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

BETWEEN: **BETFAIR PTY LTD (ACN 110 084 985)**

Appellant

AND

RACING NEW SOUTH WALES (ABN 86 281 604 417)

First Respondent

AND

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

Second Respondent

ATTORNEY-GENERAL FOR NEW SOUTH WALES

Third Respondent

IN THE HIGH COURT OF AUSTRALIA **No. S118 of 2011**
SYDNEY REGISTRY

BETWEEN: **SPORTSBET PTY LTD (ACN 088 326 612)**

Appellant

AND

STATE OF NEW SOUTH WALES

First Respondent

AND

RACING NEW SOUTH WALES (ABN 86 281 604 417)

Second Respondent

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Filed on behalf of: Attorney-General for the State of Queensland

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AND

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

AND

STATE OF SOUTH AUSTRALIA
Fourth Respondent

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SUPPLEMENTARY SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

I. CERTIFICATION

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

II. ARGUMENT

2. Queensland makes the following submissions in response to the letter of the Court dated 8 September 2011.

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Question 1: How does the concept of free trade in s 92 apply in relation to a national market for services?

3. The concept of free trade in s 92 of the Constitution is the antithesis of protection.[1] So much is apparent from *Cole v Whitfield* ('*Cole*')[2] and later cases.

4. In *Cole*, the Court unanimously identified the object of s 92 in these terms:[3]

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> The history of s. 92 points to the elimination of protection as the object of s 92 in its application to trade and commerce. The means by which that object is achieved is the prohibition of measures which burden inter-State trade and commerce and which also have the effect of conferring protection on intra-State trade and commerce of the same kind.

5. In *Betfair v Western Australia* ('*Betfair*'), Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ observed:[4]

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1 *Cole v Whitfield* (1988) 165 CLR 360 at 392-393.
2 (1988) 165 CLR 360.
3 (1988) 165 CLR 360 at 394.

> *Cole v Whitfield* established that, at least in its application to trade and commerce among the States, the object of s 92 is the elimination of protection. The term "protection" is concerned with the preclusion of competition, an activity which occurs in a market for goods or services.

6. The concept of free trade in s 92, understood as the absence of protection, applies in the same way to a national market for services as it does to other markets that involve trade or commerce among the States.[5] In every case, a court must determine whether interstate trade is subject to discriminatory burdens of a protectionist kind.[6] In practice this will involve determining whether the impugned measure imposes a real competitive disadvantage on out-of-State providers of goods or services ('out-of-State traders') in a market and whether in-State traders in the same market are granted a corresponding competitive advantage.[7] Absent facially discriminatory measures or agreement between the parties of the kind present in *Castlemaine Tooheys Ltd v South Australia*,[8] evidence about the nature of the market and the likely impact of the measure on out-of-State and in-State traders will be necessary. The nature of the court's inquiry, however, remains the same whether the market for goods or services is a regional one, involving, say, two States only, or a truly national one.

7. Three factors support these conclusions.

8. First, the language of s 92 of the Constitution does not suggest that free trade carries a special meaning with respect to national markets for services. Section 92 applies to trade and commerce 'among the States'; it does not distinguish between interstate trade in national markets involving all the States and interstate trade in smaller regional markets limited to, say, two States. Nor does s 92 distinguish between types of trade and commerce, such as that between goods and services. Accordingly, as a textual matter, the concept of free trade should not be treated as applying to national markets for services in a substantially different manner from its application to other markets.

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4 (2008) 234 CLR 418 at 452 [15].

5 For convenience, these submissions will refer to such trade as 'interstate trade'.

6 *Cole* (1988) 165 CLR 360 at 393, 395.

7 See *Cole* (1988) 165 CLR 360 at 409; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 202-203; *Betfair* (2008) 234 CLR 418 at 460 [36], 461-463 [39]-[44]. As these authorities demonstrate, although s 92 deals with interstate trade, it may be impossible to determine discrimination against interstate trade without considering the measure's impact on out-of-State and in-State traders. The situation in the United States also recognises this: see C O'Grady, 'Targeting State Protectionism instead of Discrimination under the Dormant Commerce Clause' (1997) 34 *San Diego Law Review* 571 at 583: 'Practically speaking, it appears that the [Supreme] Court [of the United States] will always focus on people, perhaps because it is nearly impossible to determine discrimination against an article of commerce without considering the economic interests of the actors who participated in the article's manufacture, distribution, sale, and consumption.'

8 (1990) 169 CLR 436.

9. Secondly, there is no conceptual difficulty in applying the concept of free trade in s 92 to markets for services, whether these markets be national or merely regional. For example, State laws that purport to prevent the supply of particular services to residents of a State by out-of-State traders alone would prima facie breach s 92. So would State laws placing more onerous restrictions on the supply of such services by out-of-State traders than on their in-State competitors. These laws would be protectionist. The provisions invalidated in *Betfair* are examples of such laws.[9]

10. Thirdly, these conclusions are consistent with the authorities regarding the so-called dormant Commerce Clause in Article I, § 8, cl 3 of the United States Constitution.[10] The Supreme Court has held that the clause strikes down State measures that discriminate against interstate trade.[11] But it has not distinguished between goods and services in the application of that test. In some cases, the Supreme Court has invalidated laws that discriminate against the provision of services in interstate trade;[12] in others, it has invalidated laws that discriminate against interstate trade in goods.[13] Given that the dormant Commerce Clause, like s 92, is concerned with the avoidance of protectionism and the creation of national markets,[14] this suggests that there should be no distinction between the application of free trade in s 92 to markets for services and markets for goods.

