IN THE HIGH COURTOF AUSTRALIA
SYDNEY REGISTRY **NO S116 OF 2011**

On appeal from the 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 (NSW)
Third Respondent

IN THE HIGH COURTOF AUSTRALIA
SYDNEY REGISTRY **NO S118 OF 2011**
On appeal from the Full Court of the Federal Court of Australia

BETWEEN: **SPORTSBET PTY LTD**
ACN 088 326 612
Appellant

AND: **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

ATTORNEY-GENERAL FOR SOUTH AUSTRALIA
Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth **(Commonwealth)** intervenes under s 78A of the *Judiciary Act 1903* (Cth), without supporting any party.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts New South Wales' lists of legislative provisions.

PART V ISSUES PRESENTED BY THE APPEAL

4. These submissions address several points of principle on the operation of s 92 of the Constitution and s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) (**NT Self-Government Act**). The Commonwealth makesno submissions on the validity of ss 33 and 33A of the *Racing Administration Act 1998* (NSW), and associated regulations, or on the validity of any approvals given under that legislation.

5. As a general comment, it is necessary to keep distinct two steps in the test for whether a law is contrary to s 92 of the Constitution, most recently explained in *Betfair Pty Ltd v Western Australia*.[1]One step is identifying a **burden**on interstate trade (a discriminatory burden that has a protectionist effect).[2]If there is a burden, the second step is assessing the **justification** for that burden (whether the law imposing the burden is reasonably necessary, or appropriate and adapted, to achieving a non-protectionist object).[3]The first step concerns the effects of a law. The second step requires a comparison of the law's effects with its objects, to determine whether the effects are proportionate.[4]

A. BETFAIR APPEAL

6. The Commonwealth makes four points in the Betfair appeal.

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1 (2008) 234 CLR 418.

2 *Betfair* (2008) 234 CLR 418 at 481 [118], 482 [122] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

3 *Betfair* (2008) 234 CLR 418 at 477 [102]-[103], 479 [110].

4 Cf Victoria submissions (Betfair), paras 17(a) and 22: this slightly different analysis based on characterisation of the impugned law would seem to lead to the same result.

A.1 Section 92 is concerned with interstate competition, not interstate competitors

7. The first point is to emphasise that the object of s 92 of the Constitution is to eliminate the protection of local industry against interstate competition.

(a) A law is only invalid if it reduces interstate *competition*

8. A State law[5] is not contrary to s 92 because it reduces competition*per se* – rather, it can be invalid only if it reduces competition from traders **in another State**.

9. This point is made in the joint judgment in *Betfair* where it is said thats 92 prevents a State from protecting its domestic industry from competition from traders in another State[6] and prevents the use of State boundaries as barriers to protect intrastate players in a market from competition from interstate players in that market.[7]The statement in the joint judgment that the object of s 92, in its application to interstate trade and commerce, is the elimination of protection[8] must be read in this light.

10. This point is also illustrated by *Barley Marketing Board v Norman*.[9] The State compulsory marketing scheme under consideration in that case did limit competitionto the extent that all barley grown in New South Wales vested in the marketing body. However, the scheme did not discriminate against interstate trade and commerce, and therefore was not contrary to s 92.[10]

(b) A burden on a competitor does not necessarily establish a burden on competition

11. Although s 92 refers to interstate trade and commerce being "absolutely free", it is only absolutely free of discriminatory burdens that are protectionist.[11]"Protection" is concerned with the preclusion of competition, which occurs in a market for goods or services.[12]

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5 Of course, s 92 of the Constitution is also a limit on Commonwealth legislative power: *Cole v Whitfield* (1988) 165 CLR 360 at 396-399 (the Court).

6 *Betfair* (2008) 234 CLR 418 at 451 [11] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ), citing *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 17 (Barwick CJ).

7 *Betfair* (2008) 234 CLR 418 at 460 [36].

See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ): only legislation that imposes a protectionist burden on interstate trade and commerce interferes with the freedom guaranteed by s 92.

8 See *Betfair* (2008) 234 CLR 418 at 452 [15].

9 (1990) 171 CLR 182.

10 *Norman* (1990) 171 CLR 182 at 202-203 (the Court).

11 See, by analogy, *Cole v Whitfield* (1988) 165 CLR 360 at 394 (the Court). Contra RNSW and HRSW (Sportsbet) submissions, para 69.

