ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No.S116 of 2011

BETWEEN

BETFAIR PTY LTD
(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
FOR NEW SOUTH WALES
Third Respondent

No.S118 of 2011

BETWEEN

SPORTSBET PTY LTD
(ACN 088 326 612)
Appellant

AND

STATE OF NEW SOUTH WALES
First Respondent

RACING NEW SOUTH WALES
(ABN 86 281 604 417)
Second Respondent

HARNESS RACING NEW SOUTH WALES
(ABN 16 962 976 373)
Third Respondent

STATE OF SOUTH AUSTRALIA
Fourth Respondent

NSW SUBMISSIONS
IN ANSWER TO COURT'S QUESTIONS OF 8 SEPTEMBER 2011

Filed for the State and Attorney of NSW, 24.9.11
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Part I: Publication of Submissions

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

Introduction

2. These submissions are made on behalf of the State of New South Wales and the Attorney General for New South Wales (together, "NSW") in these two matters. They are provided in response to the three questions identified by the Court in the Senior Registrar's letter to the parties of 8 September 2011. The oral submissions of NSW touched upon the issues raised by the questions. NSW reiterates those submissions and seeks to add the following.

3. These submissions address the three questions in turn. Before doing so, however, it is appropriate to discuss first the nature and significance of national markets, and markets for services capable of being supplied by internet, in the s.92 context.

National markets and s.92

4. No doubt markets of a national geographic dimension are more commonplace now in Australia than was previously the case. Two reasons for that are notable. First, it reflects the substantial developments in the nature, availability and cost of transport and communication services, where those developments facilitate the movement of goods, information and services across wider geographic areas. Secondly, s.92 and associated constitutional provisions (such as ss.90 and 117) have done substantial work to create and foster national markets.

5. The fact that national markets are now more common is an evolutionary development; it is not a change in kind. The existence of cross-border markets – or potential cross-border markets – was always contemplated by the Constitution. It is the very issue addressed by the trade and commerce limb of s.92.

6. In Cole v Whitfield (1988) 165 CLR 360, at 391, the Court stated the following of s.92:

> The purpose of this section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to prevent or obstruct the free movement of people, goods and communications across State boundaries.

7. The Court went on to explain (at 392-3) that the "expression 'free trade' commonly signified in the nineteenth century, as it does today, an absence of protectionism, ie, the protection of domestic industries against foreign competition".

8. The joint judgment in Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, at [12], linked s.92 to s.90 within Ch IV of the Constitution, stating that the "creation and fostering of national markets would fit with the plan of the Constitution for the creation of a new federal nation and would be expressive of national unity".

9. The joint judgment in Betfair v Western Australia at [15] added that the notion of protection "is concerned with the preclusion of competition, an activity which occurs in a market for goods or services". This identification of the relevance of a market for goods or services drew out what was implicit in earlier references to "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" (see Cole at 394, emphasis added, note also 407; see further Barley Marketing Board (NSW) v Norman (1990) 171 CLR 182 at 204-5).

10. Section 92 is not only concerned with the preclusion of competition in an existing market. It also has some application in relation to potential markets (a notion distinct from existing markets which take account of potential competition). For example, legal measures might purport to prevent competition from across State borders, and in that way limit the market for goods or services to one occurring within the State in question. Such measures – creating barriers to entry to the market in question – are undoubtedly included in what s.92 was designed to prohibit. The effect of such measures is to restrict the geographic dimension of the market. This notion is distinct from potential competition in existing markets, because it may be that the effect of the legal measures is to preclude (directly or in effect) potential competition across the borders.

11. Section 92 is directed to cross-border transactions and movement. That this is so emerges clearly from the text, dealing, as it does, with "trade, commerce and intercourse among the States". The words "among the States" refer to trade, commerce and intercourse moving between the States, across the relevant borders. So much is confirmed by the further words in s.92 of "whether by means of internal carriage or ocean navigation".

12. When this cross-border characteristic of s.92 is linked to the recognition that protectionism occurs in markets for goods or services, then it becomes apparent that here – as in other areas – reference to a market involves a geographic dimension. Specifically, any market (or potential market) to which s.92 might apply will extend across borders. This cross-border market might be regional or it might be national. The difference is one of degree.

