IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S116 of 2011

BETWEEN:

BETFAIR PTY LIMITED
(ACN 110 084 985)

Appellant

AND

RACING NEW SOUTH WALES
ABN 86 281 604 417

First Respondent

HARNESS RACING
NEW SOUTH WALES
ABN 16 962 976 373

Second Respondent

ATTORNEY-GENERAL
(NEW SOUTH WALES)

Third Respondent

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)

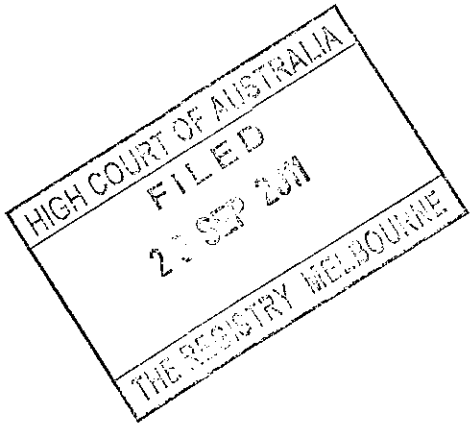
Second Respondent

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

Third Respondent

ATTORNEY-GENERAL
FOR SOUTH AUSTRALIA

Fourth Respondent



SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING) IN RESPONSE TO THE LETTER FROM THE COURT DATED 8 SEPTEMBER 2011

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(a) Summary

1. These submissions are in response to the letter from the Court dated 8 September 2011. They are in a form suitable for publication on the internet.

2. The Attorney-General for the State of Victoria submits that the answers to the questions in the letter are, in summary, as follows:

Q1: *How does the concept of free trade in s 92 apply in relation to a national market for services?*

The concept of "free trade" in s 92 means "trade free from protectionism". The subject of the guarantee in s 92 is the activities which constitute interstate trade or commerce, not the persons who undertake those activities. It guarantees that those activities are free from burdens which can be characterised as protectionist. That is so whether the trade or commerce is part of a national or sub-national market and whether it is in goods or services. In its application to services, s 92 mandates that, whatever the geographic scope of the market, a measure may not discriminate against the provision of a service across state borders, when compared with a competing intrastate service, in a way which gives the latter a competitive advantage over the former, unless it is reasonably appropriate and adapted or reasonably necessary to achieve a legitimate non-protectionist purpose.

Q2: *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?*

See the answer to question 1.

Q3: *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?*

No. Section 92 could be held to have that operation only if the Court overruled the line of cases beginning with *Cole v Whitfield*[1] and culminating in *Betfair Pty Ltd v Western Australia* (***Betfair v WA***).[2] The Court should not do so.

3. The reasons for those answers are as follows.

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[1] (1988) 165 CLR 411.

[2] (2008) 234 CLR 418.

(b) The settled approach to s 92 and its continuing application

4. The Attorney-General for Victoria repeats paragraphs 7 to 12 of his principal submissions in *Betfair Pty Ltd v Racing New South Wales & Ors* (**the principal submissions**) and elaborates as follows.

5. It has been the settled doctrine of this Court since *Cole v Whitfield*[3] that s 92 of the Constitution guarantees to interstate trade and commerce only a limited freedom — freedom from "protectionism".[4] As the Court there said:[5]

> The expression "free trade" commonly signified in the nineteenth century, as it does today, an absence of protectionism, i.e., the protection of domestic industries against foreign competition. Such protection may be achieved by a variety of different measures ... which, alone or in combination, make importing and dealings with imports difficult or impossible. ... Section 92 precluded the imposition of protectionist burdens: not only interstate border customs duties but also burdens, whether fiscal or non-fiscal, which discriminated against interstate trade and commerce.

6. This conclusion, which was based on an analysis of the history of s 92, has been applied and refined by this Court in a series of cases since *Cole v Whitfield*.[6] All have accepted the limited nature of the freedom. All have accepted that it turns on a comparison between the treatment of interstate and intrastate trade or commerce.

7. The appropriate framework for analysis of issues arising under s 92 of the Constitution is that set out in paragraph 51 of the principal submissions. Stating that framework at a level of generality by reference to legislative measures, the task is one of characterising the measure as protectionist or otherwise by answering the following questions:

   (a) Does the measure in its terms or practical operation discriminate against interstate trade or commerce, meaning either that:

      (i) the measure in its terms draws a distinction between interstate and intrastate trade or commerce otherwise than by reference to a relevant difference between them;

      (ii) the measure in its terms treats interstate and intrastate trade or commerce alike notwithstanding a relevant difference between them; or

      (iii) the practical operation of the measure shows that the objective intention of the legislature was to achieve either of the above effects?

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3 (1988) 165 CLR 360.

4 *Cole v Whitfield* (1988) 165 CLR 360 at 394.

5 *Cole v Whitfield* (1988) 165 CLR 360 at 392–393.