12 *Betfair* (2008) 234 CLR 418 at 452 [15] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

12. If the object of s 92 is to ensure that a State cannot preclude interstate competition, it follows that the focus of s 92 is on the effect or likely effect of a law or measure on **competition**, not simply its effect on a **particular competitor.**

13. Analysis of a "market" of the kind that occurs under the *Competition and Consumer Act 2010* (Cth) is therefore relevant for these purposes.[13] That analysis makes clear that the effect of a measure upon competition is not to be equated with the effect upon competitors, although the latter may be relevant to the former.[14] In deciding whether a measure has affected or will affect competition, the courts look not only to the position of actual competitors but also to **potential** competitors.[15]

14. Of course, a law may still discriminate with protectionist effect even though the law is aimed at particular interstate traders, and does not preclude competition by other interstate traders.[16] However, in this situation, there would only be a "burden" on interstate trade if the law, by discriminating against a particular interstate trader, had an effect on competition.[17]

15. Accordingly, the fact that a burden imposed by a State law or measure precludes competition by a particular interstate trader does not, in itself, necessarily establish that the law or measure is protectionist – the issue is the effect of the law or measure on competition from interstate in the relevant market.[18]

A.2 A "burden" on interstate trade and commerce must be a meaningful burden

16. The second point in the Betfair appeal is that a law or measure will notbe taken to impose a "burden" on interstate trade and commerce unless the burdenis meaningful, in the sense of not insubstantial or *de minimis*.[19] (If the burden is meaningful, and both discriminatory and protectionist, the question then is whether the burden is appropriate and adapted to achieving a non-protectionist objective.)

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13 See *Betfair* (2008) 234 CLR 418 at 449 [4], 480 [115] (fn 480), both citing the analysis of McHugh J in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 (a case about s 46 of the *Trade Practices Act 1974* (Cth)).

14 See eg *Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission* (2003) 131 FCR 529 at 585 [242] (the Court); see also *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd*(1982) 44 ALR 667 at 671 (Bowen CJ and Fisher J), 679-680 (Fitzgerald J); *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 478 (the Court).

15 See eg *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 283-284 [585] (the Court); S G Corones, *Competition Law in Australia* (5th ed 2010) at [2.135] ff.

16 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 475 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

17 See NSW (Betfair) submissions, para 68.

18 Betfair appears to accept this much: see Betfair submissions, para 81 (last sentence).

19 See, to similar effect, Victoria submissions (Betfair), para 41.

(a) A requirement for a meaningful effect on competition is inherent in "protectionism"

17. It follows from protectionism amounting to the preclusion of competitionthat a law cannot be protectionist unless its effect (or likely effect) on competitionis meaningful.

18. In *Betfair*, Heydon J accepted that, subject to the question of justification, a law would be contrary to s 92 if it burdened interstate trade "**to a significantly greater extent** than it burdens intra-State trade".[20] To similar effect, Kitto J stated in *Williams v Metropolitan and Export Abattoirs Board*[21]that the question was whether a State law "constitutes an actual burden on inter-State trade – a real impediment in its way". In *Cole v Whitfield*,[22] this Court held that a law would be invalid if it discriminated against interstate trade in pursuit of an apparently non-protectionist object "in a way or **to an extent**" that warranted characterising the law as protectionist.

19. This submission does not import into s 92 jurisprudence a requirement that there be a "substantial" lessening of competition.[23] However, it recognises that s 92 of the Constitution, like the *Competition and Consumer Act*, is only concerned with laws or measures that have a meaningful effect on competition.[24]

20. That said, the only question at the first step (burden) is whether the law does, in a meaningful way, preclude competition from interstate traders. The **reasons** for that preclusion are not relevant to whether there **is** a burden (though they may well be relevant to whether the object of the law is non-protectionist, and whether the law is appropriate and adapted to achieving that object (justification)).

21. Consequently, the fact that a disadvantage for interstate trade arises because of the business model or structure of interstate traders does not preclude the possibility of there being a "burden".[25] (As noted, however, a challenger must demonstrate that there is a burden on interstate competition, not simply on an interstate competitor.[26])Similarly, there is no requirement that a law can only amount to a "burden" on interstate trade if it removes a

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20 (2008) 234 CLR 418 at 483 [131], emphasis added.

21 (1953) 89 CLR 66 at 74, referring to *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 523 (Dixon CJ, McTiernan and Fullagar JJ).