13. Identification of the geographic dimension is a necessary part of identifying any market. Basic principles in this area are well known, but are worth referring to briefly in this context. The "parameters of the market are governed by the concepts of substitution and competition": Boral Besser Masonry Ltd v ACCC (2003) 215 CLR 374 at [247] per McHugh J. As his Honour added at [248], "[i]n economic terms, a market describes the transactions between sellers and buyers in respect of particular products that buyers see as close or reasonable substitutes for each other given the respective prices and conditions of sale of those products".

14. The Trade Practices Tribunal explained the issues well in its oft-cited decision in Re Queensland Co-operative Milling Association Limited (1976) 25 FLR 169 at 190 in the following terms (cited approvingly eg in Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177 at 188 and 210, and in Boral v ACCC at [248]; emphasis added):

> A market is the area of close competition between firms, or putting it a little differently, 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. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.

15. Of course, the "outer limits (including geographic confines) of a particular market are likely to be blurred": Queensland Wire (1989) 167 CLR 177 at 196 per Deane J.

16. Identification of the market is linked to identification of market structure. As Mason CJ and Wilson J stated in Queensland Wire at 187, "[d]efining the market and evaluating the degree of power in that market are part of the same process". The point was alluded to by Areeda and Kaplaw (Anti Trust Analysis, 1988, 4th ed, at 572; quoted approvingly by French J in Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd (1991) 33 FCR 158 at 178):

> A vast number of firms might have some actual or potential effect on a defendant's behaviour. Many of them, however, will not have a significant effect and we attempt to exclude them from the relevant market in which we appraise a defendant's power. We try to include in the relevant market only those suppliers – of the same or related to product in the same or related to geographic area – whose existence significantly restrains the defendant's power. This process of inclusion and exclusion is spoken of as market definition.

17. When it is understood that s.92 is directed to cross-border transactions and movement, and that in relation to the trade and commerce limb this will occur in a market (or perhaps a potential market) for goods or services, then it can be seen that the trade and commerce limb of s.92 is necessarily and inherently directed to facilitating and encouraging markets for goods or services which cross State borders.

18. Thus the increased commonality of national markets for goods or services is not some new development requiring a substantially new approach to s.92 in its trade and commerce limb. Section 92 has always been directed to cross-border markets. Some of those markets would have been national markets – that was likely the case in Fox v Robbins (1909) 8 CLR 115, for example. The difference between regional cross-

border markets and national markets is essentially one of degree relating to identification of the geographic dimension of the particular market.

The internet and service

19. Most s.92 cases, whether before Cole or afterwards, have concerned trade in goods rather than in services. Yet there have been cases about services. These have included cases such as Hughes and Vale Pty Ltd v NSW [No.2] (1955) 93 CLR 127, relating to the provision of road transport services, along with Betfair v Western Australia itself.

20. The provision of services has perhaps been more prone to being subject to narrower market definition in the geographic dimension, at least insofar as the services are to be provided by direct human interaction. That is so because, if human interaction is required, distance is a natural impediment to the provision of a substitutable service (cf Boral v ACCC at [254]). However, developments in transport and communications have meant that even for such services there has been a tendency to expand the size of relevant markets (note Betfair v Western Australia at [114]). For example, it is likely that the market for legal and accounting services (of at least some types) are national ones.

21. Protection may be sought to be achieved in such markets for services in much the same ways as in markets for goods. For instance, tariffs may be imposed on services provided across State borders; restrictions may be imposed on such services crossing State borders; subsidies may be given to local service-providers; other forms of discriminatory burdens may be imposed on imported services.

22. As noted above, developments in transport and communications have of themselves done much to achieve the creation and fostering of national markets, thus achieving the aim of s.92 in this respect. Those developments have tended to expand the geographic dimension of markets. They have also lowered barriers to entry to local markets or sub-markets from those supplying services from some distance away. The internet has facilitated this occurring, particularly in markets for services which do not necessarily

require human interaction but which may be provided by means of computer (such as wagering).

23. In market terms, the internet has tended to increase the geographic area of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution. Moreover, in such areas the existence of the internet tends to create some practical restriction on the regulatory powers of governments. If burdens are placed on local transactions which are too high, there will be a tendency for providers of services to move outside the jurisdiction – as, indeed, has happened in the national wagering market over recent decades. Conversely, if the burdens outside the jurisdiction are too high, then there may be a movement into the relevant jurisdictional area. There are also potential difficulties in seeking to enforce restrictions on internet services where those are provided from outside the jurisdiction. That said, it is to some extent possible to identify where relevant internet activities are taking place at (a simple, commonplace example is illustrated by Google: if one types www.google.com into an Australian computer, not operating through a proxy server, then one will be re-directed to www.google.com.au).

