IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S116 of 2011

ON APPEAL FROM FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

BETFAIR PTY LIMITED
ACN 110 084 985
Appellant

AND

RACING NEW SOUTH WALES
ABN 86 281 604 417
First Respondent

HARNESS RACING NEW SOUTH WALES
ABN 16 962 976 373
Second Respondent

ATTORNEY GENERAL (NEW SOUTH WALES)
Third Respondent

APPELLANT'S REPLY TO SUBMISSIONS OF PARTIES AND INTERVENERS ON THE COURT'S LETTER DATED 8 SEPTEMBER 2011

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

2. They address the following matters arising from the respondents and interveners' submissions:

   a. the incorrect description or characterisation of *Betfair v Western Australia* (2008) 234 CLR 418 (***Betfair***) as being concerned with geographic constraints;

   b. the mis-statement of Betfair's submissions;

   c. the difficulty of analysing trade in the "new economy", and of identifying discriminatory burdens on interstate trade, if the analysis is confined to geographic considerations using labels such as "intrastate trade";

   d. the failure of the respondents and interveners to recognise that, even on a simple geographic analysis of the application of s 92's guarantee , the fee imposed by the first and second respondents (the **respondents**) is a burden on trade amongst the States and in contravention of s 92; and

   e. several other matters raised in individual submissions.

Betfair v Western Australia

3. A number of submissions argue that *Betfair* supports a purely geographical approach to the identification of a discriminatory burden on interstate trade. For example, the respondents submitted at [24] that *Betfair* was concerned with measures that prevented Betfair taking bets from customers *located in* Western Australia; AG(Vic) submitted at [28] that the impugned measures in *Betfair* precluded the communications which Betfair sought to make *into* Western Australia from Tasmania; and the AG(SA) submitted at [6], footnote 17, that the impugned law prevented betting exchanges from providing services *in* Western Australia (our emphasis). These descriptions of the decision in *Betfair* are incomplete and for that reason inaccurate.

4. The decision in *Betfair* concerned two provisions of the *Betting Control Act* 1954 (WA):

   a. s 24(1aa), which prohibited a person in Western Australia from placing a wager through a betting exchange and prohibited Betfair from offering its betting exchange to persons in Western Australia; and

   b. s 27D, which prohibited any wagering operator anywhere in Australia from publishing Western Australian racefields without an approval, which in the case of Betfair, was "illusory" (481 [119]) because it was a betting exchange.

5. Each provision was held invalid for imposing discriminatory burdens of a protectionist kind on Betfair's interstate trade: 481 [118] and 481-2 [122]. However, those burdens (being competitive restrictions or interferences in the national market for wagering services) were not identical. The first prohibited wagering transactions between Betfair and consumers who were within the geographic limits of Western Australia. The second prohibited Betfair

entering into wagering transactions based on races conducted in Western Australia, even where those transactions were with persons located in States and Territories other than Western Australia.

6. Various submissions mis-characterise the decision in *Betfair* by concentrating solely on the first prohibition and suggesting that it may be explained by a simplistic focus upon geographic boundaries: the respondents at [24]; AG(Vic) at [19], [28] and [48]-[50]; AG (SA) at [21]-[22]; AG(WA) at [9], [19]; and TAB Limited and Tabcorp Holdings Limited (**TAB**) (intervening in the Sportsbet matter but also, without leave, addressing Betfair's submissions on the Court's questions) at [14].

10 7. Those submissions ignore the Court's decision in relation to s 27D and the reasoning which AG(Vic) extracts at [50] of his submissions. The joint judgment concluded that s 27D *directly* interfered with the national market because Betfair was denied the use of an element of its trading operations (Western Australian race fields), and *indirectly* interfered with the national market by denying Betfair's customers (wherever located) access to Western Australia race field information via Betfair's website. Western Australia, using its long-arm legislative power, chose to advance the local or narrow economic interests of Western Australian sited wagering operators and their economic contributions to the Western Australian racing industry and government by imposing discriminatory burdens or prohibitions on Betfair's interstate trade.