6 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418. See also *AMS v AIF* (1999) 199 CLR 160; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

(b) If so, does the measure burden interstate trade or commerce to its competitive disadvantage or benefit intrastate trade or commerce to its competitive advantage?

(c) If so, is that burden or benefit none the less reasonably necessary to achieve a legitimate non-protectionist purpose?

8. *Betfair v WA*[7] did not depart from these principles. As in the present case, all parties and interveners there accepted that the approach to s 92 remained that articulated in *Cole v Whitfield* and subsequent cases, and the plurality accepted the proposition that:

> s 92 was not designed to create "a laissez-faire economy in Australia"; rather, it had a more limited operation, 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.[8]

9. The outcome in *Betfair v WA* itself was illustrative of the framework set out above, as explained in paragraph 25 of the principal submissions. As explained further below, passages in the reasons of the plurality noting difficulties with the application of s 92 in the modern economy, and the conception of that provision as concerning competition within a market, must be read in this light.

10. Accordingly, nothing in *Betfair v WA* supports the submission of the appellants that the application of s 92 must now be approached, not by reference to discrimination against interstate trade or commerce, but by consideration of whether a measure "restrict[s] competition in the national market in pursuit of a narrow economic interest".[9] That approach entails overruling the fundamental basis of the decisions in *Cole v Whitfield* and the cases following it.

11. There is nothing to justify such a step. Both the words of s 92 and the construction of those words adopted in *Cole v Whitfield* are sufficiently "broad and general ... to apply to the varying conditions which the development of our community must

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7 (2008) 234 CLR 418.

8 (2008) 234 CLR 418 at 460 [36] (emphasis added). See also at 451–454 [10]–[20]. (The Attorney-General for Victoria makes submissions at paragraphs 14 to 22 below as to the distinction between the "players" in a market and "transactions" in that market.) Cf art 28 of the *Treaty Establishing the European Community*, which provides: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." It is not limited to measures which give an advantage to trade within a Member State over trade between Member States: *Joined Cases C-60 and 61/8 Cinéthèque SA v Fédération Nationale des Cinémas Français* [1985] 4 ECR 2605 at 2626 [21]–[22]; *Case C-145/88 Torfaen Borough Council v B & Q plc* [1989] ECR 3851 at 3888 [12]. That is not surprising, given its language. It is in quite different terms to s 92 of the Constitution. The European authorities concerning art 28 cannot be applied to s 92 without overruling *Cole v Whitfield* (1988) 165 CLR 360 and discounting the historical analysis which led the Court there to conclude that s 92 invalidated only interference with interstate trade or commerce that was protectionist.

9 Appellant's supplementary submissions in response to the High Court's letter dated 8 September 2011 in *Betfair Pty Ltd v Racing New South Wales & Ors* (S116 of 2011) **(Betfair's supplementary submissions)**, paragraph 9. See to the same effect, the appellant's response to the questions of the court in *Sportsbet Pty Ltd v State of New South Wales & Ors* (S118 of 2011) **(Sportsbet's supplementary submissions)**, paragraph 17. The nebulous concept of "narrow economic interest" is addressed below at paragraphs 53 to 63.

involve",[10] including those identified in *Betfair v WA*. In particular, the submissions below explain how the approach in the *Cole v Whitfield* line of cases continues to be applicable and relevant to a national market for services, in those cases where such a national market exists.

(c) Question 1 – Section 92 and services

12. Question 1 involves two distinct issues: first, the application of s 92 to services; and secondly, the application of s 92 in "national markets". It is convenient to address the second aspect of question 1 as part of question 2 and to address first the question of the application of s 92 to services.

13. In considering that issue, it is necessary to emphasize, as referred to in paragraphs 53 to 56 of the principal submissions, two important limitations on the freedom guaranteed to trade or commerce by s 92: it is focussed on trade or commerce, not persons; and it is focussed on interstate, not intrastate, trade or commerce.

(i) The focus on trade or commerce, not persons

14. Section 92 is focussed upon trade or commerce itself, ie the trading or commercial activities, not the persons undertaking those activities. That was well recognised before *Cole v Whitfield*. As Brennan J said in *Australian Coarse Grains Pool v Barley Marketing Board*:[11] "The subject of the immunity is trade, not persons".

15. That focus did not change with *Cole v Whitfield*. Thus, in *Cole v Whitfield* itself, the Court said that the impugned law "is unquestionably a burden on the interstate trade and commerce in crayfish caught in South Australian waters and sold in Tasmania" and went on to consider whether it gave "Tasmanian crayfish production or intrastate trade and commerce a competitive or market advantage over imported crayfish or the trade in such crayfish".[12] So too, in *Bath v Alston Holdings Pty Ltd*, the majority considered that the impugned measures "discriminate against interstate purchases of tobacco in favour of purchases in Victoria".[13] The focus in both cases remained on the transactions, not the traders.