22 (1988) 165 CLR 360 at 408 (emphasis added).

23 Cf Betfair submissions, para 74.

24 A "substantial" lessening of competition under the *Competition and Consumer Act*means an effect that is meaningful or relevant to the competitive process; however, that does not necessarily equate to a "not insubstantial" effect: see *Rural Press Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 71 [41], and fn 67 (Gummow, Hayne and Heydon JJ, with Gleeson CJ and Callinan J agreeing on this point).

25 Cf *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 385-386 [95], 388 [104] (the Court).

26 See paras 11 and 15 above.

competitive advantage that an interstate trader enjoys in its state of origin.[27]For example, a law may well be contrary to s 92 if it imposed a burden on interstate trade that otherwise was competitively neutral with intra-state trade. In other words, s 92 is not limited to the situation where interstate trade starts with a competitive advantage, but applies equally when interstate trade and intra-state trade start from an equal footing (before the effect of the impugned law on competition in the relevant market).

22. The real question – as identified by the Court below – is whether a law imposes a burden that disadvantages interstate trade, thus protecting intra-state trade of the same kind.[28]

23. Equally, although it may be accepted that a law will not discriminate contrary to s 92 unless the feature on which the law discriminates (either in its legal or practical operation) has a connection with interstate trade, that feature of discrimination need not have an intrinsic "interstate" character.[29] To hold otherwise would be tantamount to introducing a requirement that discrimination be "on the grounds" that trade is from interstate.Accordingly, the feature that a wagering operator is a low margin operator is capable of having the necessary connection with interstate trade.The question would be whether in its practical operation a law aimed at low margin operators discriminated against interstate trade, just as in *Castlemaine Tooheys Ltd v South Australia*[30] the question was whether a law aimed at non-refillable bottles discriminated against interstate trade.However, this would not be the end of the inquiry – a law that singled out low margin operators would not impose a "burden" on interstate trade that attracted s 92 of the Constitution unless any discrimination had a protectionist effect; that is, a meaningful effect on competition from interstate in the relevant marketas distinct from a particular competitor.

(b) A finding of invalidity requires the court to have sufficient material to establish a meaningful effect on competition

24. A court could not find that a law is contrary to s 92 of the Constitution unless sufficient material is placed before it to establish that the law has or is likely to have a meaningful effect on competition as distinct from an effect on a particular competitor.

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27 Cf *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 388 [103] (the Court). See NSWR and HRNSW (Sportsbet) submissions, paras 67 and 68.

28 See *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at 384-385 [92] (the Court).

29 Contra RNSW and HRNSW (Betfair) submissions, paras 70 and 71. See *Betfair* (2008) 234 CLR 418 at 453 [18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ): s 92 protects "those persons who from time to time are placed on the supply side or the demand side of commerce and who are present in a given State at any particular time".

30 (1990) 169 CLR 436.

25. This is not to say that a person challenging a law must necessarily adduce evidence, admissible inter partes, that demonstrates on the balance of probabilities the effect or likely effect of a law on competition in a market. The usual principles concerning constitutional facts apply to cases arising under s 92 of the Constitution[31]– the court is not confined to admissible evidence, but may also rely on other "rational considerations" that are sufficiently convincing to support the conclusion drawn.[32]These rational considerations include the court's "knowledge of the society of which it is a part",[33] and "official facts".[34]

10 26. However, a court cannot act on the basis of mere assertion or speculation.[35] It will sometimes be obvious that a law imposes a burden on interstate trade, and the court can reach this conclusion based on its knowledge of society.[36]If it is not obvious, then evidence (or at least some sufficiently probative material) must be provided.[37]

27. Accordingly, it is too broad to say that protectionism is merely the converse of discrimination.[38]A finding of invalidity also requires that the discriminatory measure has a meaningful effect on competition (and that this burden cannot be justified).If sufficient material is not provided, then the court will be unable to make the orders sought by the party challenging validity.[39]

20 ***(c) Relevance of whether a law discriminates against interstate trade on its face***

28. For these reasons, it is relevant to validity (albeit not conclusive) whether a law discriminates against interstate trade on its face, or whether any

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31 See eg *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 (Dixon CJ, McTiernan and Fullagar JJ); *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR559 at 622 (Jacobs J); see further the cases collected in Leslie Zines, *The High Court and the Constitution* (5th ed 2008) at 649-651.

