IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

No. S118 of 2011

BETWEEN:

SPORTSBET PTY LTD
(ACN 088 326 612)
Appellant

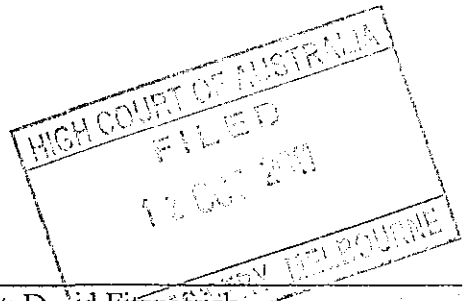
STATE OF NEW SOUTH WALES
First Respondent

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

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

STATE OF SOUTH AUSTRALIA
Fourth Respondent

APPELLANT'S REPLY TO THE QUESTIONS OF THE COURT



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1. There is much common ground in the submissions filed in response to the Court's questions,[1] including that s 92 prohibits discriminatory burdens on trade, commerce and intercourse amongst the states,[2] and must be interpreted so as to be capable of applying in the context of a national market for services.[3]

2. The fundamental issue on which the submissions diverge is, in the context of a national market for services, what comparator is to be used in assessing whether a burden is discriminatory. New South Wales and the Interveners in particular fasten on a narrow geographical test that requires the protected trade to be "within" the geographical boundaries of a State, which they label "intra state" trade. In their submission, no other comparator can be used to identify discrimination or protectionism for the purposes of s 92. That conclusion is unduly narrow and does not reflect the purpose of s 92 in fostering national markets and national unity. It is not embraced by RNSW and HRNSW.[4]

3. Four propositions are advanced in reply:

   (a) Section 92 does not mandate that discrimination or protection can only be identified by a comparison with "intra state trade" understood in a purely geographic sense;

   (b) *Betfair v Western Australia*[5] was not only concerned with the protection of transactions occurring within Western Australia but with the protection of wagering operators, who were aligned with that State, in respect of their Australia wide operations;

   (c) The Respondents and Interveners distort Sportsbet's submissions on the protection of narrow economic interests; and

   (d) Even on a narrow geographic approach, both the TAB and local bookmakers are "in-State" operators and the transactions that were protected from competition included those occurring within NSW.

(i) Retreating to geography ignores the reality of national markets.

4. *Betfair v Western Australia* recognised that the changes that have occurred since *Cole v Whitfield* have led to a growth in trade that crosses, but does not depend on, interstate boundaries. Despite State geographic boundaries receding in practical significance in the development and maintenance of national markets[6], the States seek to retain them as the sole criterion for the identification of "in-State" trade against which discrimination or protection is to be assessed when applying s 92[7]. Acceptance of that proposition would entail the erosion of the practical protection that s 92 was intended to afford. It wrongly converts a tool of analysis that is useful in some cases into an essential aspect of s 92.

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1 Contained in the letter of the Senior Registrar dated 8 September 2011
2 RNSW 17; NSW 28; Victorian 30; Western Australia 20-21; TAB 6;
3 RNSW 10; NSW 28; Victoria 31-32; Western Australia 20-21; South Australia 21; TAB 22; Commonwealth 3(1)
4 See RNSW and HRNSW at 21 and 27.
5 (2008) 234 CLR 418 at [9], [116], 118], [119] and [121]
6 NSW 26
7 NSW 31, 33, 39, 42 and 44, Victoria 2, 6, 16, 22, 23, 41; 62; Western Australia 34, 37; Queensland 6, 9 and 11

5. The problems in confining s 92 to the protection of geographically distinct markets were identified in *Betfair v Western Australia* and include the following: (a) in national markets it is difficult to define a trader or trade as "local"[8]; and (b) States, using their long arm territorial reach, may seek to benefit from, or exploit, transactions that are connected with, but do not take place within, their borders in ways that offend s 92[9]. The Respondents and Interveners appear to accept that the concept of intra state trade, understood in a purely geographic sense, may lack meaningful content in a context where the respective locations of the trader and customer are irrelevant to the transaction[10]. Similarly, the benefits that a State may seek to bestow on a trader may not be confined to transactions that take place within the State but may extend to transactions across State borders: a State may favour a trader in respect of all of its transactions and not just those that occur within the State's boundary, or may favour a trader not because of the location of its trades but because of some other relationship, such as legal, financial or regulatory, that the trader has with that State.