Betfair's submissions in chief – State connections

20 8. In answer to the Court's questions, Betfair submitted that s 92's guarantee is to ensure that national markets are created and fostered with commerce flowing among the States without competitive restriction or interference of the relevant kind: see at [3]-[7]. That interference may arise from a legislative or executive measure that restricts competition in a national market for goods or services by advancing a narrow economic interest of a State (or the Commonwealth) while burdening or restricting interstate trade in goods or services of the same kind: see at [8]-[10].

9. The respondents urged a similar approach at [21] and [27]. They submitted that s 92 would be engaged by a legislative or executive measure that discriminates between traders on the basis of some connection or lack of connection, physical or legal, that they might have with a
30 State. They added at [27] that those connecting factors might be defined by the reach of State legislative power, rather than the State's geographic boundaries.

10. The submissions by AG(NSW) and some of the interveners suggest that Betfair's submission requires nothing more than the imposition of a burden on an interstate trader or on interstate trade: see AG(NSW) at [48]; AG(WA) at [12]; AG(Vic) at [10], [54], [56]-[60] and TAB at [17] (and possibly the respondents at [32]-[34] if directed at Betfair's submissions; see also [11]-[12] of the respondents' submissions). That is not correct. Betfair's submission was (see [31]) that the discriminatory burden can be imposed in pursuit of a narrow economic interest of a State (or group of States, or the Commonwealth) by means of legislative or executive power. This does not eliminate all geographic appreciation of markets or economic interests
40 (contra TAB at [20]); but it ensures that a narrow geographic definition of how competition

may be restricted or precluded is not the only way in which a protectionist burden on interstate trade can be identified.

11. Nor, contrary to what is suggested by the AG(Vic) at [56]-[60] (and perhaps the AG(WA) at [15]), does Betfair's approach involve the abandonment of discrimination as the central notion underpinning s 92 analysis: see Betfair's submissions in chief in answer to the Court's questions at [30]-[32], [34]-[40]. The approach for which Betfair (and the respondents) contend ensures that the comparison required by the discrimination inquiry is a meaningful one, in a context where it has become increasingly difficult to identify "pure" intrastate traders on the basis of geography.

Difficulty of traditional analysis in the circumstances of the new economy

12. All the parties and the interveners accept that the "new economy" creates problems if s 92 is to be applied solely by reference to a comparison with "intrastate trade": see e.g. respondents at [3]; AG(NSW) at [45]; AG(WA) at [18]-[19]; AG(Vic) at [21] and TAB at [12].

13. However, only Betfair, Sportsbet and the respondents offer a solution to this difficulty: see Betfair at [8]-[16], [26], [31]; Sportsbet at [14]-[20] and the respondents at [21] and [27] (although there is perhaps a "drift" in the submissions of the respondents to an approach focussed upon geographic borders or physical location– see e.g. [2] and the last sentence of [35]).

14. Despite identifying the difficulty, neither the AG(NSW) nor any of the interveners who raise the issue suggest a solution, ultimately reverting to geographic notions of "intrastate" or "cross border" trade: see e.g. AG(NSW) at [31], [35], [39]; AG(WA) at [36]-[37]; and AG(Vic) at [22], [29]. In Betfair's submission, those approaches illustrate the problems created by application of such labels and do not avoid the acknowledged difficulties.

15. The proposed focus on geography will also lead to doctrinal incoherence and uncertainty. Indeed, two interveners come to opposite views: the AG(Vic)at [28] expresses the view that the provision of services on the internet may mean there are more occasions for s 92's applicability, whereas the AG(NSW) is of the view that it may be less likely that the regulatory measures affecting such trade would contravene s 92: at [35], [37] (see also TAB at [21]).

16. Section 92's guarantee cannot be analysed solely by reference to rigid geographical notions of "intrastate" trade as the section must be applied (as was intended) to the varying conditions which the development of the Australian community must involve: *Betfair* at 481 [19], [20] referring to O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367-8. Nor, contrary to what appears to be suggested by the AG(Vic) at [23], does one read into the words "among the states" a textual requirement for that problematic approach.

17. In the context of State legislative or executive measures, the analysis should focus on whether the State has deployed its power in a way that restricts competition in the market by burdening interstate trade while favouring narrower economic interests of, or associated with, the State.