32 *Thomas v Mowbray* (2007) 233 CLR 307 at 519 [630], 522 [639] (Heydon J).

33 *North Eastern Dairy* (1975) 134 CLR559 at 622 (Jacobs J), cited in *Thomas v Mowbray* (2007) 233 CLR 307 at 519 [633] (Heydon J).

34 *Thomas v Mowbray* (2007) 233 CLR 307 at 522 [639] (Heydon J): of particular significance is "materials not prepared with an eye to litigation about the constitutional validity of the relevant statute".

35 See, by analogy, *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 80 [43] (the Court): the question of whether the sole objective of a law was to raise revenue "cannot be left to mere assertion".

36 See eg *Minnesota v Barber* 136 US 313 (1890) at 326 (cited with approval in *Betfair* (2008) 234 CLR 418 at 464 [46]): the "necessary effect" of the law under challenge "is to burden or obstruct commerce with other States".

37 See, by analogy, *Sportodds* (2003) 133 FCR 63 at 77 [34] (the Court): "Unless the discrimination is obvious on the face of the legislation ... it isnecessary to establish, as a fact, that the burden operates so as to discriminateagainst interstate trade".

38 Contra Betfair submissions, para 75.

39 *Sportodds* (2003) 133 FCR 63 at 82 [50] (the Court).

discrimination must be discerned from the practical operation of the law. This distinction does not involve a "false dichotomy".[40]

29. If a law discriminates against interstate trade and commerce on its face, it will often be obvious that the law also imposes a burden on interstate trade that has a meaningful effect on competition. *Bath v Alston Holdings Pty Ltd*[41] provides an example – once the majority justices concluded that the tax imposed on retailers discriminated against interstate tobacco, the burden on competition in the relevant market was obvious.[42]

30. It may be accepted that sometimes a law that does not discriminate against interstate trade may still impose a burden on interstate trade that is obvious, such that the burden is apparent on the court's knowledge of society.However, this would need to be a clear case, where this burden was the "necessary effect" of the law.[43] If there is room for argument as to the practical effect of the law, and whether it constituted a burden, then the court would require some probative material on the practical operation of the law before it could declare the law invalid.[44]Again, a "burden" on interstate trade means discrimination against interstate trade that has a meaningful effect on competition in the relevant marketas distinct from a particular competitor.

31. This submission – that a law that discriminates on its face can more readily be found to impose a burden on interstate trade – is consistent with this Court's approach in other areas.In considering whether a Commonwealth law is contrary to the *Melbourne Corporation* doctrine, it is relevant (but not decisive) that the law imposes a "special burden" on a State or States.[45]In considering whether a law is contrary to the implied freedom of political communication, it is relevant (but not decisive) that the law operates on communications that are political in nature.[46]

A.3 Effect of law is to be determined at the time of facts giving rise to challenge

32. The third point in the Betfair appeal concerns the time at which the validity of a law is to be assessed. As noted, the test for validity for s 92 of the Constitution involves two steps: (1) identifying a burden on interstate trade (that is discriminatory and protectionist), and (2) determining whether that

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40 Contra Betfair submissions, paras 66-71; see also para 80.

41 (1988) 165 CLR 411.

42 *Bath* (1988) 165 CLR 411 at 425 (Mason CJ, Brennan, Deane and Gaudron JJ). See also *Fox v Robbins* (1909) 8 CLR 115.

43 See *Minnesota v Barber* 136 US 313 (1890) at 326.

44 See, by analogy, *Sportodds* (2003) 133 FCR 63 at 80 [43]-[44], 82 [50] (the Court).

45 *Austin* (2003) 215 CLR 185 at 249 [124] (Gaudron, Gummow and Hayne JJ); Zines, *The High Court and the Constitution* (5th ed 2008) at 460-463.

46 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ), 169 (Deane and Toohey JJ); *Levy v Victoria* (1997) 189 CLR 579 at 619 (Gaudron J).

burden can be justified (that is, reasonably appropriate and adapted to achieving a non-protectionist object).

