operations of the business may be conducted from locations in several States, none or only one of which is the first State.

50 These considerations underline the proposition that the subject of s 92 is interstate trade, not traders, whose transactions may or may not consist wholly of interstate transactions or of intrastate transactions.

Conclusions respecting the application of s 92

51 The nature of the questions of fact and degree to be answered by Betfair with respect to the fee structure provided under the Regulations is indicated by the following passage in the final section of the reasons in *Cole v Whitfield*[47]:

> "The question which we must now determine is *whether reg 31(1)(d) of the Sea Fisheries Regulations* which reveals no discriminatory purpose on its face *is impermissibly discriminatory in effect.* In other words, whether the burden which the regulation imposes on interstate trade in crayfish goes beyond the prescription of a reasonable standard to be observed in all crayfish trading and, if so, *whether the substantial effect of that regulation is to impose a burden which so disadvantages interstate trade in crayfish as to raise a protective barrier around Tasmanian trade in crayfish*." (emphasis added)

52 The questions presented in the present appeal thus become: (i) whether the practical operation of the fee structure shows an objective intention to treat interstate and intrastate trade in wagering transactions alike, notwithstanding a relevant difference between them; and, if so, (ii) whether the fee structure burdens interstate trade to its competitive disadvantage; and, if so, (iii) whether

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46 See *Malayan Shipping Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 156 at 159; [1946] HCA 7.

47 (1988) 165 CLR 360 at 409.

that burden nonetheless is reasonably necessary for New South Wales to achieve a legitimate non-protectionist purpose. If an affirmative answer were given to (i) and (ii) then, unless (iii) be answered in the negative, the conclusion would be that the fee structure gives to intrastate wagering transactions which utilise NSW race field information such a competitive or market advantage over those interstate wagering transactions which also do so, as to raise a protective barrier around those intrastate transactions. For the reasons which follow the case presented by Betfair fails at step (i), and, in any event, at step (ii), so step (iii) is not presented for decision.

53 Betfair relied upon the decision in *Castlemaine Tooheys*[48], that the law of South Australia prescribing 15 cents as the refund amount in relation to non-refillable beer bottles, where four cents was payable for refillable bottles used by the competitors of the plaintiffs, the Bond brewing companies, was contrary to s 92 of the Constitution. It was said in the joint reasons[49] that this regime "subjected the Bond brewing companies' interstate trade to serious competitive disadvantages by reason of their selling beer in non-refillable bottles", and that[50]:

> "The practical effect of the [regime] was to prevent the Bond brewing companies obtaining a market share in packaged beer in South Australia in excess of 1 per cent whilst their competitors used refillable beer bottles. It is uneconomic for the Bond brewing companies to convert their existing interstate plants to use refillable bottles."

54 These conclusions, however, were facilitated by what was laid out in pars 77 and 79 of the Case Stated. This has no counterpart with respect to the case presented by Betfair. Paragraph 77 read[51]:

> "By reason of the unavailability to the Bond Brewing Companies in and subsequent to October 1986 of plant capable of use for refilling refillable bottles for the South Australian market combined with its extra transport costs of returning bottles to the breweries for refilling, the Bond Brewing

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48 (1990) 169 CLR 436.

49 (1990) 169 CLR 436 at 477.

50 (1990) 169 CLR 436 at 464.

51 (1990) 169 CLR 436 at 449.

> Companies would incur substantial extra costs in using refillable bottles for that market compared with its major competitors in that market. By reason of the increased prices that it would be necessary to charge for the products of the Bond Brewing Companies to recover these increased costs, the Bond Brewing Companies would be unable to obtain a market share in excess of about 1 per cent of the market in packaged beer in South Australia even if they used refillable bottles for their products."

Paragraph 79 read[52]:

> "The object and effect of the [regime] has been to make the sale of beer in non-refillable bottles commercially disadvantageous."

55 In the present case, the circumstance that the fee structure adopted by Betfair for its wagering operations differed from that adopted by other wagering operators did not constitute a relevant difference which, consistently with s 92, could not be disregarded by treating alike interstate and intrastate wagering transactions utilising NSW race field information. All that Betfair established was that by maintaining its current pricing structures, and given its low margin, the fees imposed by RNSW and HRNSW absorbed a higher proportion of its turnover on interstate transactions than that of the turnover of TAB, the principal intrastate wagering operator.

56 Nor did Betfair demonstrate that the likely practical effect of the imposition of the fees will be loss to it of market share or profit or an impediment to increasing that share or profit. As the Full Court emphasised[53], Betfair did not:

> "seek to show that, as a matter of fact, it is likely that this possible effect will be sufficiently significant in the demand side of the market – which is assumed to be made up of both sophisticated and unsophisticated punters – to affect adversely Betfair's niche in the supply side of the market – which includes operators on a higher margin than Betfair who must also choose whether or not to pass on the 1.5% fee to punters. We are unable to conclude that, notwithstanding the ex facie uniform application of the fee, it is apt to diminish Betfair's competitive advantages in a material way."

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52 (1990) 169 CLR 436 at 449.

53 (2010) 189 FCR 356 at 389 [107].

A further step?

57 We agree with Kiefel J that for the outcome of this appeal, it is unnecessary to enter upon any question whether s 92 applies, notwithstanding its words "among the States", to markets conducted without reference to State boundaries. That, as her Honour observes, is a large question, and is for another day.

Orders

58 The appeal should be dismissed. The appellant should pay the costs of the first and second respondents. (The third respondent did not seek a costs order against the appellant.)

59 HEYDON J. Before a law can be held contrary to s 92 of the Constitution, it is a necessary but not sufficient condition that it create a certain effect. That effect is a discriminatory burden on interstate trade of a protectionist kind. The nature of the effect can be put in various ways. Each represents a useful attempt at elucidation through metaphor. One example is that it "constitutes an actual burden upon inter-State trade – a real impediment in its way"[54]. A second is that there must be "a burden which so disadvantages interstate trade in [an item] as to raise a protective barrier around [intrastate] trade in [that item]."[55] A third is that the practical effect of the impugned law must be to burden interstate trade to a significantly greater extent than it burdens intrastate trade. A fourth is that the burden must be meaningful and not insubstantial. A fifth is that interstate trade is exposed to a disadvantage which is "serious"[56].

60 If s 92 is to apply, it is necessary for an impugned law to give a relative trading advantage to intrastate trade as distinct from interstate trade. "The subject of immunity is trade, not persons"[57]. The relevant advantage must affect interstate or intrastate trade generally. The mere fact that an impugned law injures an individual trader does not suffice. That is because s 92 does not directly protect the individual rights of interstate traders. The impact on an individual trader would not burden interstate trade unless the trader's interstate trade was large either actually or potentially[58].

61 As was submitted on behalf of the Attorney-General for the State of Victoria, a law cannot be characterised as protectionist merely because its practical operation imposes a burden on a single interstate trader. It depends on the facts. The law may adversely affect only a few interstate traders. The law may benefit other interstate traders. The law may positively affect some interstate and intrastate traders and adversely affect others. The law may impose

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54 *Williams v Metropolitan and Export Abattoirs Board* (1953) 89 CLR 66 at 74 per Kitto J; [1953] HCA 93.

55 *Cole v Whitfield* (1988) 165 CLR 360 at 409 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; [1988] HCA 18.

56 The expression is used in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 477 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1.

57 *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 649 per Brennan J; [1985] HCA 38.

58 For example, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 475.

a heavier burden on local traders than interstate traders. The effect of the law on interstate trade or commerce may be very minor.