Question 2: In the past, protectionist measures found to offend against s92, 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?

11. As explained above,[15] s 92 is intended to eliminate measures that protect in-State interests against competition from out-of-State interests in a market.[16] In

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

10 This provides: 'Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.

11 *United Haulers Association Inc v Oneida–Herkimer Solid Waste Management Authority* (2007) 550 US 330 at 340.

12 See, for example, *C & A Carbone Inc v Town of Clarkstown, New York* (1994) 511 US 383 (waste disposal services).

13 See, for example, *Guy v Baltimore* (1879) 100 US 434 (fees on use of public wharves by all vessels carrying products of States other than Maryland); *Baldwin v GAF Seeling Inc* (1935) 294 US 511 (law prohibiting the sale of milk in New York unless a minimum price has been paid); *Granholm v Heald* (2005) 544 US 460 (laws that restricted out-of-State wineries, including those from California and Virginia that took orders by internet, from directly shipping to customers in Michigan and New York but imposed no such burden on in-State wineries).

14 See, for example, *H.P. Hood & Sons, Inc. v. Du Mond* (1949) 336 US 525 at 539; *Hughes v Oklahoma* (1979) 441 US 322 at 325-326; *West Lynn Creamery v Massachusetts Dairy Equalization Fund* (1994) 512 US 186 at 192.

15 Paragraphs 4 to 6.

practice, s 92 requires a court to ask whether a measure imposes a real competitive disadvantage on out-of-State traders and whether in-State traders in the same market are granted a corresponding competitive advantage. But irrespective of whether the market is national or regional (being confined to only a few States) and irrespective of technological developments such as the internet[17] that greatly facilitate interstate trade, the nature of the inquiry is the same.

12. It is true that, in a national market, it may sometimes be difficult to classify traders as being in-State or out-of-State and to determine whether there is a burden of a protectionist kind. But the difficulties should not be exaggerated. In *Betfair*, for example, the Court had little difficulty in treating the RWWA and other licensed bookmakers in Western Australia as in-State operators who were protected from competition by the provisions of the *Betting Control Act 1954* (Cth).[18] That allowed the Court to find that the relevant provisions of that Act imposed discriminatory burdens of a protectionist kind on interstate trade.[19]

13. In any event, if in a particular case the nature of the connection between traders in a market and a given State would make it impossible to say that in-State traders have been protected from competition, that would only indicate that there is no breach of s 92. It would not require the concept of protectionism in s 92 to be jettisoned.

Question 3: 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 on an interstate trader by comparison with other traders irrespective of whether those traders can be characterised as trading intrastate or interstate?

14. The answer is 'no', for several reasons.

15. First, as explained in paragraphs 8 above, s 92 does not refer to national markets for goods or services. It refers instead to trade, commerce and

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16 (2008) 234 CLR 418 at 460 [36], 461 [39] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

17 The internet's impact on interstate trade, however, should not be exaggerated. The telegraph and telephone could also be said to have revolutionised trade in goods and services across colonial and State borders.

18 (2008) 234 CLR 418 at 481-482 [118]-[122].

19 Apart from *Betfair*, there is no reason to think that the concept of protectionism is somehow rendered irrelevant to trade within a national market. Consider a hypothetical market in wine, the participants of which include large wineries as well as much smaller family vineyards. All these traders might sell locally and to persons in other States, and orders might be made through the internet or by mail order. If a particular State were to prohibit the sale of wine directly to customers in the State but were to exempt all or most wineries located within a State from the prohibition, there might well be discriminatory burden of a protectionist kind. The fact that there would be a national market would not render the concept of protectionism meaningless.

intercourse 'among the States'. Section 92 should therefore apply in the same way to interstate trade whether or not there is a national market for goods or services.

16. Secondly, s 92 is concerned with the elimination of protection. No party has challenged that proposition. That purpose of s 92, however, does not require the prohibition of all measures that may happen to have the effect of imposing a competitive disadvantage on one or more out-of-State traders in a national market. Provided that a measure does not impose a discriminatory burden of a protectionist kind on interstate trade as such,[20] it is irrelevant that the measure may make it more difficult for a particular out-of-State trader to compete against all other out-of-State traders and in-State traders.

17. Thirdly, and relatedly, s 92 does not confer individual rights. So much is clear from *Cole* and later cases.[21] To treat individual out-of-State traders within a national market as being protected against measures that impose a competitive disadvantage on them by comparison with other traders, whether those traders can be classified as out-of-State or not, would effectively resurrect the individual rights view of s 92. That step should not be taken.

18. Fourthly, these views are consistent with cases on the dormant Commerce Clause. The Supreme Court of the United States has consistently held that the fact that the burden of a measure falls on a single out-of-State trader, or some group of out-of-State traders, does not by itself mean that there is discrimination against interstate trade.[22] No different rule should be applied here.

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20 For an example of measures which imposed a competitive disadvantage on only one out-of-State trader but which were held to discriminate in a protectionist way against interstate trade, see *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436. This result flowed, however, from evidence about the state of the particular market and the effect of the measures on the Bond brewing companies' market share and competitiveness: see at 447-449 (case stated), 463-464, 475-476 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

21 See *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 201.

22 *Exxon Corporation v Governor of Maryland* (1978) 437 US 117 at 126-128; *Minnesota v Clover Leaf Creamery Company* (1981) 449 US 456 at 474; *CTS Corporation v Dynamics Corporation of America* (1987) 481 US 69 at 88.