24. Nevertheless, it is still quite possible to identify that some trade in a market for services may cross State borders. That may be readily apparent for provision of, for example, accountancy and legal services, involving human interaction. But it will also be true for interactions taking place by way of telephone or internet connection. So much is illustrated by this Court's decision in Betfair v Western Australia.

25. In any event, it is necessary in a range of areas of law to identify the location and/or the direction or movement of an activity taking place electronically, and the law is capable of doing this. This may be necessary for the purposes of identifying where a tort has occurred and thus what law applies (cf Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575), for identifying where a contract is formed and what law governs it, or for identifying whether an offence has been committed in some particular location. The same can be done in this constitutional context.

26. As put above, it is fundamental to s.92 that it is directed to trade, commerce and intercourse crossing State borders. The internet has facilitated such transactions, and thereby facilitated the development of national markets. It may have reduced the practical significance of State borders. Nevertheless, it is still necessary and possible to identify cross-border transactions.

Question 1

27. Question 1 asks the following:

> How does the concept of free trade in s.92 apply in relation to a national market for services?

28. NSW answers as follows: the concept of free trade under s.92 applies in relation to a national market for services in the same way as it applies generally, consistently with principles articulated by this Court in Cole and Betfair v Western Australia, albeit that in practice it is perhaps less likely that a measure will be characterised as imposing a discriminatory burden of a protectionist kind.

29. As explained above, neither the fact that the market at issue here is a national market, nor the fact that it is a national market for services, requires that a new approach be taken to the trade and commerce limb of s.92. Further, no party has to date sought to overturn the principles articulated in Cole and Betfair v Western Australia. It follows from those decisions that the trade and commerce limb is directed to prohibiting measures which can be characterised as imposing discriminatory burdens of a protectionist kind, where protectionism is understood to involve the preclusion of competition in a market for goods or services.

30. As NSW put in its oral submissions (lines 5950-5995), the notion of precluding competition should not be taken to mean preventing competition. Rather, it should be taken to refer to the (protectionist) burdening of the relevant type of trade and commerce, being trade and commerce which crosses State borders. It is neither necessary nor sufficient for a challenger to establish that an interstate trader cannot compete profitably and/or at all given the burden.

31. The focus is as follows:

(i) does the impugned measure, by its legal operation or practical effect, tend to burden cross-border trade and commerce in a significant or substantial manner which is not equally imposed on trade and commerce that does not cross State borders (ie is there discrimination); and

(ii) is this done in such a way and to such an extent, taking account of the particular market structure in question, as to warrant characterisation of the measure as protectionist.

32. The label of "protectionism" is relevant to identify the type of discrimination involved; to require implicitly some degree of materiality; and so as to exclude measures which impose incidental discriminatory burdens on interstate trade which are reasonably necessary to achieve some legitimate non-protectionist end (where this is all part of the one characterisation test: see Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 at 471.6).

33. The approach can be expressed in another way in economic terms: it may be said to involve an assessment of whether the measure, by its legal operation or practical effect, has a significant tendency to shrink the geographic dimension of the market back towards State borders by imposing burdens on cross-border trade which tend to reduce the substitutability of cross-border goods/services for local goods/services (without requiring that this tendency actually have the effect of shrinking the geographic dimension of the market).

34. This approach is quite capable of being applied within a cross-border regional or national market. As explained above, s.92 inherently and necessarily applies to such markets (actual or potential). For example:

(i) In Fox v Robbins there may well have been a national market involved, albeit perhaps with different sub-markets in different States. Part of the trade in question was across the Western Australian State border. The measure had a substantial effect of burdening trade which crossed that State

border into the Western Australian sub-market, compared to trade within that sub-market which did not cross the border. The economic effect of the measure could readily be characterised as tending to reduce substitutability of goods imported from across the border.

(ii) In Castlemaine Tooheys the burden of the regulatory measure had a disproportionate effect on one cross-border trader, being the new challenger in the market which was having significant success in shaking up that market, in circumstances where the purported explanation on environmental grounds did not withstand scrutiny. The effect of the measure was to erect a barrier to entry, reducing substitutability by imposing a burden which fell, in practice, disproportionately on trade which crossed the border.