62 In short, a measure cannot contravene s 92 unless it involves the unequal treatment of interstate trade and intrastate trade to the serious trading advantage of intrastate trade when compared with interstate trade.

63 The relevant trading advantage has been described as a "competitive or market advantage"[59] or "significant competitive advantage"[60]. As initially used, and as correctly used, these expressions were not referring to or assuming the relevance of the word "market" as employed in the *Competition and Consumer Act* 2010 (Cth). And they were not referring to the test for contravention to be found in some provisions of that legislation, turning on the purpose, effect, or likely effect of substantially lessening competition in a market. The statement "intrastate trade has been given a competitive or trading advantage" does not entail a search for the outer limits of what market that intrastate trade is taking place in. Nor does it entail a search for whether that advantage substantially lessens competition in that market. The two expressions "competitive or market advantage" and "significant competitive advantage" were referring only to what flows from the burden created by the impugned law. Similarly, references in the authorities to protection from "the competition" of interstate traders[61], to the "competitive disadvantage" of interstate traders and to the "advantage" of intrastate traders[62] do not mean that the methods of analysis which the *Competition and Consumer Act* requires must be adopted. The same is true of references to "the preclusion of competition"[63].

64 Of course, s 92 of the Constitution must be applied to the circumstances of Australian life as they change from time to time. But the meaning of s 92 cannot

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59 *Cole v Whitfield* (1988) 165 CLR 360 at 409 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 467 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

60 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ.

61 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 426 per Mason CJ, Brennan, Deane and Gaudron JJ; [1988] HCA 27.

62 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 481 [118] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; [2008] HCA 11.

63 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452 [15] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

be affected by legislative innovations three quarters of a century after 1900 which introduced the test of substantially lessening competition in a market in relation to particular types of conduct[64]. That meaning cannot be affected by judicial decisions interpreting that legislation handed down even later. Nor can intergovernmental agreements made many decades later affect that meaning.

65 Proceedings in the Federal Court of Australia frequently involve inquiries into the question whether there is a substantial effect on competition in a market. Those proceedings have developed certain unattractive drawbacks. They are ponderous. They are slow. In them the parties tender, often successfully, copious quantities of inadmissible or marginally admissible "expert" evidence, selected with extreme discrimination, assembled at enormous expense and given with considerable impertinence in more than one sense of that word. Those drawbacks also exist in certain proceedings for review of certain types of administrative action in the Australian Competition Tribunal. In those proceedings the rules of evidence do not apply, but the drawbacks described are equally undesirable. These are not drawbacks lightly to be imported into cases on s 92 of the Constitution. The question of whether there is a burden on interstate trade is a question of "fact and degree"[65]. But, as the appellant correctly submitted, it is not a question to be encumbered by analysis centred on whether there has been a substantial lessening of competition in a market.

66 The trial judge in this case did have before him expert trade evidence. It can often be of value. It was of value here. But his Honour said: "One interesting omission in this case was any expert witness skilled in economics."[66] The tone was regretful. The omission, however, may actually have been a blessing. It may have assisted clarity of thought.

67 The appellant's case was summarised thus[67]:

> "the result of the imposition of a fee based on 1.5% of back bet turnover, is that [the appellant] pays the [first and second] respondents 54-61 cents of each $1 of its commission from a NSW horse race. In contrast, [TAB

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64 *Trade Practices Act* 1974 (Cth), ss 47, 49 and 50; see also the amendments to ss 45, 47 and 50, and the introduction of ss 45A-45C, effected by the *Trade Practices Amendment Act* 1977 (Cth), ss 25 and 27.

65 *Cole v Whitfield* (1988) 165 CLR 360 at 409 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

66 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 793 [322].

67 Aspects of the background are set out in *Sportsbet Pty Ltd v New South Wales* [2012] HCA 13 at [38]-[39].

> Ltd] pays about 9 cents of each $1 of its commission. The additional cost imposed on [the appellant] is 5 or 6 times greater than the additional cost imposed on [TAB Ltd]. This necessarily operates to the competitive advantage of [TAB Ltd]."

68 An initial flaw in this submission is that it assumes there is an unequal competitive advantage conferred on TAB Ltd and an unequal competitive disadvantage for the appellant. But the appellant did not demonstrate this. Even if it had, the submission encounters another difficulty. A comparison between the position of one interstate trader and one local trader does not establish a burden on interstate trade. Many traders other than the appellant may participate in that interstate trade. What matters is not the individual position of any one interstate trader, but the position of the interstate trade in which they participate when compared to intrastate trade.

69 A court faced with a s 92 challenge must assess whether an impugned law discriminates by burdening interstate trade or commerce to its competitive disadvantage or by benefiting intrastate trade or commerce to its competitive advantage. Under the influence of the way the appellant pleaded and ran its case, it may be said that analysis both at trial and on appeal in the Federal Court of Australia diverged from that test to some extent in concentrating on the loss of a competitive advantage to the appellant.

70 As noted above, the question is one of "fact and degree"[68]. The appropriate process of assessment, like the assessment of other questions of fact and degree, depends on evidentiary analysis. Apart from any matters of which judicial notice can be taken, matters falling within common experience and matters receivable as "constitutional facts", evidentiary analysis depends on what evidence has been tendered. Speaking of s 92 cases, Barwick CJ stated[69]:

> "However much the resolution of such a case is to be approached as a practical problem bearing in mind that it may be part of the nation's trade which is or may be affected by the Court's decision, in the end legal relationships deriving from the ascertained facts must be of singular importance and in many, if not in all, cases definitive of the outcome. Consequently, the facts ought at the outset to be carefully proved and fully explored by both parties. Equally, those who have to decide the facts in

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68 See above at [65].

69 *Tamar Timber Trading Co Pty Ltd v Pilkington* (1968) 117 CLR 353 at 358; [1968] HCA 15. See also *Chapman v Suttie* (1963) 110 CLR 321 at 325 per Dixon CJ; [1963] HCA 9; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 498 per Stephen J; [1977] HCA 2.

> the first instance should be astute to realize which are significant for the application of the constitutional provisions and should find such facts precisely and state their findings as to them clearly."

This was not a case in the original jurisdiction removed into the Full Court. Sometimes that procedure exposes the parties to difficulties in tendering evidence and causes them to fall back on reasoning from constitutional facts. This case originated in a substantial trial. The parties had the opportunity to try to prove any fact they liked by evidence. That must affect the willingness of the Court to embark on an attempt to illuminate with a flickering lamp constitutional facts only discernible from shadowy materials. In fact, the appellant did not seek very strongly to rely on constitutional facts. Rather, its position was that the evidence it called was sufficient for its purposes.

71 The evidence showed that the appellant was engaged in interstate trade or commerce. It also showed that the fee of 1.5% of back bet turnover resulted in the appellant paying a larger proportion of its gross revenue from gambling on New South Wales thoroughbred or harness racing than TAB Ltd, a local trader, did of its gross revenue from that type of gambling. But did the evidence show that a competitive disadvantage was imposed, not on the appellant, a single interstate trader, but on all interstate trade? The appellant pointed to no evidence which showed how the fee reduced the competitive advantage of interstate trade. It pointed to no evidence which showed how the fee increased the competitive advantage of intrastate trade. It pointed to no evidence of how the fee nullified or reduced a competitive disadvantage of intrastate trade.