(a) Test of validity raises questions of fact, that are capable of changing over time

33. Each of these steps raises questions of fact.

34. Under the first step (burden), a court will determine: (i) the extent of any burden on interstate trade; (ii) (in the case of a law that does not discriminate on its face) whether the law discriminates against interstate trade in its practical operation; and (iii) whether the burden on interstate trade has or is likely to have a meaningful effect on competition.[47]

35. Under the second step (justification), a court will determine: (i) the object or objects of the law; (ii) whether alternative, non-protectionist means exist for giving effect to the non-protectionist object;[48] and (iii) whether those alternative means are practicable.[49]

36. The answer to many of these questions of fact is capable of changing over time[50] – particularly the extent of any burden; whether a law has or is likely to have a meaningful effect on competition; whether there are alternative, non-protectionist means of giving effect to the object of the law; and the practicality of those alternative means.[51]

(b) Factual questions would be determined as at the time of events underpinning the proceeding

37. These questions of fact would be determined as at the time of the events underpinning the proceeding. That is because the issue for the court is the validity of the law at that time, not whether it was valid at some earlier or later time.[52]

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47 See paras 16 and 17 above.

48 *Betfair* (2008) 234 CLR 418 at 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), 480 (Gaudron and McHugh JJ).

49 See *Rowe v Electoral Commissioner* (2010) 273 ALR 1 at 106-107 [438]-[442] (Kiefel J).

50 Often, the object or objects of the law would remain the same – however, the objects might alter over time through amendments to the law, or because a change in circumstances meant that the original mischief did not exist: see *Sportodds* (2003) 133 FCR 63 at 78 [38] (the Court); contra Victoria submissions (Betfair), para 17(b).

51 *Sportodds* (2003) 133 FCR 63 at 80 [43]-[44] (the Court).

52 See also, by analogy, *Sue v Hill* (1999) 199 CLR 462 at 487 [49], where Gleeson CJ, Gummow and Hayne JJ emphasised that meaning of "foreign power" in s 44(i) of the Constitution was to be determined at the material time (ie the person's nomination as a candidate), not at any earlier time.

38. In *Kruger v The Commonwealth*[53] the question of whether a decision was "reasonable" (which affected whether it was supported by the statute and also whether it could be regarded as punitive) was heldto be determined at the time of the events in question, not the time of the challenge many years later.[54]The same approach applies to whether at the time of the events giving rise to the challenge to the validity of a law,the law was reasonably appropriate and adapted to achieving a non-protectionist object.

39. Accordingly, there is the possibility that a change in factual circumstances could result in a change in whether the law is consistent with s 92 of the Constitution; for example, changes to the structure of the relevant market may alter the effect the impugned law has on interstate competition.[55]

A.4 Subjective purpose is relevant to the validity of an administrative decision (but not of a law)

40. The fourth point in the Betfair appeal is that subjective purpose is relevant in considering whether an **administrative decision** is consistent with s 92 of the Constitution. That is so, even though subjective purpose is not relevant to the validity of a **law**.[56]

41. Starting with the latter point, it is clear that subjective purpose or motive is **not** relevant to the validity of a law (even if such a purpose or motive could be ascertained).[57]The "object" of a law is determined objectively, by reference to its meaning and effect.[58]This is something more than an intention that an Act operate according to its terms[59] – theobject is the counterpart to the mischief that the law is intended to address.[60]Extrinsic materials can be used to determine this object.[61]

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53 (1997) 190 CLR 1.

54 *Kruger* (1997) 190 CLR 1 at 36-37 (Brennan CJ), 62 (Dawson J), 84-85 (Toohey J).

55 See eg *Armstrongv Victoria (No 2)* (1957) 99 CLR 28 at 73-74 (Williams J); *Commonwealth Freightersv Sneddon* (1959) 102 CLR 280 at 302 (Menzies J); Zines, *The High Court and the Constitution* (5th ed 2008) at 560-561.Contra Betfair submissions, para 82.

See also, in relation to the defence power, *Australian Textiles Pty Ltd v Commonwealth* (1945) 71 CLR 161 at 181 (Dixon J); *Hume v Higgins* (1949) 78 CLR 116 at 133-134 (Dixon J).

56 See *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 68 (Latham CJ); Betfair submissions, paras 103-111; contra *Betfair v Racing NSW* (2010) 268 ALR 723 at 777 [236]-[237] (Perram J).

57 See eg *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 (Dixon J); see also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 462 [423] (Hayne J) and *Thomas v Mowbray* (2007) 233 CLR 307 at 453 [425] (Hayne J, dissenting but not on this point).

58 *APLA* (2005) 224 CLR 322 at 394 [178] (Gummow J).