16. It is true that the language in some of the cases since *Cole v Whitfield* refers to the persons involved in trade or commerce, not the trading or commercial transactions themselves. But in these cases, because of the nature of the transactions, the out-of-State trader's transactions were necessarily interstate trade or commerce and the in-State trader's transactions were necessarily intrastate trade or commerce.

17. Thus, in *Bath v Alston Holdings Pty Ltd*, the majority said that the impugned measures "protect local wholesalers and tobacco products they sell from the competition of an out of State wholesaler whose products might be cheaper in some

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[10] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367–8 per O'Connor J, quoted in *Betfair v WA* (2008) 234 CLR 418 at 453 [19].

[11] (1985) 157 CLR 605 at 649. See also *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 100 per Isaacs J: "*trade and commerce consists of acts not things*. The things themselves are indispensable, just as the human actors are; but they do not form part of the trade and commerce itself" (original emphasis).

[12] *Cole v Whitfield* (1988) 165 CLR 360 at 409.

[13] (1988) 165 CLR 411 at 425.

other Australian market place".[14] The reference to "local wholesalers" was to those who held a wholesale tobacco merchant's licence under Victorian legislation, which was required only for wholesale sales of tobacco in Victoria: their sales to Victorian retailers would necessarily be intrastate transactions. Conversely, the reference to an "out of State wholesaler" was to someone who did not hold such a licence, and who was thus precluded from selling wholesale tobacco in Victoria: their sales to Victorian retailers would necessarily be interstate transactions.

18. In cases such as this, the traders can be seen as a convenient proxy for the trade. The validity of a measure may thus be tested by reference to its operation on traders, identified as "intrastate traders" or "interstate traders".

19. This may also be seen in *Betfair v WA*. Betfair sought to compete, in interstate trade (from Tasmania to Western Australia), with "in-State wagering operators". The in-State wagering operators were the Western Australian totalisator and bookmakers licensed in Western Australia to conduct business on race courses in Western Australia.[15] The "demand side" of the market at issue was represented by Mr Erceg, a resident of Western Australia.[16] The transactions between such persons and the in-State wagering operators were thus necessarily intrastate transactions. Accordingly, consideration of the effect of the impugned provisions on competition between the in-State and out-of-State operators[17] was a proxy for the requisite comparison between the treatment of interstate and intrastate transactions.

20. However, in some cases, traders are not a proxy for trade. The development of the "new economy"[18] means that a trader today might have premises in multiple States or none, and might engage in intrastate and interstate transactions with equivalent ease by means of the internet. As the plurality observed in *Betfair* of references in *Cole v Whitfield* to "domestic industry":[19]

> The references ... highlight the practical and conceptual perplexity that arises in accommodating interstate commerce to the notion of protectionism in intrastate trade and commerce. Further, subsequent references in *Castlemaine Tooheys*[20] to "the people of" the State and to "its" well-being, rather than to 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, have their own difficulties. They appear to discount the significance of movement of persons across Australia, and of instantaneous commercial communication, and to look back to a time of physically distinct communities located within colonial borders and separated by the tyranny of distance.

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[14] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 425.

[15] *Betfair v WA* (2008) 234 CLR 418 at 466 [55], 472 [80].

[16] *Betfair v WA* (2008) 234 CLR 418 at 448 [2], 449 [4].

[17] *Betfair v WA* (2008) 234 CLR 418 at 481 [118], [121]–[122].

[18] *Betfair v WA* (2008) 234 CLR 418 at 452 [14].

[19] *Betfair v WA* (2008) 234 CLR 418 at 453 [18].

[20] (1990) 169 CLR 436 at 472–473.

21. In many cases in the modern economy, a trader cannot be identified as part of the "domestic industry" of any particular State by the simple criteria of the past, such as residence or principal place of business. Then, it is necessary to recall that s 92 is a freedom for trade, not traders, and to pay close regard to the transactions said to be burdened by the impugned measure.

22. What s 92 thus prohibits is the attempt by a State to promote transactions within the State over transactions between the State and other States (i.e. among the States). It prohibits protection of the State's internal economic activity. That is the proper understanding of references to the State's "domestic industry" in *Cole v Whitfield*.