72 The appellant took the Court to a great deal of evidence. But it did not analyse the forms which the relevant intrastate and interstate trade took. It did not examine how its case fitted in with the fluid and dynamic environment of the relevant trading activities. Those who experience the desire to gamble have many outlets at which to gratify that desire beyond those that the appellant and TAB Ltd provide. Even if the interstate and intrastate trade is limited to gambling on horse racing, which is questionable, those who desire to gamble on horse racing have available to them many persons prepared to provide the facilities to do so apart from the appellant and TAB Ltd.

73 The focus of the appellant was on its own position. That approach might have been legitimate if the appellant's position were typical of the relevant interstate trade or, as the appellant put it, "the lens through which one looks at the effect on interstate trade". But the singular position of the appellant negated that possibility. The appellant's approach might also be legitimate if it occupied so dominant a position in interstate trade that an impact on its position was sufficiently substantial to burden interstate trade to an extent significantly greater than the burden on intrastate trade. In that regard, the appellant drew an analogy

between itself and the Bond brewing companies in *Castlemaine Tooheys Ltd v South Australia*[70]. It sought to portray itself in the manner that the Bond brewing companies portrayed themselves in that case, namely as a new challenger with a small share of sales that was vigorously shaking up a stagnant trade[71]. But the evidence did not bear out the analogy. It pointed the other way, suggesting complex and vigorous trading activity across the nation in which there were numerous participants in diverse circumstances. The appellant also submitted that there "is no other way of analysing the effect on the market … than via its effect on particular traders, otherwise it becomes an abstract exercise, an artificial one." Up to a point that may be so. But it does not justify limiting the traders examined to just one.

74 Even if the inquiry is limited to the appellant's own position, the evidence was not favourable to its case. Its chief executive officer, whose credibility was praised by the trial judge, admitted that the fee had not reduced the number or type of New South Wales thoroughbred or harness races on which the appellant sought wagers. He accepted that the appellant had not altered its commission structure in response to the fee. He acknowledged that the appellant had not introduced a premium charge in response to the fee. He admitted that there was no connection between the introduction of the fee and the odds offered by the appellant's customers. He also admitted that since the fee came in there had been no change of substance in the commissions which the appellant charged or the odds it offered. He further admitted that the appellant had not altered its "marketing spend" in response to the fee. He agreed that the fee had not caused the appellant to lose a single dollar of back bet turnover and that the fee had not caused the appellant to lose a single dollar of commission. He admitted that the fee had not caused the appellant to change its competitive behaviour in any way in relation to its dealings with customers and its attempts to win business away from competitors. He admitted that though an examination of the appellant's future conduct in the event of defeat in these proceedings was under way, no plan for change had been developed. And he agreed that the appellant's planning documents projected the achievement of "very substantial" and "healthy" targets notwithstanding the imposition of the fee. He did not assert that the appellant would cease to compete or to trade profitably, either at all or in relation to horse races in New South Wales. Nor did he assert that the appellant would not continue to gain market share.

75 The Full Court also dealt with a submission by the appellant that the uniform fee discouraged low margin operators and price competition, and that this discouragement was to the benefit of high margin operators. The Full Court

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70 (1990) 169 CLR 436.

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

held that to demonstrate that the fee was likely to diminish the appellant's competitive advantage, it would be necessary to show that it disturbed the appellant's low margin operation *in fact*. It found that the appellant had failed to do this. The Full Court stated that the appellant had failed to show that the fee could deter gamblers from betting with the appellant. The Full Court also stated that the appellant had failed to demonstrate by evidence that the fee would cause any disturbance of the competitive relativities in a way which could be significant in terms of market share or profitability. And the Full Court stated that the appellant had not pointed to evidence that any change in the competitive relativities would not readjust after the fee was introduced through a process by which the appellant and the appellant's competitors priced it into their margins. The appellant denied the legitimacy of the Full Court's approach. But it did not deny what the Full Court said about the lack of evidence to support the propositions necessary to establish the appellant's case.

76 The appellant has failed to point to evidence supporting the view that the fee challenged in these proceedings is an actual burden on interstate trade to a significantly greater extent than it is an actual burden on intrastate trade.

77 The appeal must be dismissed. The appellant should pay the costs of the first and second respondents. The third respondent did not seek a costs order against the appellant.

78 KIEFEL J. Information concerning a race field is necessary to place a bet on a horse race and is essential to the business of a wagering operator. This was recognised in *Betfair Pty Ltd v Western Australia*[72]. The legislation which is relevant to this appeal does not, as the legislation in that case did, effectively deny the use of race field information to particular kinds of wagering operators[73]. At issue in these proceedings is the fee imposed by Racing New South Wales ("RNSW") and Harness Racing New South Wales ("HRNSW")[74] as a condition of approvals to use race field information concerning racing venues in New South Wales granted to wagering operators including Betfair Pty Limited ("Betfair").

79 Betfair operates the only betting exchange in Australia out of Tasmania, where it holds a licence from the Tasmanian Gaming Commission[75]. It was the view of the primary judge in the Federal Court proceedings (Perram J) that Betfair could not lawfully carry out such an operation from New South Wales[76]. No issue as to the validity of the provisions which his Honour considered had that effect is raised in these proceedings. Betfair's customers are drawn from around Australia. They may place bets on horse races or sporting events anywhere in Australia, including in New South Wales, by telephone or through the use of the internet. Its business has the interstate dimension spoken of in *Betfair Pty Ltd v Western Australia*[77].

80 Betfair was granted approvals by each of RNSW and HRNSW under the *Racing Administration Act* 1998 (NSW) to use New South Wales race field information. Each approval was subject to standard conditions, including the imposition of a fee of 1.5 per cent on what is referred to as "back bet turnover". Betfair contends that this fee condition subjects it to a disadvantage of such a nature that s 92 of the Constitution is infringed and it contends that RNSW and HRNSW were actuated by the purpose of protecting the New South Wales totalizator, TAB Limited ("TAB"), in imposing the condition.

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72 (2008) 234 CLR 418 at 481 [118]; [2008] HCA 11.

73 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 481 [118].

74 Established under the *Thoroughbred Racing Act* 1996 (NSW), s 4(1) and the *Harness Racing Act* 2009 (NSW), s 4(1), respectively.

75 Under the *Gaming Control Act* 1993 (Tas).

76 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 747 [84].

77 (2008) 234 CLR 418 at 448 [1].

The legislation and the fee condition

81 Prior to the introduction of the legislative provisions relevant to this appeal, wagering operators did not pay for the use of race field information in New South Wales or elsewhere. Wagering operators were permitted to accept bets on events in any State or Territory, with the relevant authorities in each State and Territory collecting fees and taxes only from the wagering operators they licensed (the so-called "Gentleman's Agreement")[78]. Some of the income from the fees and taxes was made available to bodies within the racing industry.

82 Changes to the methods by which wagering is conducted, including the use of the internet by "out-of-State" wagering operators, who accepted bets on races in States and Territories from which they had not received their licence, meant that this method of obtaining income was no longer viable. TAB, the monopoly off-course totalizator in New South Wales[79], which was privatised under the *Totalizator Agency Board Privatisation Act* 1997 (NSW), distributes income earned from its totalizator agencies in New South Wales pursuant to the Racing Distribution Agreement ("the RDA"), which was first entered into on 11 December 1997 between TAB, RNSW, HRNSW and others. RNSW and HRNSW are obliged to provide racing programmes at New South Wales race courses[80].