(iii) In Bath v Alston Holdings Pty Ltd (1988) 165 CLR 411, the issue which divided the majority and the minority was whether or not it was correct to focus just on the functional level of the market in question, or whether a broader view could be taken. On the majority's view that it was necessary just to focus on the particular functional level, then the Victorian measure was of much the same kind as held invalid in Fox. It imposed a discriminatory burden on trade crossing borders, tending to preclude such trade occurring by limiting substitutability, and in a way that warranted characterisation as protectionist.

(iv) In Betfair v Western Australia, the situation was similar to that in Castlemaine Tooheys. It was a new type of business specifically prohibited by Western Australia, where the model employed by that business was uniquely employed by an interstate operator. To prohibit that model – in circumstances where the Court found there was no justification for doing so – was to preclude competition from interstate trade of a particular kind.

35. However, in practical terms it is perhaps less likely that if the market in question is a national market for the provision of services capable of being supplied by internet (as opposed to goods) the regulatory measures will contravene s.92. At least if the

national market is one of some complexity and with numerous participants, then in the absence of measures which baldly target trade crossing the State's borders, it is likely to be quite difficult for a State to impose targeted measures which burden only, or disproportionately, trade which happens to cross the State's borders. Moreover, as noted above, insofar as services can be provided over the internet then there is something of a natural constraint on the imposition and exercise of State regulatory restrictions. If measures imposed are too severe, then this will tend to drive operators outside of the State in question, who may continue to offer services to the world at large from outside the State.

36. As Sportsbet puts it in its submissions on these questions at [15], "technological change has fostered the developed of the national market" in the relevant services. As explained above, developments in transport and communications have assisted in creating and fostering national markets. These developments tend to reduce the number of circumstances in which measures will be taken to contravene s.92. A similar point was made by Betfair in Betfair v Western Australia, to the effect that implementation of the National Competition Policy was likely to reduce recourse to s.92 (noted in the joint judgment at [16]).

37. The fact that there is reduced need to have recourse to s.92 does not mean that some new role must be sought for the provision, let alone one which is neither supported by the text nor required by its purpose. Rather, it is merely to accept that s.92 is not required to do all of the work of creating and fostering national markets, and insofar as that work is done by economic forces or technological developments then the number of circumstances in which this Court will be called upon to adjudicate possible contraventions of s.92 may well fall.

Question 2

38. Question 2 asks the following:

> In the past, protectionist measures found to offend against s.92 have discriminated against interstate trade and protected intrastate trade, that is, local trade carried on within state borders. How does the concept of protectionism

apply to trade carried on in a national market without reference to state borders?

39. NSW answers as follows: discrimination necessarily involves a comparative assessment, and the relevant comparison here must be between cross-border trade (conventionally called interstate trade) and trade which does not cross the borders (conventionally called intrastate trade).

40. This approach, first, reflects the textual focus of s.92 in relation to trade, commerce and intercourse "among the States", crossing State borders.

41. Secondly, it reflects the post-Cole understanding that what is prohibited by s.92 in its trade and commerce limb is discriminatory burdens of a protectionist kind, not burdens on interstate trade or commerce per se. As the joint judgment in Betfair v Western Australia accepted at [36], s.92 was not designed to create a laissez-faire economy in Australia, but rather had a more limited operation, namely, "to prevent the use of State boundaries as trade borders or barriers for the protection of intrastate players in a market from competition from interstate players in that market".

42. Thirdly, this approach reflects the concern that "legislators in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers" (Betfair v Western Australia at [34]). There are, in other words, pressures on State legislatures to tend to favour local trade interests, and to seek to protect local employment and investment.

43. As explained above, cross-border markets have always been the concern of s.92 in its trade and commerce limb. That the number of national markets has increased reflects both the success of s.92 and technological developments.

44. The concept of protectionism is applied to trade carried on in national markets in the manner explained above. The focus is on whether a measure, by its legal operation or practical effect, tends to burden cross-border trade or commerce in a significant or substantial manner not applied equally to trade or commerce that does not cross

borders, in a way that tends to reduce substitutability of goods or services capable of being supplied across the State's borders (with a resulting tendency to reduce the geographic dimensions of the market), and in such a manner and extent as to warrant characterisation as protectionist.