(ii) The focus on interstate, not intrastate, trade or commerce

23. The second limitation of the freedom guaranteed by s 92 is that it is focussed upon trade or commerce only of a particular kind, namely trade or commerce "among the States". That is the textual origin for the focus, since Federation, on interstate trade or commerce. As in s 51(i) of the Constitution, which uses the same words, the Constitution mandates for the purposes of s 92 a distinction between interstate and intrastate trade or commerce.[21] That distinction cannot simply be ignored.[22]

24. Where a measure is said to burden certain trading or commercial activities, s 92 is attracted only if those activities can properly be said to be "interstate". This requires there to be some aspect of the activities which crosses State boundaries. Precisely what transactions will bear that character is a question of fact and degree, to be determined by considering the substance of the transaction. In that task, cases concerning s 92 prior to *Cole v Whitfield* will be of assistance.[23]

(iii) The application of s 92 to services

25. The conclusion that the substance of a transaction involves interstate trade or commerce is more readily reached in a case involving trade in goods than it is in relation to services. The passage of the goods across State boundaries will ordinarily provide the requisite interstate element. The sale and transport of apples grown in New South Wales to a retailer in Victoria plainly constitutes interstate trade or commerce. If a law of Victoria makes it more difficult for such a transaction to occur, when compared with the sale and transport of apples grown in Victoria to the retailer there, the law discriminates against interstate trade or commerce. It matters not in either case where the grower is resident or has their place of business, whether they also grow apples in other States, or whether they also sell apples in some or all other States.

26. In the case of services, the identification of an interstate element may be more difficult. It is only "those aspects of ... the provision of services which involve movement across State boundaries"[24] that fall within the concept of interstate trade or

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[21] See further paragraph 54 of the principal submissions.

[22] Cf, e.g., Betfair's supplementary submissions, paragraph 2; Sportsbet's supplementary submissions, paragraphs 6, 20.

[23] See, eg, *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 627ff per Mason J, 650–651 per Brennan J, 664–668 per Dawson J.

[24] *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 628 per Mason J.

commerce. That is not to draw an arbitrary distinction between goods and services. It is to recognise that, in many cases, the provision of a service will take place at a single location — where the service is received. Where out-of-State residents are discriminated against in the provision of services within a State, any remedy might thus more readily be found in s 117 of the Constitution than s 92.[25]

27. The difficulty in the past of providing services across distances may explain why, of the pre-*Cole v Whitfield* cases, relatively few deal with trade or commerce in services, as opposed to goods. The *Bank Nationalisation Case*[26] is one example in which it was held that the transactions in question did constitute interstate trade or commerce. *Hospital Provident Fund Pty Ltd v Victoria*[27] and the reasons of Dawson J in *Street v Queensland Bar Association*,[28] discussed in paragraphs 59 to 62 of the principal submissions, provide contrary examples.[29]

28. Today, the provision of services by communications across State boundaries may mean that there are more occasions on which s 92 will operate in relation to services. But, in that case, the question is still whether the interstate communication (by which the service is provided) is subjected to a burden of the relevant kind. Thus, in *Betfair v WA*, the impugned measures precluded the communications which Betfair sought to make into Western Australia from Tasmania and by which it sought to provide wagering services to persons who received the communications in Western Australia. In such cases, it will be necessary to determine whether, in substance, the communication bears the character of interstate trade or commerce.

29. Apart from cases involving the provision of services by interstate communications, questions of fact might arise whether particular services are provided interstate. Where a patient ordinarily resident in Melbourne sees a doctor at the latter's Sydney practice while the patient is on holidays in Sydney, there is surely no interstate trade or commerce. But the same result might not necessarily follow where the patient travels from Melbourne to Sydney specifically to see the doctor or where the doctor travels to Melbourne specifically to see the patient.[30]

30. In each case, it would be necessary to consider whether the impugned measure burdened a transaction in interstate trade or commerce in such a way as to merit characterisation as protectionist.

31. The approach to s 92 is thus the same for goods and for services.[31]

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[25] See, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461.

[26] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 380–383 per Dixon J, approved by the Privy Council in *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 at 632–633.

[27] (1953) 87 CLR 1.

[28] (1989) 168 CLR 461 at 540.

[29] *Boyd v Carah Coaches Pty Ltd* (1979) 145 CLR 78 was a case involving services, but there was interstate trade and commerce because the services consisted of the movement of paying passengers across State borders. *Mansell v Beck* (1956) 95 CLR 550 was considered, not as a case involving interstate provision of the service of a lottery, but as involving the movement of money and lottery tickets across State borders.

[30] Advertising by the doctor into Victoria would involve interstate trade or commerce: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

[31] Cf the position in Europe, where there are quite separate provisions for goods and services in the *Treaty Establishing the European Community*: see Title I ("free movement of goods") and compare Title III ("free

(d) Question 2 – Section 92, protectionism and national markets

32. The Attorney-General for Victoria makes three submissions in answer to question 2. First, the approach to s 92 articulated in *Cole v Whitfield* and applied in subsequent cases does not turn on whether the market in question is a "national" or a "sub-national" market: that approach remains relevant and applicable whatever the scope of the market. Secondly, nothing in *Betfair v WA* supports any different approach. Thirdly, the approach contended for by the appellants should not be accepted.

(i) *The operation of the* Cole v Whitfield *test in a national market*

33. In the competition law context, a "market" is understood as:[32]

> 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.