83 The second reading speech to the Bill which became the Act which introduced ss 33 and 33A of the *Racing Administration Act*[81] referred to interstate wagering operators as "free riding on New South Wales racing events."[82] The expression may be taken to convey that they benefited from what was provided by the racing industry in New South Wales without being required to pay. It was said that there was a need to "encourage the ongoing viability and

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78 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 792 [316]; see also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 470 [69].

79 *Totalizator Act* 1997 (NSW), s 14(1)-(2).

80 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 742 [66]-[67].

81 *Racing Legislation Amendment Act* 2006 (NSW), s 3 and Sched 1.2, item 4, which came into effect on 1 July 2008. Sections 33 and 33A have subsequently been amended by the *Racing Administration Amendment Act* 2008 (NSW), s 3 and Sched 1, items 11-13. See also *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 749 [90]-[92].

82 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2006 at 3116.

future economic development of the racing industry"[83]. It is tolerably clear that the introduction of ss 33 and 33A was intended to obtain revenue from interstate wagering operators for the use of the New South Wales racing industry[84]. Perram J acknowledged that the new methods of wagering were having an impact on the revenues of TAB[85].

84 Section 33(1)(a) of the *Racing Administration Act* makes it an offence for a "wagering operator" to use "NSW race field information" unless authorised to do so by a "race field information use approval"[86] and the wagering operator complies with conditions to which the approval is subject. Section 32A relevantly provides that a person "uses NSW race field information" if the person, whether in Australia or elsewhere, publishes it or communicates it to a person. Section 32A's terms are broad enough to include publication by an on-line communications system such as the internet or subscription television.

85 Each of RNSW and HRNSW is a "relevant racing control body" for the purposes of Pt 4 of the *Racing Administration Act*[87]. Section 33A(1) and (2)(a) of that Act provides that the relevant racing control body may grant to a person a race field information use approval and may impose certain conditions, including that the holder of the approval pay a fee. Clause 20(b)(ii) of the Racing Administration Regulation 2005 ("the Regulations")[88] provides, inter alia, that in determining an approval application, the relevant racing control body must not take into account the locality in Australia of an applicant's head office or principal place of business. Paragraph (c) of cl 20 requires, in relation to an applicant that is a wagering operator, that the relevant racing control body must take account of whether the applicant holds a licence under State or Territory legislation to carry out its wagering operations.

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83 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 2006 at 3116.

84 Legislation to similar effect, though not in identical terms, has been passed in other States and Territories: see *Betting Control Act* 1954 (WA), s 14A; *Racing Act* 1999 (ACT), Pt 5B; *Authorised Betting Operations Act* 2000 (SA), Pt 4, Div 4; *Racing Act* 2002 (Q), Ch 3, Pt 6; *Gambling Regulation Act* 2003 (Vic), Ch 2, Pt 5, Div 5A; *Racing Regulation Act* 2004 (Tas), Pt 6A.

85 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 743 [69].

86 These three terms are defined in s 27 of the *Racing Administration Act* 1998.

87 *Racing Administration Act* 1998, s 27.

88 Made under the *Racing Administration Act* 1998, s 37(1).

86 Clause 16(2)(a) of the Regulations provides:

> "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".

"Wagering turnover" is defined by cl 14(1) of the Regulations to mean "the total amount of wagers made on the backers side of wagering transactions made in connection with that race or class of races." The wager made by a "backer", that is, the person on the side of the wager that bets that an event will occur, is referred to as a "back bet".

87 The approvals granted by each of RNSW and HRNSW, including those to Betfair, contain a standard condition that the "Approval Holder" must pay to them a fee of an amount equal to 1.5 per cent of the "Approval Holder's Net Assessable Turnover in respect of the Approval Period" which exceeds the Approval Holder's "Exempt Turnover Threshold", which in the case of RNSW is $5 million and in the case of HRNSW is $2.5 million[89]. "Turnover" is defined by reference to the total amount of wagers made on the "backers" side of wagering transactions made in connection with a race or class of races.

Administrative decisions and s 92

88 The validity of the impugned provisions of the *Racing Administration Act* and the Regulations, which confer power on RNSW and HRNSW to condition the grant of the relevant approvals, is not in issue in these proceedings. Betfair seeks declarations that the approvals granted to it by RNSW and HRNSW are invalid, or are invalid to the extent that they impose a discriminatory fee contrary to s 92, and seeks orders for the repayment by RNSW and HRNSW of the fees it has paid.

89 The decisions of RNSW and HRNSW to condition the approvals made under s 33A(1) of the *Racing Administration Act* pursuant to s 33A(2) of that Act are of an administrative nature. It was not disputed that they may be the subject

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89 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 365 [30]; *Sportsbet Pty Ltd v New South Wales* (2010) 186 FCR 226 at 256 [97].

of judicial review[90]. However, no issue has been raised in these proceedings as to whether the constitutional question raised by Betfair may have been dealt with on an application for judicial review.

90 The validity of the fee condition imposed by each of RNSW and HRNSW depends upon the lawful exercise of the discretion by those bodies. Stated shortly, the exercise of that discretion is confined by s 92. It is so confined because the grant of the discretionary power is itself confined. Brennan J observed in *Miller v TCN Channel Nine Pty Ltd*[91] that a discretion to issue a licence on conditions cannot be exercised against interstate trade and commerce, because a discretion must be exercised in accordance with any applicable law, including s 92[92], and because, in the absence of contrary intention, general words of a statute conferring administrative powers are to be read as subject to s 92[93].

91 The freedoms guaranteed by s 92 operate as a limit upon the exercise of Commonwealth and State legislative powers. The *Racing Administration Act* and the Regulations therefore cannot grant a discretionary power which is to be exercised in a manner inconsistent with s 92. Any such grant of power must be construed so as not to exceed the limits of legislative power[94]. The general words of cl 16(2)(a) of the Regulations, conferring the power to impose a fee condition, are therefore to be read as subject to s 92.

The wagering operators

92 It is common ground that Betfair operates within a national market in Australia for wagering on horse races and other sporting events[95]. It is not disputed that the services offered by Betfair, TAB and bookmakers in New South Wales are closely substitutable. As was observed in *Queensland Wire Industries*

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90 However, the decision to condition the approvals upon payment of a fee was not reviewable by the Minister under s 33D(1)(b) of the *Racing Administration Act* 1998.

91 (1986) 161 CLR 556; [1986] HCA 60.

92 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-614. See also *Wotton v Queensland* [2012] HCA 2 at [10].

93 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 614, quoting *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488 at 522; [1952] HCA 17.

94 *Interpretation Act* 1987 (NSW), s 31(1).

95 The market for its services may also be international: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 480 [114].

Pty Ltd v Broken Hill Proprietary Co Ltd[96], a market is not limited to goods and services of the same kind but extends to those goods and services which are closely substitutable.

93 There are some differences in what is offered to customers by wagering operators taking bets on New South Wales races and there are differences in how those operators earn their income. It is the latter which assumes importance in Betfair's case.

94 As has already been observed[97], a person who places a bet that a certain event will occur is said to place a "back bet". It will be recalled that the fee condition in question is directed to turnover on bets of this kind. The person who accepts a back bet is said to "lay" that bet. The latter is the exercise in which a bookmaker is engaged. Bookmakers engage in fixed price betting, by which the price to be paid to a successful punter is agreed at the time the bet is placed[98]. Bookmakers seek to make their profit on wagers by an "overround", which may also be described as a win rate or margin. In the Full Court, Betfair submitted that the evidence demonstrated that the average win rate or margin of corporate bookmakers is in the order of five to six per cent[99]. The maintenance of the win rate or margin and the reduction of a bookmaker's risk may require constant reassessment of the bookmaker's book and the placing of bets with other bookmakers.