59 Cf *APLA* (2005) 224 CLR 322 at 462 [424]-[425] (Hayne J).

60 *APLA* (2005) 224 CLR 322 at 394 [178] (Gummow J).

61 See *Interpretation Act 1987* (NSW), s 34; *Acts Interpretation Act 1901* (Cth), s 15AB; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

42. If one of the objects of a law is protectionist, the law will not be appropriate and adapted to achieving a non-protectionist object, even if the law has other, non-protectionist objects as well.[62] However, the presence of a protectionist object, in itself, does not invalidate the law – there must also be a burden on interstate trade that is discriminatory and protectionist.[63]

43. The position is different with administrative decisions. The subjective purpose of an administrative decision – whether it is made for a protectionist purpose – **is** relevant to the validity of that decision. A decision made for a protectionist purpose will be invalid, if it is established further that the decision imposes a discriminatory and protectionist burden on interstate trade.

44. An administrative decision must of course be made only for the purposes of the authorising Act.The courts can therefore examine the actual purposes for which a decision was made.[64]An Act could not authorise a decision-maker to impose a discriminatory and protectionist burden on interstate trade for a protectionist purpose – the presence of **a** protectionist object would invalidate the law.[65] Therefore, a decision that imposes such a burden for a protectionist purpose would be ultra vires the statute.

45. The position with s 92 and administrative discretions is discussed further at Pt B.2 below.

B. SPORTSBET APPEAL

46. The Commonwealth makes three points in the Sportsbet appeal.

B.1 The validity of individual measures must be considered together if, as a matter of fact, they form a single scheme

47. The first point concerns the circumstances in whichlegally separate measures[66] can be considered together as part of a scheme, in determining

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62 *Betfair* (2008) 234 CLR 418 at 464 [47]-[48] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).Contra RNSW and HRNSW (Sportsbet) submissions, para 56, where it is suggested that a law would be valid, even if was enacted "in the hope" of protecting local traders, if the law was appropriate and adapted to achieving a non-protectionist object.

63 See *Betfair* (2008) 234 CLR 418 at 464 [48] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ): it is sufficient that a law have a protectionist object, because otherwise s 92 would permit "legislation **which imposes upon interstate trade a discriminatory burden of a protectionist kind**, merely because of the presence of other objectives" (emphasis added).

See NSW (Sportsbet) submissions, para 75.

64 See eg *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 193 (Gibbs CJ), 215-216 (Stephen J), 226 (Mason J), 264-265 (Aickin J), 284 (Wilson J).

65 See para 42 above.

66 The position is of course different if one Act refers to or incorporates another Act: cf *First Uniform Tax Case* (1942) 65 CLR 373 at 411 (Latham CJ); or if the legislation is connected together and the provisions of the legislative Acts are dependent the one upon the other: *Logan Downs Pty Ltd*

their validity.The Commonwealth accepts that, when it is contended that a law is contrary to a constitutional prohibition, it is necessary to examine the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – as well as its terms in order to ensure that the limitation or restriction "is not circumvented by mere drafting devices".[67]

48. However, an examination of the practical operation of a law does not permit reliance on the subjective purpose or motives of legislators to invalidate a law.[68] A reference to a "scheme" does not mean the Court can strike down a law because of the subjective purposes which the legislators may have wished to achieve. As Latham CJ (with Rich and McTiernan JJ agreeing) stated in *Moran*:[69]

> If the statutes carry out the scheme, their validity is determined by what they in fact do and the prearranged scheme is irrelevant. If the statutes do not carry out the scheme, their validity is still determined by what the statutes in fact do and again the scheme is irrelevant.

49. There will be discrimination against interstate trade if it is established that, notwithstanding that TAB Ltd is also required to pay the turnover fee, TAB Ltd was insulated from the effect of turnover fee.This requires showing more than just that an amount equivalent to the turnover fee in one or more years was paid to TAB Ltd by the racing control bodies, but rather that in the circumstances, TAB was not subject to **the particular burden** imposed on Sportsbet.Relevant factual issues would include: (i) whether TAB Ltd was paying to receive race field information before the introduction of the turnover fee, and (ii) if so, how much TAB Ltd was paying for that information (out of the total amount being paid by TAB Ltd under the Racing Distribution Agreement).

50. Again, there would only be a "burden" on interstate trade that attracts s 92 of the Constitution if this discrimination had a meaningful impact on interstate competition in the relevant market.