The market "describes a range of economic activities defined by reference to particular economic functions (eg manufacturing, wholesale or retail sales), the class or classes of products, be they goods or services, which are the subject of those activities and the geographic area within which those activities occur".[33] A "national market" is one whose participants are located throughout all States and Territories, and where the transactions which constitute the market take place throughout all States and Territories.

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movement of persons, services and capital"). Further, within Title III, there is separately guaranteed a "right of establishment" in chapter 2 and a "freedom to provide services" in chapter 3. The text and structure of the provisions is quite different to s 92 of the Constitution. A number of cases in Europe have considered whether gambling and internet gambling fall within the freedom to provide services, now in art 49 of the *Treaty Establishing the European Community*: see *Case C-275/92 Her Majesty's Customs and Excise v Schindler* [1994] ECR I-1039 (lottery); *Case C-67/98 Questore di Verona v Zenatti* [1999] ECR I-7289 (bookmaking); *Case C-243/01 Gambelli* [2003] I-13031 (internet bookmaking); *Case C-42/07 Liga Portuguesa de Futebol Profissional v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* [2009] ECR I-7633 (internet bookmaking, casino games and lottery). But that article is in quite different terms to s 92: it provides that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". There is a considerable body of jurisprudence on the meaning of "establishment" for this purpose.

[32] *Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 190, referred to with approval in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 188 per Mason CJ and Wilson J, 199–200 per Dawson J, 210 per Toohey J, and *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 413–414 [99], 422–423 [133] per Gleeson CJ and Callinan J, 454–455 [248]–[249] per McHugh J.

[33] *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158 at 174 per French J (FC).

34. The question of market definition in the competition law context is notoriously complex and contestable. As Deane J said of that task in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*:[34]

> The identification of relevant markets and the definition of market structures and boundaries ... involves value judgements, about which there is some room for legitimate differences of opinion. The economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap with one or more others. The outer limits ... of a particular market are likely to be blurred ...

10 The question regularly involves highly technical expert evidence, and protracted pleadings and evidentiary disputes.

35. Insights from competition law may assist in the identification of the discrimination against interstate trade or commerce which attracts the operation of s 92. In particular, tools from competition law analysis concerning the effect of actions in a market may reveal that the practical operation of a facially neutral law is to discriminate against interstate trade or commerce. That may reveal that the law merits characterisation as protectionist.

36. Conversely, in a national market, with many participants, each of whom regularly competes for custom throughout Australia, it may be less likely that a State will
20 identify any part of the market as its "local" industry and thus deserving of its protection. That may also be so in a market that is less than national but nevertheless geographically broad. Accordingly, the geographic scope of the market may inform the factual context in which the characterisation exercise mandated by s 92 is performed.

37. Further, it is no doubt true that, when compared with the position at the time of Federation, the Australian economy today may more readily be conceived of (in a non-technical sense) as a "national" economy, rather than a collection of State economies. That is so in part because of advances in technology, including the internet, but also because of advances in other fields, such as transport. More
30 transactions which constitute the nation's economic activity take place across State borders than was the case at the time of Federation. So much was recognised by the plurality in *Betfair v WA*.[35]

38. As explained in paragraph 12 of the principal submissions, these advances have facilitated competition across State lines, and have fostered the development of interstate and national markets in fields in which previously there were only local markets. This has changed the factual context within which s 92 operates, increasing the occasions upon which persons engaged in interstate trade may seek to rely upon s 92 to impugn State laws.

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[34] (1989) 167 CLR 177 at 195–196. See also *Australia Meat Holdings Pty Ltd v TPC* (1989) ATPR 40-932 at 50,097 per Sheppard J: "Obviously the drawing of any line to define the geographic market is an arbitrary exercise which will never be completely correct. There will always be a certain fuzziness about it ..."

[35] *Betfair v WA* (2008) 234 CLR 418 at 453 [18].

39. The nature and extent of the relevant market will be a question of fact in every case. It cannot be said that there is a national market for all goods (or especially for all services), or that there are no "State" markets. Not all markets (in a competition law sense) within the national economy are national markets: over the last 20 years, many cases in the competition law context have concerned markets defined within State borders or even more locally.[36] Services, especially those delivered personally, are by their nature typically provided in highly localised markets. It would therefore be unsafe for the law to be developed according to any premise that there is predominantly a single "national market".

40. Be that as it may, it is neither necessary nor desirable for the characterisation of a market as "national" or otherwise to affect the legal questions to be asked in considering the operation of s 92. Section 92 does not, and ought not to, turn on fine and complex questions of market definition.

41. The necessary and sufficient premise for the operation of s 92 is that there is at least the potential for interstate trading or commercial transactions to compete with intrastate trading or commercial transactions. That premise is readily satisfied, no doubt, in those cases where there is a national market, but that is not the constitutional criterion for the operation of s 92.[37]

42. Given that s 92 is concerned with trade across State boundaries, it has <u>always</u> posited a market or potential market that is not geographically contained within a single State. The existence of markets that transcend State boundaries is therefore not new. It is not a product of the new economy.[38]

43. Conversely, even in a national market, some transactions will be intrastate, with respect to a particular State, and some will be interstate, with respect to that State. There is no reason a transaction contained wholly within the borders of one State should be regarded as interstate where the market in which it takes place is national, but intrastate where the market is confined to some subset of the States and Territories.