Application of traditional analysis to the respondents' impost

18. Even if the Court adopts the 'traditional' analysis (see e.g. AG(Cth) at [3(3)], AG(SA) at [30] and TAB at [13]-[14]), as Betfair has submitted (see [41] of its response to the Court's questions), the respondents' impost is contrary to s 92's guarantee because:

    (i) the TAB is a relevant comparator whose differential treatment reveals protection. As TAB submitted at [13] and [14], a "substantive part" of the activities conducted by it in order to supply the goods or services to customers within NSW are conducted within that state (the TAB having the monopoly off-course totalizator licence in NSW and having established a retail network of 1,971 agencies and licensed venues in New South Wales – see Perram J at [282], [284]: 6 AB 2294-5). That result also follows from the matters identified by Betfair in its answers to the Court's questions at [36]. TAB is an in-State operator in the same way that RWWA was an in-State operator in *Betfair* (at 450-451 [9], and 481-2 [118], [121], [122]) and the fact that the TAB also engages in interstate transactions relating to NSW race events is irrelevant, just as it was irrelevant in *Betfair* that RWWA engaged in interstate transactions in relation to WA race events (AG(Qld) at [12]; AG(SA) at [30]);

    (ii) Betfair represents interstate trade because it is based in Tasmania (and indeed cannot be based in NSW – see Perram J at [84]: 6 AB 2238), it enters into transactions on NSW race events with consumers in NSW and in other States and Territories, and those transactions are subjected to a much greater burden than that cast on TAB's transactions; and

    (iii) a comparison between the intrastate and interstate trade or commerce, as represented by the TAB's wagering transactions and those of Betfair, reveals a discriminatory burden imposed upon Betfair in order to, or with the effect of, protecting the TAB, and through it, the NSW racing industry, which is not reasonably necessary for any legitimate object. To adapt the words used by the Commonwealth in [3(3)] and by TAB in [14] of their submissions, the measure operates to the competitive disadvantage of Betfair in providing wagering services between Tasmania and NSW (and other States and Territories) and to the advantage of TAB in providing, or insofar as it provides, wagering services on NSW races within NSW.[1]

Other matters raised in the respondents' and interveners' submissions

19. Betfair made the same submission as the AG(Vic) at [13], namely that s 92 is focussed on trade or commerce not persons, although it may be that persons/traders may provide a relevant analytical framework, because they represent a proxy for trade: see the oral submissions made by Mr Young QC at T31.1322ff, T184.8095ff. Betfair also agrees that s 92 is focussed on interstate, not intrastate, trade or commerce. There is, accordingly, no warrant for insisting that s 92 can only apply if you can identify an intrastate trader, defined geographically, which is protected.

[1] The AG(Cth) submissions at [3(3)] are couched in terms of "serious competitive disadvantage", but this mis-states the test applied in *Betfair* (as explained by Mr Young QC at T189.8322-9).

20. Despite these submissions, the AG(Vic) reverts to an exclusively geographic focus on trade or commerce: see e.g. at [22], [41]-[45]. In Betfair's submission, this approach is unsound. The relevant comparison for determining whether narrow State-based economic interests are being protected does not require an 'intrastate' trader which is geographically located within a State or whose market is, or transactions are, geographically confined within a State. It is sufficient that the measure protects an economic interest that is defined or created by State legislative or executive power by restricting interstate trade.

21. Various submissions raise and rely upon economic theories and competition law principles: see e.g. AG(NSW) at [33], AG(SA) at [1], and TAB at [15]. There is no doubt that developments in economic theory, correctly understood and applied, have assisted in the analysis of the proper application of s 92 in the context of an economy more sophisticated than the economy between the colonies prior to 1900 (or even 1986). For example, the demand side as well as the supply side of the market (see *Betfair* at 453 [18]) should be taken into account and the geographic limits (or axis: see TAB at [20]) raised by McHugh J in *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 at 456 [254] may be less relevant in the context of wagering services provided over the internet. However, the wholesale importation of competition law concepts, especially any requirement to demonstrate a serious or substantial lessening of competition as a result of the measure, would distort the proper role of s 92.

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