45. The relevant focus, it is submitted, is on trade and commerce, not traders per se. That reflects the text and purpose of the provision. Moreover, it accommodates the fact that there can be difficulties in labelling a business a "local" or an "interstate" trader. Many entities will have bases and conduct operations in a range of locations in modern national markets. Moreover, in light of the nationalisation of corporate law, the identification of a place of registration of a corporation is rather fortuitous. These difficulties are avoided if it is understood that the concern is with the conduct of trade and commerce across borders (compared to trade which does not cross the borders), regardless of how one might characterise the nature of the businesses which conduct that trade.

46. The approach outlined involves making economic assessments of the nature and effect of impugned measures. In some instances the nature and tendency of the measure will be entirely evident, as in cases such as Fox and Bath. In other cases it will be necessary for the relevant effects and tendencies to be established by evidence. This evidence would likely need to address the nature and structure of the market in question, and the likely effects on trade within those markets (and possible sub-markets) taking account of that market structure. Issues of fact and degree will be involved.

47. It is not surprising that it may be necessary to identify and examine the structure of the market, for, as noted above, identification of market structure is intimately tied to identification of the market itself.

48. There is no warrant for introducing the notion of whether or not an impugned measure "is directed towards the advancement of narrow economic interests", as suggested by both Sportsbet and Betfair in their submissions on the questions. This notion is too

loose a concept to aid analysis, and is in any event not properly tied to the text and purpose of the constitutional prohibition.

49. Sportsbet also submits at [25] that s.92 "is not just concerned with the immediate protection of local traders but also with broader considerations including protection of State revenues or other parochial social or economic interests". This, again, is too broad and unqualified a statement. States are perfectly entitled to seek to protect their revenues in a general sense – indeed, to do so is a necessary condition of the continued existence and functioning of the States as polities. They are not, however, entitled to do so in a way which imposes discriminatory protectionist burdens on cross-border trade. Further, if by the term "parochial social or economic interests" Sportsbet means to impugn the achievement of social or economic goals in the geographic area of the State, then they seek to impugn the very notion of a State being able to legislate to advance the public interest as perceived from time to time within the limited grant of geographic power that is held by States within the Australian constitutional structure. Again, however, such regulation in the public interest cannot be imposed in a protectionist manner.

50. In Betfair's submissions on the questions at [34]-[42] it seeks to reiterate why it claims to have made out its case in light of its answers to the questions. Yet that reiteration illustrates again its failure to make good its claim. The race fields legislative scheme does not involve measures of the kind considered in Fox, Bath or Betfair v Western Australia, where the discriminatory and protectionist effect was relatively clear (at least, in the case of Betfair v Western Australia, when the justifications offered for the restrictions were rejected). Betfair has always maintained that it was running a practical effects case, yet it has failed to provide adequate and meaningful evidence of the structure of the national wagering market, or evidence of the likely effects of the race fields scheme on cross-border trade compared to trade not crossing NSW borders. It has failed to establish there is in fact a discriminatory burden on cross-border trade, let alone that any such burden is of such a nature and extent as to warrant characterisation as protectionist. As put by NSW in oral submissions, a measure is less likely to be protectionist if the market is geographically broad, competitive, diverse

and with a significant number of participants (T. lines 5940-5945). This is such a market (T. lines 6100-6135).

51. As for Sportsbet, its case was focused on whether existing traders operating locally have been immunised from bearing the new regulatory burden imposed by the race fields scheme. If that in truth had been done, then one could readily infer that there was a discriminatory and protectionist burden imposed on cross-border trade compared to trade which did not cross borders. But that is not the position. All operators using NSW race fields information are subject to the new regulatory burden. There has been adjustment of pre-existing burdens borne in a discriminatory manner by traders operating locally. For the reasons explained at the hearing, such an adjustment cannot be objectionable and, indeed, is entirely consistent with the aims of reducing distortions in the market, to the benefit of local consumers on the demand side. Sportsbet has not established any discriminatory burden imposed on trade or commerce cross NSW State borders.

Question 3

52. Question 3 asks the following:

> In the context of trade, carried on in a national market, does "absolutely free" in section 92 prohibit any measure creating a burden on interstate trade, which amounts to a competitive disadvantage (if such is demonstrated) on an interstate trader by comparison with other traders irrespective of whether those other traders can be characterised as trading intrastate or interstate?

53. The answer of NSW to this question is "no".

54. To take the contrary view would amount to a radical recalibration of s.92, away from the text and established doctrine, and substantially back towards an individual rights approach.