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[36] *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 (market for real estate advertising in eastern Sydney); *Davids Holdings Pty Ltd v Attorney-General (Cth)* (1994) 49 FCR 211 (independent wholesale market for supply of grocery products in Queensland and northern New South Wales); *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 (market for street directories in Melbourne); *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374 (wholesale market for concrete masonry products in Melbourne); *ACCC v Australian Medical Association Western Australian Branch Inc* (2003) 199 ALR 423 (market for relevant medical services in Perth and surrounding suburbs); *ACCC v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339 (wholesale market for purchase of bread in Victoria).

[37] Despite the description of various decided s 92 cases in paragraph 28 of Betfair's supplementary submissions, none of those cases revolved around the existence or otherwise of a national market. Betfair does not suggest that there was any finding or even any reference to national markets in the reasoning in these cases (other than *Betfair v WA* (2008) 234 CLR 418). Even in *Betfair v WA*, Betfair did not plead the existence of a national market for wagering services. It pleaded transactions that established the existence of trade and commerce among the States.

[38] See, eg, *New South Wales v The Commonwealth* (1915) 20 CLR 54, where this Court considered the application of s 92 to the sale by a New South Wales resident of wheat located in New South Wales to a Victorian company for delivery in Victoria.

44. If, for example, a producer of goods in Victoria sells some goods within Victoria and exports other goods to New South Wales, where those goods are sold in competition with goods produced in New South Wales, s 92 prevents New South Wales from imposing a discriminatory burden on the sales from Victoria which protects the sale in New South Wales of locally produced goods. That is so whether or not, in addition to exporting to New South Wales, the producer of goods in Victoria also exports goods to South Australia, or indeed to all other Australian States as a participant in a "national market". Nor does the position change if producers of goods in New South Wales, in addition to selling them within New South Wales, also export goods to other Australian States where they compete with Victorian produced goods.

45. The concept of protectionism explained in paragraph 22 above, namely the protection of the State's internal economic activity, makes sense in both national and sub-national markets, as well as in relation to economic activity that is part of the new economy.

(ii) Betfair v WA

46. It is against this background, and the acceptance of *Cole v Whitfield* referred to in paragraphs 8 and 9 above, that the following comments in *Betfair v WA* must be understood:[39]

> The term "protection" is concerned with the preclusion of competition, an activity which occurs in a market for goods or services. To focus upon the geographic dimension given by State boundaries, when considering competition in a market in internet commerce, presents practical and conceptual difficulties.

47. While it is true that protection is concerned with the preclusion of competition and that this is an activity which occurs in a market for goods or services, a prohibition on protectionism is not synonymous with a prohibition on anti-competitive conduct. As explained in paragraph 11 of the principal submissions, there are a great many things that will have anti-competitive effects in a market that will not discriminate against interstate trade, and that therefore are not contrary to s 92.

48. The practical and conceptual difficulties identified by the plurality are real but they are to be resolved by focussing closely on the interstate transactions said to be burdened by the impugned law and comparing their treatment with that of competing intrastate transactions.

49. In *Barley Marketing Board (NSW) v Norman*,[40] the Court noted the caution with which certain United States decisions must be viewed precisely because those decisions interpreted the Commerce Clause more widely than s 92 was interpreted in *Cole v Whitfield* by rendering unconstitutional restrictions on competition. While the plurality in *Betfair v WA* emphasised the assistance that can be gained from pre-1900 United States decisions and later authorities which focussed upon protectionism,[41] nothing said there denied the correctness of the caution expressed in *Barley Marketing Board (NSW) v Norman* about the later, more wide-ranging, United States decisions.

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[39] *Betfair v WA* (2008) 234 CLR 418 at 452 [15].

[40] (1990) 171 CLR 182 at 203–204.

[41] *Betfair v WA* (2008) 234 CLR 418 at 461 [38].

Indeed, in discussing *Brown v Houston*,[42] the plurality in *Betfair v WA* emphasised that it was that part of the decision referring to "any discriminating burden or tax upon the citizens or products of other States" that was "relevant to s 92".[43]

50. So too, the following statement by the plurality in *Betfair v WA*:[44]

> The effect of the legislation of Western Australia is to restrict what otherwise is the operation of competition in the stated national market by means dependent upon the geographical reach of its legislative power within and beyond the State borders. This engages s 92 of the Constitution.

That statement was made in a context where the competition at issue was that between in-State and out-of-State operators. So much is evident from the immediately following dispositive passages in the reasons.[45] It should not be taken as departing from the need for a comparison between the treatment of interstate and intrastate trade or commerce, in favour of a broader focus on interference with competition in the national market.