6. To put Sportsbet's submission in more concrete terms: TAB obtained a refund of all of the race fields fees placed on wagers accepted by TAB on NSW races regardless of whether the punter was located within or outside of NSW. Thus it was favoured in relation to its Australia wide operations to the extent that they were based on NSW races. This necessarily means that TAB was favoured in its conduct of wagering transactions with customers present in NSW.

7. Notwithstanding their acknowledgement of the problem, with the exception of RNSW, the Respondents and Interveners do not provide a solution, but merely insist on the importance of defining the comparator by reference to the physical location of the trade or trader.

8. Victoria submits that the problems can be avoided by focusing on the transaction rather than the trader[11] and that it is necessary to identify the protection of transactions occurring "within the State". There are two points to be made. First, although s 92 is a protection of interstate trade, the process of characterisation necessary to determine whether a measure is protectionist cannot be undertaken in a manner divorced entirely from the treatment, either favourable or unfavourable, that may be accorded to traders. Secondly, a State measure does not fall outside s 92 simply because it applies to protect transactions by a trader such as TAB that occur both with persons within the State and with persons located outside of the State. There is no suggestion in *Betfair v Western Australia* that the competitive advantage conferred on RWWA and other WA licensed wagering operators, vis-à-vis Betfair, was irrelevant simply because those operators entered into transactions both within WA and with persons outside of that State[12].

9. RNSW and HRNSW recognise, correctly it is submitted, that avoiding the protection of "local markets" (ie markets existing wholly within the geographic boundaries of a State) is only one aspect of s 92[13]. To limit s 92 to the protection of local markets would not address protection that can be achieved by a State relying on legislative power which, to use the language of the joint judgment in Betfair at [116], gives a "geographical reach" that extends beyond the physical border.

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[8] 234 CLR at [14]-[15], [18], [88]-[90] and [97]
[9] 234 CLR at [33], [34], [89]-[90] and [116]
[10] RNSW 3, NSW 45, Western Australia 18-19, Victoria 21 , TAB 12.
[11] Victoria 21
[12] 23 CLR at [9], [118] and [121]
[13] RNSW Submissions para [18]

10. RNSW submits[14] that, for the purposes of s 92, an impugned measure may discriminate between traders on the basis of some physical or legal connection that they might have with a State. Where those connections exist, and they are used as the basis for discriminating against interstate trade and advantaging the State-connected trade, it is irrelevant that the advantaged trade is not confined within the geographical boundaries of the State. That kind of discrimination still bites even if the protected trade occurs both within and outside the State. There is no reason why that kind of discriminatory burden on interstate trade should be taken outside of s 92 simply because the relevant connection to the State is not found in the fact that all of the protected transactions occur within the State. Section 92 must be able to respond to that circumstance if it is to continue to provide substantive protection in the fostering of national markets.

(ii) The submissions ignore a central aspect of *Betfair v Western Australia*, namely the invalidity of s 27D which did not depend on establishing trade occurring within Western Australia

11. The submission that s 92 requires the identification of trade or trade transactions occurring entirely within a State cannot sit with the decision of this Court in *Betfair v Western Australia* in relation to s 27D of the *Betting Control Act* 1954 (WA). That provision burdened or restricted transactions between Betfair and punters throughout Australia.

12. Section 27D prohibited wagering service providers from publishing WA race fields inside and outside Western Australia without approval[15], which as a practical matter was not available to Betfair[16]. RWWA was exempt. Section 27D burdened interstate trade conducted by Betfair directly by denying it the use of an element in its trading operations and indirectly by denying its registered customers, located throughout Australia, the latest WA race fields on which to bet. Betfair, but not "in-State operators", was burdened in its "Australia-wide operations"[17]. The Court's comparison between Betfair and "in-State operators"[18] did not proceed on the basis that wagers with RWWA were conducted entirely within Western Australia[19]. Nor did the Court use the expression "in-State operators" to connote traders who only operated in-State, as distinct from those who were licensed by, and had financial connections with, Western Australia and its racing industry. The latter characteristics were sufficient to class RWWA and WA bookmakers as "in-State operators". The restriction on competition which engaged s 92 occurred in a national market and affected the Australia-wide operations of the wagering operators, including RWWA, WA bookmakers and Betfair.