95 A totalizator, or pari-mutuel, does not operate in this way. Wagering by totalizator involves the pooling of wagers in respect of which the price is not fixed. The pool is divided amongst the successful punters when the outcome of a race is known and after the deduction of the totalizator's commission[100]. The primary judge referred to three kinds of totalizator betting operators in New South Wales: those operated on-course, by racing clubs and also TAB[101]; those operating from interstate; and a single off-course totalizator operated by TAB.

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96 (1989) 167 CLR 177 at 195, 199, 210; [1989] HCA 6.

97 At [86].

98 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 729 [17]; *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 360 [13].

99 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 360-361 [14].

100 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 732 [30].

101 TAB is permitted to operate on-course totalizators by s 15(1) of the *Totalizator Act* 1997.

The latter operates as a monopoly[102]. The primary judge found that TAB's average commission from its off-course totalizator "is about 16% of the quantum of all bets placed."[103] However, some 66 per cent of its commission was said, as at August 2007, to have been accounted for in costs under the RDA, taxes and levies.

96 A betting exchange facilitates customers betting on whether a future event such as a horse winning a race will or will not occur. In essence, as the primary judge observed[104], a betting exchange allows punters to bet with each other on a fixed price basis. It matches a bet that an event will occur (eg the horse winning) with a bet that it will not (eg the horse losing). Although Betfair is the counter-party to each bet placed by a punter, it will only take a bet if it is able to match it with an opposing bet[105]. A betting exchange operator has been described as an intermediary where the risk is carried by the customers[106]. Betfair generally charges commission only on the net winnings of a customer. However, it may charge additional fees in some instances. Its rate of commission is between two and five per cent[107]. Its average commission has increased from around 3.2 per cent to 3.5 per cent with the growth of its customer base. Its licence from the Tasmanian Gaming Commission currently limits the commission it can charge to a maximum of five per cent of net winnings[108].

The fee and Betfair's gross revenue

97 A feature of Betfair's method of earning revenue is that its commissions are not charged on back bets. It charges commission only on net winnings, whether the win is on a back bet or a lay bet. Its position may be compared with that of TAB, which takes commission on all back bets. This feature of Betfair's business means that the fee will represent a numerically higher proportion of its gross revenue.

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102 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 733 [35].

103 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 743 [69].

104 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 734 [39]-[40].

105 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 362 [21].

106 Betting Exchange Task Force, *Report of the Betting Exchange Task Force to the Australasian Racing Ministers' Conference*, (2003), quoted in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 450 [8].

107 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 758 [138].

108 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 363 [23].

98 Because Betfair derives its commission only from bets which are successful, its gross revenue is only a fraction of its overall turnover on back bets. However, it is the turnover on back bets on New South Wales races to which the fee of 1.5 per cent is applied. The primary judge found that the fee represented between 54 and 61 per cent of Betfair's commission in the financial years 2007-2008 and 2008-2009[109]. Betfair compares this with the position of TAB, where the fee represents 10 per cent of its commission[110]. It may be added that Betfair pleaded that to bookmakers the fee generally represented 25-50 per cent of their gross revenue.

99 The fee condition imposed by RNSW and HRNSW is, on its face, neutral. It is a standard condition expressed as the same rate to be applied to back bet turnover. *Cole v Whitfield*[111] recognises that a law may discriminate against interstate trade or commerce not only if it, on its face, subjects that trade or commerce to a disability or disadvantage, but also if the factual operation of the law produces such a result. Betfair relies upon a comparison with TAB to demonstrate the relevant discrimination. And, as Betfair's submissions make plain, the discrimination for which it contends arises because of the fundamental difference between its and TAB's businesses referred to above[112].

The decisions below

100 In *Cole v Whitfield*, the Court gave some meaning to the general statement in s 92 that trade and commerce amongst the States shall be "absolutely free", by identifying the kinds of legal burdens from which trade and commerce were intended to be protected. The width and generality of the wording of s 92 in its draft form, and the question whether it should be more definitely expressed, were raised during the Convention Debates[113], but no amendments were effected to identify what regulations affecting trade might be permitted and those which

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109 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 757 [135].

110 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 365 [32], 375 [60].

111 (1988) 165 CLR 360 at 399; [1988] HCA 18, citing *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 588-589 per Barwick CJ, 602 per Stephen J, 606-607 per Mason J, 622-623 per Jacobs J; [1975] HCA 45.

112 At [93]-[96].

113 *Official Report of the National Australasian Convention Debates*, (Adelaide), 19 April 1897 at 876 (Edmund Barton), 22 April 1897 at 1142 (Isaac Isaacs), 22 April 1897 at 1144 (Richard O'Connor).

might not[114]. *Cole v Whitfield* identified laws which impose "discriminatory burdens of a protectionist kind" as laws which were contrary to the object of s 92, historically ascertained[115].

101 The primary judge found that the fee, whilst facially neutral, discriminated against Betfair as a low margin operator in favour of a high margin operator like TAB. It discriminated against Betfair "because it treats two wagering operators who earn commission at different rates as if they were the same."[116] However, his Honour found that Betfair failed to prove that the fee was protectionist in nature[117].

102 A Full Court of the Federal Court (Keane CJ, Lander and Buchanan JJ) dismissed Betfair's appeal. The Court held that whether a protectionist character can be discerned as a matter of practical effect depends upon the effect of the law on the competitive relationship between intrastate and interstate trade[118]. It was observed that Betfair's case relied upon the impact of the fee on the business models adopted by individual traders as an enquiry relevant to whether the fee discriminates against interstate traders for the purposes of s 92, yet no decision had suggested this to be the concern of s 92[119]. In the Full Court's view, Betfair's argument "does not descend beyond the evident arithmetical truth that the lower a wagering operator's margin, the greater the percentage of the wagering operator's price and revenue will be taken by the fee."[120]

103 The Full Court held that it was necessary that Betfair show some competitive disadvantage to which it was subjected by the imposition of the fee. If Betfair had a competitive advantage, as it contended, because of its low margin business model, Betfair needed to show that the fee was likely to deny or diminish that advantage[121]. Betfair had not shown it to be likely that punters would be deterred from placing bets with it or that it would lose any market share

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114 *Cole v Whitfield* (1988) 165 CLR 360 at 391.

115 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

116 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 761 [153].

117 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 726 [5].

118 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 376-377 [65].

119 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 382 [80].

120 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 389 [107].

121 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 387 [99].

to TAB[122]. Betfair's argument proceeded upon an assumption that the "competitive relativities" would not be readjusted in the ordinary course of business to pre-fee condition levels once TAB and bookmakers priced the fee into their margin, and there was no evidence to support that assumption[123].

104 Betfair submitted before the Full Court that the Court should not insist upon the identification of any "putative competitive advantages and disadvantages"[124] to establish a breach of s 92 and it maintains that position on this appeal. It submits that the authorities do not suggest as necessary a separate enquiry into whether a law is protectionist or that it is necessary for it to show that its position in the market was adversely affected. These additional requirements, it submits, are not to be found in what was said in *Cole v Whitfield*, *Bath v Alston Holdings Pty Ltd*[125] and *Castlemaine Tooheys Ltd v South Australia*[126].