B.2 Law conferring a discretion will only be invalid if discretion cannot be exercised consistently with the Constitution

51. The second point in the Sportsbet appeal is that an administrative discretion – such as that contained in reg 16 of the *Racing Administration Regulation*

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v Commissioner of Taxation (1965) 112 CLR 177 at 187 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).

67 *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

68 *Moran* (1939) 61 CLR 735 at 774 (Starke J); see also 760 (Latham CJ).

69 (1939) 61 CLR 735 at 766. The issue in *Moran* was whether the effect of Commonwealth taxes on flour, when combined with Commonwealth grants of financial assistance to the States, was to impose a tax that discriminated between States. This Court held that the scheme was valid, largely because the grants were not subject to s 51(ii) or s 99.

See also *South Australia v The Commonwealth (The First Uniform Tax Case)*(1942) 65 CLR 373 at 411 (Latham CJ).

2005 (NSW)– will only be contrary to s 92 of the Constitution (or s 49 of the NT Self-Government Act) if the discretion cannot be exercised consistently with the constitutional requirement.

52. An administrative discretion ought not be contrary to s 92 if it is capable of being exercised consistently with the Constitution, and there are available means of judicial review to ensure that the discretion is exercised in a constitutionally valid manner.[70] The subjective purpose of the decision-maker is relevant for these purposes. If there is a protectionist purpose, the decision (if it imposes a burden on interstate trade that is discriminatory and protectionist) will be ultra vires the statute.[71] In other words, the question is whether a discretion **can** be exercised consistently with the Constitution (given the considerations to which a decision-maker is legally required to have regard), not whether **it is likely** that the discretion will be exercised consistently with the Constitution.[72]

53. This is consistent with the holding in *Betfair* that a provision conferring a discretion on the Minister to authorise a person to publish Western Australian race fields was invalid. In exercising that discretion, the Minister would be required to have regard to the statutory prohibition of betting exchanges – thus, the prospect of Betfair obtaining an approval was "illusory".[73] The prospect of a discretion being exercised consistently with the Constitution was "illusory" because of certain statutory considerations to which the decision-maker was bound to have regard.

54. In the Sportsbet appeal, any potential for a conflict of interest only goes to whether a decision-maker is likely to decide a certain way – it does not preclude the decision-maker from exercising the discretion consistently with the Constitution.[74]

55. In some cases, the identity and nature of the decision-maker will be relevant in another way – it may show the sorts of considerations to which the decision-maker may legitimately have regard,[75] and whether the decision-maker could be the subject of any lawful direction.[76] However, no State

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70 *Miller v TCN Channel 9* (1986) 161 CLR 556 at 613-614 (Brennan J). See further Victoria submissions (Sportsbet), paras 27-30.

71 See para 43 above.

72 Cf Sportsbet submissions, para 90.

73 *Betfair* (2008) 234 CLR 418 at 481 [119] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

74 Cf Sportsbet submissions, paras 86, 89-90.

75 See, by analogy, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 284 [11] (Gleeson CJ), 299 [59]-[60] (McHugh, Hayne and Callinan JJ).

76 See *Bread Manufacturers (NSW) v Evans* (1981) 180 CLR 404 at 429 (Mason and Wilson JJ): whether a Minister may validly issue a direction to a decision-maker depends on "the particular statutory function, the nature of the question to be decided, **the character of the tribunal** and the general drift of the statutory provisions in so far as they bear on the relationship between the tribunal and the responsible Minister" (emphasis added).

statute could authorise a decision-maker to act contrary to the Constitution (or s 49 of the NT Self-Government Act), regardless of the identity of the decision-maker.

B.3 Section 49 of the NT Self-Government Act has the same operation as s 92 of the Constitution

56. The third point in the Sportsbet appeal is that s 49 of the NT Self-Government Act imposes the same requirements in relation to trade between a State and the Northern Territory as s 92 of the Constitution imposes, from time to time, in relation to trade between the States.[77] Accordingly, the points made above in the Betfair appeal about s 92 apply equally to s 49 of the NT Self-Government Act.

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77 *AMS v AIF* (1999) 199 CLR 160 at 176 [36] (Gleeson CJ, McHugh and Gummow JJ), 192 [96] (Gaudron J), 212 [153] (Kirby J), 233 [221] (Hayne J).