13. The Respondents ignore this important aspect of the decision. For example, RNSW[20] wrongly submits that the vice was the exclusion of Betfair from competition in the national market *within* Western Australian by preventing it from taking bets from customers located *in* Western Australia. That erroneous view is reflected in other submissions[21].

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[14] RNSW 21 and 27.
[15] 234 CLR at [72]
[16] 234 CLR 481 at [119] the chance of approval for Betfair was "illusory"
[17] 234 CLR 481 at [9], [116], [118], [119], [121].
[18] Eg at [9], [118]
[19] 234 CLR 470 [69] discussing the "Gentleman's Agreement"
[20] RNSW 24;
[21] Victoria 19, 24, 28 and 50; Western Australia 6 (footnote 17); Queensland 12.

(iii) The submissions distort Sportsbet's submissions and reference to narrow economic interests

14. Various submissions criticise Sportsbet's use of the phrase "narrow economic interests" by taking it out of the context in which it was used.[22] That context describes narrow economic interests that are associated with a State through economic regulatory or executive arrangements, in circumstances where the impugned measure advantages those associated interests while imposing discriminatory burdens on interstate traders and trade which does not have or serve those associated interests.

15. The concept of narrow economic interests associated or connected with a State is neither nebulous nor circular[23]. The point it seeks to capture is that in order to preserve an "economic centre" in the context of a national market, a State may align itself with certain traders and give their transactions preferential treatment in ways that discriminate against interstate trade. This is correctly acknowledged by RNSW's submission that s 92 would be engaged by a State measure that discriminates between traders "on the basis of some connection or lack of connection, physical or legal, that they might have with a State"[24].

16. RNSW's references[25] to State "connecting factors" and "parochialism" are important because they emphasise, as the Court did in *Betfair*, that a State may intrude into national markets to the extent that its "geographical reach" extends beyond its physical boundaries in ways that impose discriminatory burdens on interstate trade[26]. The reference by Victoria[27] to paragraph [116] of *Betfair* does not support its argument because it wrongly assumes that the Court was giving a narrow geographic content to the concept of an in-State trader. That approach misreads the judgment of the Court and ignores the significance that the joint reasons attach to long arm territorial reach in the new economy.

(iv) Sportsbet's factual situation

17. The fact that TAB and NSW bookmakers enter into wagers on NSW races with customers located both within and outside NSW does not mean that State measures that protect TAB and NSW bookmakers at the expense of the free flow of interstate trade are not caught by s 92. On the traditional approach to s 92, they are caught either because, on the test adopted by TAB[28], a substantive part of their business is conducted in NSW or because, as the Commonwealth submits[29], s 92 applies because the measure protects transactions undertaken within NSW even if TAB or NSW bookmakers also undertake transactions of the same kind with persons located outside NSW. On either approach, the current measures protected TAB and NSW bookmakers as in-State traders by discriminating in their favour "in so far as [they] trade domestically"[30].

18. Thus, even on a geographic analysis, both TAB and NSW bookmakers are "in-State" traders. TAB is licensed to conduct a totalisator in NSW. It conducts a substantial part

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[22] Victoria 10, 21, 22, 23, 41 and 48; NSW 39, 42 and 48; South Australia 23, 25, 26 and 30; cf Sportsbet's Response to the Questions of Court at 18.
[23] Victoria 60
[24] RNSW 21, 23 and 27.
[25] At 21 and 27.
[26] 234 CLR at [116]
[27] Victoria 50
[28] TAB 14
[29] Commonwealth 3
[30] TAB 14

of its business from retail premises in that State. Bookmakers conduct their business from race tracks in NSW. The combination of licensing, economic contribution and place of business give them a NSW locus. Part of their business may be in the nature of an export business, exporting wagering products to persons outside of the state. However, that component does not deny them the character of an in-State trader, whose in-State transactions are being protected from interstate competition.

10 DATED: 12 OCTOBER 2011

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