Discrimination and protectionism

105 The legislative burdens identified in *Cole v Whitfield* as infringing s 92 were described as "discriminatory burdens of a protectionist kind"[127]. In *Betfair Pty Ltd v Western Australia*, it was pointed out that it would be wrong to take *Cole v Whitfield* as marking a complete break from what had earlier been said by this Court concerning the place of s 92 in the scheme of the Constitution[128]. The obvious exceptions to that statement are cases involving theories about the operation of s 92 which are no longer employed, including the so-called "individual rights" theory of s 92, discredited in *Cole v Whitfield*, which was that s 92 guarantees the right of an individual to engage in interstate trade or commerce[129]. Betfair's concentration upon the effects of the fee condition upon its profit margin may be thought to reflect something of this theory.

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122 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 386 [98].

123 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 387 [99].

124 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 387 [100].

125 (1988) 165 CLR 411; [1988] HCA 27.

126 (1990) 169 CLR 436 at 467; [1990] HCA 1.

127 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

128 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 451 [11].

129 *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 201; [1990] HCA 50; see also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 456 [26].

106 The idea that the guarantee in s 92 is directed to laws which discriminate against interstate trade in favour of intrastate trade, by the burdens or restrictions that they impose, is not new. In *Fox v Robbins*[130], the fee imposed by a West Australian statute for a licence to sell wine the product of fruit grown in Western Australia was two pounds. The fee for a licence to sell wine produced from fruit grown elsewhere in Australia was 50 pounds. Griffith CJ and Barton J respectively described the measure as a burden on sales of Australian wines other than West Australian wine[131] and a burden which would hamper or restrict interstate trade[132]. Each of the Justices described the effect of the law as a discrimination against wine from other States[133] and Barton J called it "inter-state protection, not inter-state free trade."[134]

107 In *Cole v Whitfield*, a Tasmanian regulation relevantly prohibited a person from buying or selling crayfish of less than the prescribed size, whether or not it was taken in Tasmanian waters. The defendants sought to sell, from Tasmania to mainland and overseas markets, crayfish sourced in South Australia, which were above the prescribed size in South Australia, but less than that prescribed in Tasmania. The Court referred to the historical object of s 92 as being the preclusion of protectionist burdens[135]. Not only border customs duties, which had been at the forefront of the Convention Debates, qualified as such a burden, but so too did any "burdens, whether fiscal or non-fiscal, which discriminated against interstate trade and commerce."[136] The Court said that "free trade", in the past as well as the present, commonly signified an absence of protectionism, that is, the protection of domestic industries against foreign competition[137]. Protectionism was the kind of legal burden to which, historically, s 92 was said to be addressed[138].

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130 (1909) 8 CLR 115; [1909] HCA 81.

131 *Fox v Robbins* (1909) 8 CLR 115 at 120 per Griffith CJ.

132 *Fox v Robbins* (1909) 8 CLR 115 at 123 per Barton J.

133 *Fox v Robbins* (1909) 8 CLR 115 at 120 per Griffith CJ, 123 per Barton J, 126 per O'Connor J, 129-130 per Isaacs J, 131 per Higgins J.

134 *Fox v Robbins* (1909) 8 CLR 115 at 123.

135 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

136 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

137 *Cole v Whitfield* (1988) 165 CLR 360 at 392-393.

138 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

108 The means by which the Court in *Cole v Whitfield* saw the object of elimination of protection being achieved was the prohibition of "measures which burden interstate trade and commerce and which also have the effect of conferring protection on intrastate trade and commerce of the same kind."[139] The Court said that "[t]he general hallmark of measures which contravene s 92 in this way is their effect as discriminatory against interstate trade and commerce in that protectionist sense"[140], thereby signifying that a particular kind of discrimination is involved.

109 Discrimination of the relevant kind may be evident from the terms of a law, as in *Fox v Robbins*, or from its practical operation[141]. *Castlemaine Tooheys* furnishes an example of the latter. It was said in *Cole v Whitfield* that the concept of discrimination commonly involves the notion of a departure from equality of treatment[142]. In theory, discrimination may involve the differential treatment of things which have the same characteristics, or the treatment of things which are different as the same. In the context of s 92 it is the former treatment which is more likely to be involved because the goods and services the subject of interstate and local trade will be largely substitutable, and so in that sense the "same".

110 Nothing said in *Cole v Whitfield*, however, suggests that *any* discrimination will constitute a breach of s 92. As applied to interstate trade, the discrimination must also have a protectionist effect, that is, the creation of a protective barrier of some kind around the local market. Whilst the discriminatory character of a measure may be regarded as indicative of protectionism, not all discriminatory measures will have a protectionist effect. However, the concept of protectionism in the context of s 92 necessarily implies discrimination against interstate trade. Thus the critical descriptor in the expression "discriminatory burdens of a protectionist kind" is "protectionist". This may account for what was said in *Castlemaine Tooheys*, that there is one enquiry, that concerned with the characterisation of a law as protectionist or otherwise[143].

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139 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

140 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

141 *Cole v Whitfield* (1988) 165 CLR 360 at 399-400.

142 *Cole v Whitfield* (1988) 165 CLR 360 at 399.

143 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471.

111 Betfair sought to rely upon the finding of the primary judge that, although facially neutral, the fee condition discriminates against Betfair because it treats all wagering operators as if they earned commission at the same rates or, put another way, it discriminated between high and low margin operators. However, that finding is of limited relevance to the question whether the fee condition has a protectionist effect. The primary judge subsequently found that no such effect was shown.

112 One difficulty with an approach which views the question of discriminatory effect separate from that of protectionist effect is that, where an interstate trader bases its s 92 case on the relative effect of a measure on it and a local trader, the enquiry simply becomes one as to whether there is a difference between the two traders the subject of comparison. The primary judge did find a difference between Betfair and TAB, but it was in their business model, as low and high margin operators, respectively[144]. It was not in the effect of the fee condition upon them as interstate and local traders respectively.

113 This is not to suggest that an examination of the effect of the impugned measure on Betfair itself is impermissible in the process of comparison which is at the heart of any assessment of discriminatory effects. But it is necessary to bear in mind that in such an assessment Betfair represents interstate trade. It is the effects upon Betfair as an interstate trader, more particularly in its ability to compete with local traders, with which s 92 is concerned and to which the requirement of protectionism is directed. It is not enough, as Betfair's argument perhaps assumed, that it be an interstate trader. It is necessary to show a protectionist effect upon it in that capacity.

114 Betfair's argument has always focussed upon the extent of the burden of the fee condition upon it, as a cost. But that is to say no more than that the fee represents a higher proportion of Betfair's gross revenue than TAB's. Many licence fees will have a differential effect upon the revenue stream of a company or an individual. Fundamentally, as Brennan J observed in *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board*[145], the subject of the immunity given by s 92 is trade, not those who conduct it.

115 The argument that a burden has a protectionist effect directs attention away from the company or individual as such and to their position in the market. The term "protection", it was pointed out in *Betfair Pty Ltd v Western*

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144 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 761 [153].

145 (1985) 157 CLR 605 at 649; [1985] HCA 38.

Australia[146], is concerned with the preclusion of competition, which is an activity which occurs in a market for goods or services.

Section 92 and competition analysis

116 The economic concept of trade within a market informs the constitutional purpose of s 92. A "market" has been described as[147]:

> "the area of close competition between firms … the field of rivalry between them … Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive."