55. In essence, the contrary view involves eliminating any element of protectionism from the constitutional test. It may be noted that no party has (to date) advocated that such a step be taken. That step would be a substantial shift from the approach adopted in

Cole v Whitfield and developed in Betfair v Western Australian. It would depart from the focus on cross-border trade and commerce that is inherent in the text.

56. Moreover, the practical effects of such a change would be very significant. All laws discriminate in some way. They act to regulate particular transactions or behaviours, and in that way burden those persons who previously engaged in such transactions or behaviours and/or those who wished to do so. Every law regulating trade and commerce acts to preclude competition in some way, for the same reason. The law will act to prevent or restrict a person engaging in particular proscribed behaviour, where in a free (laissez-faire) market they would have been free to do so. For example:

(i) A law which regulates misleading conduct will impose greater practical burden on those whose business model involved such conduct, and will act to reduce or remove competition on that basis.

(ii) A law which regulates labelling or branding will impose greater practical burdens on those who previously used, or wished to use, the type of labelling or branding which is restricted. It will impose a greater burden on those persons than on other market participants who did not use, and who did not wish to use, such labelling or branding.

(iii) A law which imposes licensing requirements, with a fit and proper person element, will obviously exclude some competitors from the marketplace, where previously those competitors would have been free to participate in the market.

(iv) A law which imposes a tax or levy will impose economic burdens on all participants, but it is a statement of the obvious that some participants will be more capable of bearing that burden than others.

57. It is inevitable that an interstate trader who is burdened by such measures will be able to point to some other participant in the relevant market who does not bear an equivalent practical burden. In practical terms, therefore, the contrary view would

mean that the first stage of analysis would be very readily established by any complainant.

58. Such an approach would involve a substantial step back towards the individual rights theory. It would mean that a trader who could establish such a burden would have to do very little to establish a prima facie contravention of s.92, simply because they were an interstate trader and they were subject to a regulatory burden. In contrast, a trader who did not engage in cross-border trade would have no cause for complaint. This approach would therefore suffer from precisely the same fundamental flaw of the individual rights theory identified, and rejected, unanimously by this court in Cole v Whitfield at 402: "Instead of placing interstate trade on an equal footing with intrastate trade, the doctrine keeps interstate trade on a privileged or preferred footing, immune from burdens to which other trade is subject". As the Court subsequently noted in Barley Marketing Board (NSW) v Norman at 201, the theory "had the effect of transforming s.92 into a source of discriminatory protectionism in reverse".

59. Not only is this effect unwarranted in the constitutional context, it is contrary to the demand-side concern that was discussed in the joint judgment in Betfair v Western Australia. To give preferential treatment to one set of traders over another, simply on the basis of whether or not they engage in cross-border trade, is to deny consumers the benefit of full-blooded competition between all market participants.

60. This approach would mean that essentially all of the work of s.92 analysis would be done at the second, justification stage of analysis. In this respect there would be some similarity to the approach taken to provisions in the *Treaty Establishing the European Community*, as construed and applied by the European Court of Justice. However, that court has developed a complex and flexible doctrine of proportionality. In particular, the margin of appreciation accorded to law makers is flexible and potentially wide, depending on all the circumstances and the nature of the law. In contrast, the joint judgment in Betfair v Western Australia signalled a relatively strict approach would be taken to the justification stage of s.92 analysis by adopting the criterion of "reasonable necessity" (at [102]).

61. In any event, this approach would place a significant institutional burden on the courts, serving no constitutional purpose in so doing. The judgments involved in assessing proportionality or reasonable necessity are complex and commonly somewhat subjective. That is not to say that they can be avoided in the application of many constitutional guarantees. But that characteristic is one significant reason against a substantial expansion of the first stage of analysis of any particular constitutional guarantee, in the absence of some significant constitutional imperative requiring to the contrary.

62. Making assessments as to what types of competition are contrary to the public interest is the essence of political judgment. The relevant constitutional purpose here is not whether or not laws restricting or burdening competition are justifiable. Rather, the relevant constitutional imperative is whether laws unduly burden cross-border trade, in particular doing so in a manner that disadvantages that trade vis-à-vis trade within State borders.

63. As explained above, it is entirely possible to continue to apply the established approach within national markets, including national markets for services. There has been no factual, governmental nor constitutional change which warrants taking a different approach.

Dated: 26 September 2011

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