(iii) The appellants' submissions

51. The appellants' submissions both accept that, in applying s 92, a comparison must be made.[46] Both focus upon a comparison between two classes of traders.

52. For the reasons in paragraphs 14 to 22 above, the correct approach is to focus on transactions, not traders. Furthermore, the focus on traders throws up the immediate difficulty of identifying the criterion which divides the two classes of trader to be compared and then applying that criterion in the modern economy.

53. Sportsbet submits that the comparison is between interstate traders and intrastate traders, with intrastate traders defined by reference not to geography but "economic analysis", assisted by the "nature and object of the relevant legislative or regulatory measures".[47] Interstate traders appear to be all traders other than intrastate traders so defined. The analysis is said to be directed towards overcoming attempts "to create or preserve narrow economic interests or limited economic centres".[48]

54. Betfair contends that the comparison is between a trader in the national economy and "other traders representing narrow economic interests".[49] The former are apparently those traders not representing narrow economic interests.

55. These elusive approaches should be rejected.

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[42] (1885) 114 US 622 at 630.

[43] *Betfair v WA* (2008) 234 CLR 418 at 462 [41]. See also the way in which the plurality at 462–464 [42]–[46] dealt with *Guy v Baltimore* (1879) 100 US 434 and *Minnesota v Barber* (1890) 136 US 313.

[44] *Betfair v WA* (2008) 234 CLR 418 at 480 [116].

[45] *Betfair v WA* (2008) 234 CLR 418 at 481–482 [118]–[122].

[46] Sportsbet's supplementary submissions, paragraph 11; Betfair's supplementary submissions, paragraph 30.

[47] Sportsbet's supplementary submissions, paragraph 20.

[48] Sportsbet's supplementary submissions, paragraph 18.

[49] Betfair's supplementary submissions, paragraph 30.

56. The use of the concept of "narrow economic interests", associated with the rubric of "protectionism" and "discrimination", masks the radical departure from the text of s 92, and its construction in the *Cole v Whitfield* line of cases, for which the appellants now contend.

57. The conclusion in *Cole v Whitfield* was reached in a unanimous judgment of this Court after detailed consideration of the history of s 92. It has been consistently applied and refined in a series of cases, culminating in *Betfair v WA*. It produces a workable approach to the provision, in place of the complex and conflicting cases that preceded it. It is capable of operating whatever the nature of the market. It is capable of operating for both goods and services. The appellants have not contended that there are present any of the factors this Court requires to justify overruling a previous decision.[50]

58. The appellants' approach shifts the focus from a comparison between interstate and intrastate trade to a comparison between persons who may or may not be engaged in interstate trade but who are separated by a criterion which is easy to state but of very uncertain application. The vagueness of the criterion, and the extent of the departure from notions of protection of a State's internal economic activity, is illustrated clearly by the submissions. In Sportsbet's submission the "narrow economic interests" might be "those of the State itself, or those of corporations that have been licensed by the State, or are located principally within the State, or are otherwise associated with the State and its economic interests". In Betfair's submission the "narrow economic interests" may be those that "serve one State, a combination of States or even the Commonwealth".[51]

59. Concentration on such notions fails to identify any comparator for the purpose of identifying "discrimination" against interstate trade and commerce. The effect is to strip the requirement of discrimination of any meaningful content. In its place, it is suggested that it suffices to identify a burden imposed on a person for a *purpose* associated with narrow economic interests.[52] This disguises a revived form of the discredited "individual rights" analysis of s 92.

60. Further, it is said that the identification of those representing narrow economic interests is informed by the legislative or regulatory measure under challenge. But that is circular. It has the result that those permitted to engage in conduct by a regulatory regime are taken to be those who represent narrow economic interests and thus intrastate traders. Those prohibited from engaging in the conduct are, by definition, interstate traders. Section 92 is then engaged because the regime discriminates between the two. By this reasoning, any State regulatory regime would engage s 92 and all the work would be done by any "saving" limb, which would presumably apply. And on the submissions of Betfair, the same would apply to any Commonwealth regulatory regime as well.

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[50] See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438–439.

[51] Betfair's supplementary submissions, paragraph 26.

[52] For example, Sportsbet's supplementary submissions refer to measures that "burden ... interstate trade in a way that seeks to create or preserve narrow economic interests or limited economic centres": paragraph 18.

61. Ultimately, the identification of intrastate traders must therefore go beyond the regulatory measure under challenge. Apart from some simple and necessarily arbitrary means of locating a trader, the task required by the appellants' submissions would inevitably turn on unsatisfactory factual inquiries into the degree of connection between persons and locations. For the reasons explained in paragraph 20 to 21 above, that task will often be highly artificial in a modern economy.