117 Betfair did not suggest that the identification of the market and the close substitutability of the services offered by its local competitors were not relevant to questions about s 92, yet it challenges the opinions of the primary judge and the Full Court that it was necessary for it to show that it was likely to suffer some competitive disadvantage by reason of the fee condition. Its argument contains the suggestion that to require it to demonstrate effects upon competition is to import into constitutional questions concerning s 92 concepts which have relevance only to competition law. Its suggestion that such a requirement is not to be found in decided cases implies that it is a novel approach.

118 More particularly, Betfair submitted that *Cole v Whitfield* does not require a party alleging breach of s 92 to show something akin to "a substantial lessening of competition", an effect which is referred to in Pt IV of the former *Trade Practices Act* 1974 (Cth) (now the *Competition and Consumer Act* 2010 (Cth)). The phrase describes the result which certain kinds of anti-competitive conduct may have and may not be seen as necessary to proof of protectionism. Nevertheless, what has been said about the enquiry the phrase encapsulates has relevance generally to questions concerning effects upon competition, namely that it is directed "not so much at the position of particular competitors as to the state or condition constituting the market or markets in question"[148].

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146 (2008) 234 CLR 418 at 452 [15].

147 *Re Queensland Co-operative Milling Association Ltd – Proposed Merger* (1976) 8 ALR 481 at 517, cited in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 188, 199-200, 210.

148 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 478.

119 The reasons of the Full Court did not state a requirement that Betfair demonstrate the likely effect of the fee condition upon competition generally within the market. I did not understand any party to suggest this was necessary. What the Full Court correctly pointed out was that a conclusion that the fee condition operated in a protectionist sense required Betfair to demonstrate some likely effect upon its ability to compete as an interstate trader.

120 In his further submissions on the appeal, the Attorney-General for the State of Victoria, intervening, observed that insights from competition law may reveal that the practical operation of a facially neutral law discriminates against interstate trade or commerce in a way that may merit characterisation of the law as protectionist. That is because insights drawn from the economic theory of competition are useful to explain the effects of a legislative or other measure upon trade in a market. Such insights have long informed discourse on s 92. Even if it has not always been necessary to identify the effect of burdens on interstate trade in economic terms, it is evident that the focus of the courts has always been upon whether interstate trade was prevented or disadvantaged in its ability to compete within a market.

121 In *Fox v Robbins*, Barton J considered that the much higher licence fee which was imposed upon interstate traders in wine had the same effect as a duty collected at the border[149]. Isaacs J foresaw that trade would be prevented because residents of one State would be deterred from purchasing or importing the products of other States[150]. In *Castlemaine Tooheys*, the provisions had the effect of preventing the Bond brewing companies, as interstate suppliers, from increasing their market share in South Australia beyond a certain point. The effect of the impost in *Fox v Robbins* could be described, in the language of competition law, as a barrier to entry to the local market, as could the effect of the impugned provisions in *Castlemaine Tooheys* and in *Betfair Pty Ltd v Western Australia*.

122 In *Castlemaine Tooheys*, it was said that decisions of United States courts, at least in so far as they spoke of concepts such as the suppression of interstate competition and the existence of a national economic unit, were helpful in the characterisation of laws for alleged contravention of s 92[151]. It was also said that *Cole v Whitfield* established that a law which imposes a burden on interstate trade, but does not give the domestic product or the local trade in that product a

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149 *Fox v Robbins* (1909) 8 CLR 115 at 123.

150 *Fox v Robbins* (1909) 8 CLR 115 at 129.

151 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 470.

"competitive or market advantage", is not a law which discriminates against interstate trade on protectionist grounds[152]. The Full Court in this case attached some importance to that observation, as requiring as a necessary step in establishing protectionism the identification of a competitive disadvantage[153].

Protectionism and competition

123 Whether the object of the protection of free trade in s 92 might be supported more generally by competition principles has not been a matter to which the attention of this Court has previously been directed. However, in *Betfair Pty Ltd v Western Australia* it was observed that, since *Cole v Whitfield* was decided, there had been developments in the Australian legal and economic milieu in which s 92 operates, including the emergence of a National Competition Policy which included, as a "guiding principle", that legislation should not restrict competition, unless it can be shown that the benefits of the restrictions to the community as a whole outweigh the costs and that the "objectives of the legislation 'can only be achieved by restricting competition'"[154]. Such a principle may treat as undesirable any effect of substance lessening the ability of those in a market to compete and require, as a justification, that measures which have that effect are necessary to the achievement of their objective. If such a principle were applied in cases involving s 92, the requirement that a legislative or other measure be seen as protectionist in effect may not be essential.

124 *Betfair Pty Ltd v Western Australia* also recognised that problems may arise from changes in the way business is now conducted, including in markets where borders have no relevance. It was pointed out that there were "practical and conceptual difficulties" where the focus was upon "the geographic dimension" given by State boundaries when considering competition in a market in internet commerce[155] and that it may be difficult to accommodate commerce of that kind to the notion of protectionism in intrastate trade and commerce[156]. Reference was there made[157] to the remarks of O'Connor J in *Jumbunna Coal*

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152 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 467.

153 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 381-382 [78]-[79].

154 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452-453 [16], quoting Competition Principles Agreement, 11 April 1995, cl 5(1).

155 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 452 [15].

156 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 453 [18].

157 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 453 [19].

Mine NL v Victorian Coal Miners' Association[158], that the Constitution is intended to apply "to the varying conditions which the development of our community must involve."

125 In *Cole v Whitfield*, it was acknowledged that two elements in s 92 arguably gave it a wider operation to trade and commerce than the prohibition of protectionist burdens. One element is the reference to "intercourse" among the States and the other is the words "absolutely free"[159]. It might also be thought that the words "among the States" have particular importance, since they may either limit or enlarge the view of the operation of s 92, when read in conjunction with the words "absolutely free". Given the structure of s 92, much may depend upon where the emphasis is placed.

126 The purpose of s 92 was said in *Cole v Whitfield* to be to create a free trade area throughout the Commonwealth and to deny the Commonwealth and the States the power to prevent or obstruct the free movement of people, goods and communications across State boundaries[160]. The framers of the Constitution may not have envisaged the extent of the national markets which now exist, but they did realise that a single trade area was necessary to achieve the objective of trade "among the States" being free. However, present authority maintains as relevant to s 92 the distinction between interstate and intrastate trade, a distinction drawn in part from what has been said about the words "among the States" appearing in s 51(i) of the Constitution, although the distinction has sometimes been said to be somewhat artificial[161]. As long as an interstate element is seen as present in s 92, the requirement of protectionism is both relevant and necessary, as *Cole v Whitfield* held.

127 It is not necessary to the outcome of this appeal to determine whether a further step should be taken, beyond what was decided in *Cole v Whitfield*, to recognise that any effect lessening competition in a market which operates without reference to State boundaries is contrary to s 92[162]. This is clearly a

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158 (1908) 6 CLR 309 at 367-368; [1908] HCA 95.

159 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

160 *Cole v Whitfield* (1988) 165 CLR 360 at 391.

161 *Wragg v State of New South Wales* (1953) 88 CLR 353 at 385-386 per Dixon CJ; [1953] HCA 34; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 502 per Gibbs J; [1976] HCA 66.

162 On 8 September 2011, the Court invited further submissions from the parties on a series of questions addressed, inter alia, to how the concept of protectionism applies to trade carried on in a national market.

large question and requires a particular set of facts to illuminate it. This case does not involve such facts. The evidence here does not permit a conclusion as to the likely consequences of the fee condition upon competition within the relevant market. It does not even identify the consequences for Betfair in that regard.

128 It is necessary to mention that, during argument on this appeal, Betfair sought to refer to a report of the Productivity Commission[163] in order to show, inter alia, the effect of the fee condition upon competition within the market[164]. A draft of this report was tendered, but not received, in evidence at trial as relevant to a different purpose, namely to show Betfair's competitive advantage over TAB[165]. Regardless of whether it has the status of authoritative economic material, as Betfair contends, Betfair should not now be permitted to rely upon it for other purposes, particularly since the respondents have not had the opportunity to test the opinions contained within it.

The likely effect of the fee condition upon interstate trade

129 Betfair relied upon inferences to be drawn from the effect of the fee upon its revenue as demonstrating that it was commercially disadvantaged. It emphasised the fact that the fee represents a greater cost to its business, per revenue dollar, in the order of five or six times more than the cost to TAB. It says that the natural consequence of such a high cost is to competitively disadvantage it and to favour TAB.

130 It was not sufficiently explained by Betfair how a cost effect may be translated into a competitive effect in the market. The only matters to which Betfair pointed were the percentage the fee bears to its gross revenue and a comparison with one competitor who has a different business model. Its reliance upon *Fox v Robbins* as analogous is misplaced. So far as concerned the practical effect of the fee in that case, it was possible to determine that those whose business was selling wine in Western Australia would be deterred from importing

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163 Productivity Commission, *Gambling*, Report No 50, (2010), vol 1.

164 In argument, Betfair also suggested that this report showed that other States impose a fee upon gross revenue and not back bet turnover, which might be relevant to the question of the need or justification for the measures adopted by RNSW and HRNSW having regard to the object of the relevant provisions of the *Racing Administration Act* 1998, to raise revenue: see in this regard *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102], referring to *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 608.

165 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 795 [334].

wine from other States because of the high cost of the licence. It may be added that courts today are likely to undertake a more detailed approach to questions concerning effects upon competition, in part because it is a more complex question in today's markets and because courts now are more often exposed to issues surrounding competition principles.

131 Betfair pointed to two obvious choices that were open to it: to absorb the cost or pass it on to its customers. Even assuming that these would be the only adaptations a business could make to maintain its market position, such adaptations would be the same for any business faced with a new or increased cost.

132 Betfair has chosen not to pass on the cost of the fee, or any part of it, to its customers during the currency of the proceedings. Neither, apparently, has TAB done so. There was some evidence to suggest that Betfair could apply to the Tasmanian Gaming Commission to change the rate at which it charged commission. Any effect upon Betfair's ability to compete by the maintenance of a ceiling on the rate of commission it may charge would not, in any event, qualify as an effect flowing from the fee condition. Betfair did not suggest that it would be necessary to seek permission to change its rate of commission. There would appear to be a substantial margin between its present charges and the permitted rate of five per cent. More importantly, the prospect of costs being passed on raises questions about whether relativities with Betfair's competitors might be maintained or significantly altered, as the Full Court observed[166]. This question was not addressed by Betfair in evidence.

133 It is not obvious how Betfair's ability to compete is likely to be adversely affected if it absorbs the cost of the fee. Its reliance upon the findings in *Castlemaine Tooheys* is also misplaced. It does not provide an example of the Court drawing inferences from the high cost imposed by the legislation. In *Castlemaine Tooheys*, the effects of the measures upon competition were agreed as facts by the parties. It was agreed that the measures concerning the deposit fees so substantially affected the Bond brewing companies' trading position that they lost market share: that they were limited to attaining only one per cent of the market when they had projected that they would capture a ten per cent share[167]. It is, however, evident from that case that the parties understood that the Court would be required to determine matters of that kind in order to address the principal question which arose, namely whether the measures, and the effects that they had upon competition, could be justified by reference to other, non-protectionist, objects.

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166 *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 386-387 [99].

167 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 443, 447-449.

134 Betfair sought, unsuccessfully, during the trial in these proceedings to rely upon the draft report of the Productivity Commission to show that it had a competitive advantage over TAB. Its low margin and TAB's high costs might be relevant to such a question, as may other factors such as the nature, and difference, of the services it offers. Assuming for present purposes that it did enjoy some such advantage, it did not show that it was likely to have been diminished or lost. More was required than to point to an increase in its costs.

135 Betfair did not demonstrate that the fee condition, in its practical operation, is likely to have a discriminatory, protectionist effect.

Subjective purpose of protectionism

136 Consideration need only be given to the purposes or objects of a legislative or other measure if it is found to impose a discriminatory burden of a protectionist kind. A court need only consider purpose where it is contended that, despite a measure imposing a discriminatory burden of a protectionist kind, it is justified because it is directed to the achievement of a non-protectionist purpose. In the context of s 92 it is usually required that the measures be reasonably necessary to achieve that legitimate purpose[168].

137 In *Cole v Whitfield*, the purpose of the prohibition was found to be the environmental purpose of protecting and conserving a valuable natural resource in the stock of Tasmanian crayfish, and the prohibition on the size of crayfish sold in Tasmania from any source was necessary to that end[169]. In *Castlemaine Tooheys*, some balancing of means and objects was recognised as appropriate[170], but the means chosen were considered to be disproportionate to the achievement of those objects[171] and could not be justified.

138 Obviously, Betfair does not contend that the fee condition is a measure which could be justified by reference to an object other than protectionism. It relies upon the purpose of RNSW and HRNSW, which is to say their respective subjective intentions, to satisfy the requirement of protectionism. The primary judge found that members of the boards of these racing authorities were, at the

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168 *Cole v Whitfield* (1988) 165 CLR 360 at 409; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102], citing *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 608.

169 *Cole v Whitfield* (1988) 165 CLR 360 at 409-410.

170 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472.

171 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-477.

time of the decision to impose the fee, of the view that its imposition would limit the loss of revenue to TAB and protect its revenue from competition with interstate traders[172]. However, his Honour also held that such an intention is not relevant to an enquiry as to whether s 92 is breached[173].

139 It is Betfair's contention that the subjective purpose of RNSW and HRNSW is relevant because the fee condition was imposed as the result of an administrative decision. In such a circumstance the purpose or intention of the decision-maker is said to be relevant in characterising the decision as imposing a discriminatory burden in a protectionist sense. Any other view, it submitted, would allow the delegation of the power to a decision-maker to achieve, by indirect means, what could not be done directly.

140 The answer to Betfair's lastmentioned concern is that a power to subvert the freedoms guaranteed by s 92 cannot be delegated. Any discretion provided by a statute must be exercised compatibly with s 92, as explained earlier in these reasons[174].

141 The balance of Betfair's contention may be dealt with shortly, by reference to the relevance of RNSW's and HRNSW's intentions to the matters in issue. The intention of those bodies might be relevant, in proceedings for judicial review, to show that they have some improper purpose. But these are not proceedings of that kind. Any intention on the part of RNSW and HRNSW to protect TAB is not relevant to proving that the measure had a protectionist effect. That is a question of fact to be determined by reference to factors relating to Betfair's ability to compete as an interstate trader. Whether the measure may be said to have other purposes, determined objectively, does not arise. This is because, as has been explained, Betfair has not established that the fee condition is a discriminatory burden of a protectionist kind.

Conclusion and orders

142 The appeal should be dismissed. The appellant should pay the costs of the first and second respondents. (The third respondent did not seek a costs order against the appellant.)

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172 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 775 [227], 775-776 [229]-[231], 777 [239].

173 *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723 at 777 [236]-[237].

174 At [90]-[91].