62. Finally, the reference in s 92 to trade and commerce "among the States" (like the equivalent expression "between the Territory and the States" in s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth)), not only insists on the significance of geographic boundaries within Australia, but reflects a deeper constitutional reality. Those boundaries define the very States which are constituent elements of the federation and which are empowered, subject to the Constitution, to advance the economic and other interests of those who reside or do business within their jurisdiction, including those from interstate who do such business. In those circumstances, s 92 does not operate as some general "protection" against the States advancing "parochial social or economic interests".[53]

63. The existence of the States as part of the federation demonstrates their ability and entitlement to advance such interests, except in circumstances where they are constrained not to do so. Section 92 cannot be taken as meaning that such interests can never be advanced, as the appellants appear to suggest. Rather, the question whether such interests may be advanced arises only where discrimination against interstate trade and commerce has *already* been established, and then is to be determined by reference to the "reasonably appropriate and adapted" or "reasonably necessary" tests[54] rather than according to a generalised prohibition.

(e) Question 3 – Section 92 and competition

64. Question 3 asks whether s 92 operates in a national market to 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 other traders can be characterised as trading intrastate or interstate. The State submits that s 92 does not operate in this fashion. (The appellants do not submit to the contrary.)

65. If the "interstate trader" referred to in the question is taken to mean an out-of-State trader, then the difficulties of location explained above apply. Even if the "interstate trader" is, rather, a person engaged in interstate trade, s 92 could not be held to prevent any burden on an interstate trader in comparison with other traders in the national market "irrespective of whether those other traders can be characterised as trading intrastate or interstate" without departing from the basis of the line of cases commencing with *Cole v Whitfield* and culminating in *Betfair v WA*.

66. Such an approach would either eliminate the requirement for "protectionism" entirely, or redefine it in such a way that the concept is unrecognisable from that which was applied in *Cole v Whitfield* and subsequent cases. As noted above, there are many kinds of action in a market that might interfere with competition but which do not

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[53] Cf Sportsbet's supplementary submissions, paragraph 25.

[54] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Betfair v WA* (2008) 234 CLR 418.

have as their purpose or effect the protection of a "domestic industry" however that may be defined.

67. Further, this approach would re-define the kind of "discrimination" with which s 92 is concerned in a manner inconsistent with *Cole v Whitfield*, because it would require a comparison between the effect of the impugned law on two traders, rather than a comparison between the effect of the law on interstate and intrastate transactions. On the present state of the law, a burden is not protectionist in the requisite sense merely because it affects competition between participants in a national market, even if those participants happen to be on different sides of a State boundary.[55]

10 68. For the reasons identified in paragraph 57 above, *Cole v Whitfield* should not be overruled.

69. Further, the approach raised by question 3 would be tantamount to a return to the individual rights view of s 92. That view was rejected in *Cole v Whitfield*, and that rejection was noted and affirmed in *Betfair v WA*.[56] Given the likely diversity of traders in a national market, any measure which burdens an interstate trader is likely to do so to its competitive disadvantage to some degree when compared with at least one other trader in the market. Any kind of regulation will likely reduce competition to some degree, namely by those wishing to compete by means prohibited or limited by the regulation. Accordingly, notwithstanding the apparent limitation of the posited
20 measure to burdens which affect the competitive position of the interstate trader, in practice, any regulation of an interstate trader would potentially engage s 92.

70. This was recognised by the Court in *Barley Marketing Board (NSW) v Norman*,[57] where the Court noted the caution with which certain United States decisions must be viewed precisely because those decisions interpreted the Commerce Clause to render unconstitutional restrictions on competition. In *Betfair v WA*, the plurality accepted that, to some degree, this "would further a revival of an 'individual rights' theory of s 92".[58]

71. If it were further the case that, in a national market, all trade were effectively to be considered interstate trade, the approach to s 92 raised in question 3 would be an even
30 more expansive individual rights view of s 92. It would guarantee an individual right to trade free from any interference to all who participated in a national market, even where transactions in that market occurred wholly within State boundaries. That would be a radical departure from the approach to s 92 not only since *Cole v Whitfield* but since Federation.

72. The creation of national markets was the purpose of s 92. As such markets become more widespread and firmly established, it is to be expected that the occasions for the operation of s 92 will become less frequent. It is neither necessary nor appropriate to develop the test under s 92 to give it an ongoing role in relation to national markets in relation to the validity of measures that do not discriminate against interstate trade. If

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[55] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471, 474.

[56] *Betfair v WA* (2008) 234 CLR 418 at 456 [26], 461 [38].

[57] (1990) 171 CLR 182 at 203–204.

[58] *Betfair v WA* (2008) 234 CLR 418 at 461 [38].

s 92 has little role to play in such markets, that will be because the objectives of the section are being met, with trade occurring in a truly national context without attempts by State or Territory governments to create divisions within the national market by reference to State or Territory boundaries.

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