HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

BETFAIR PTY LIMITED & ANOR PLAINTIFFS

AND

STATE OF WESTERN AUSTRALIA DEFENDANT

Betfair Pty Limited v Western Australia [2008] HCA 11
27 March 2008
C2/2007

ORDER

1. *The questions reserved in the amended special case dated 7 June 2007 be answered as follows:*

Question One

Is s 24(1aa) of the Betting Control Act *1954 (WA) invalid either:*

(a) wholly; or

(b) to the extent that s 24(1aa) would apply to a person, including the second plaintiff, who makes or accepts offers to bet through the use of the first plaintiff's betting exchange, by telephone or internet communication between a place in Western Australia and the Tasmanian premises,

by reason of s 92 of the Constitution?

Answer

Section 24(1aa) of the Betting Control Act *1954 (WA) is invalid to the extent that it would apply to a person including the second plaintiff, who makes or accepts offers to bet through the use of the first plaintiff's betting exchange by telephone or internet communication between a place in Western Australia and the Tasmanian premises of the first plaintiff.*

Question Two

Is s 27D(1) of the Betting Control Act *1954 (WA) invalid either:*

(a) wholly; or

(b) to the extent that s 27D(1) would apply to conduct of the first plaintiff in publishing or otherwise making available a WA race field:

(i) by way of telephone or internet communication between the Tasmanian premises and a place in another State; or

(ii) for the purpose of making or receiving offers to bet through the use of the first plaintiff's betting exchange by telephone or internet communication between the Tasmanian premises and a place in another State,

by reason of s 92 of the Constitution?

Answer

Section 27D(1) of the Betting Control Act *1954 (WA) is invalid to the extent that it would apply to conduct of the first plaintiff in publishing or otherwise making available a WA race field:*

(a) by way of telephone or internet communication between the Tasmanian premises of the first plaintiff and a place in another State; or

(b) for the purpose of making or receiving offers to bet through the use of the first plaintiff's betting exchange by telephone or internet communication between the Tasmanian premises of the first plaintiff and a place in another State.

Question Three

Is s 27D(1) of the Betting Control Act *1954 (WA) invalid or inoperative either:*

(a) wholly; or

(b) to the extent that s 27D(1) would apply to conduct of the first plaintiff in publishing or otherwise making available a WA race field in:

(i) Tasmania;

(ii) Western Australia; or

(iii) elsewhere,

by reason of s 118 of the Constitution or otherwise under the Constitution?

Answer

Unnecessary to answer.

2. The costs of the plaintiffs of the amended special case be borne by the defendant.

Representation

S J Gageler SC with K C Morgan for the plaintiffs (instructed by Gilbert & Tobin)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell and K H Glancy for the defendant (instructed by State Solicitor for Western Australia)

D M J Bennett QC, Solicitor-General of the Commonwealth with G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with J K Kirk intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with G F Cox and S A McDonald intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

P M Tate SC, Solicitor-General for the State of Victoria with S G E McLeish and S P Donaghue intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with A M Pomerenke intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for Queensland)

N J Young QC with S D Gates intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Solicitor-General of the State of Tasmania)

CATCHWORDS

Betfair Pty Limited v Western Australia

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – *Betting and Racing Legislation Amendment Act* 2006 (WA) inserted ss 24(1aa) and 27D(1) into *Betting Control Act* 1954 (WA) ("WA Act") – Section 24(1aa) of WA Act provides that a person who bets through use of a betting exchange commits an offence – Section 27D(1) of WA Act provides that a person who, in Western Australia or elsewhere, publishes or otherwise makes available a Western Australian race field in the course of business commits an offence unless the person is authorised to do so by an approval, and complies with the conditions of that approval – First plaintiff was granted a licence under Div 5 of Pt 4A of the *Gaming Control Act* 1993 (Tas) to operate a betting exchange – Second plaintiff used computer connected to internet to place with first plaintiff bets on the outcome of races and other sporting events in Western Australia – Whether ss 24(1aa) and 27D(1) of WA Act are valid.

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – Whether ss 24(1aa) and 27D(1) of WA Act impose impermissible disadvantage on first plaintiff that is not imposed on Western Australian wagering operators – Whether ss 24(1aa) and 27D(1) of the WA Act impermissibly preclude, on the supply side, increase in competition within the national market for betting services provided, on the demand side, by second plaintiff.

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – Interpretation – Source of present doctrine respecting s 92 of Constitution – Role of s 92 to create national markets expressive of national unity – Object of s 92 in application to trade and commerce among States is to eliminate protection – Performance of role and fulfilment of object of s 92 changes with developments in legal and economic context in which s 92 operates – Utility of concept of "people of a State".

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – Significance for present operation of s 92 of general understanding of concepts of "free trade" and "protection" against which provision was framed – "Free trade" understood in Australian colonies and British Empire as antithesis of "protection" – Significance of debates about free trade at time of federation.

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – Relevance of United States decisions decided before 1900 to understanding provenance of s 92.

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – Relevance of presence of non-protectionist objectives in legislation the practical effect of which is to discriminate against interstate trade in protectionist sense.

Constitutional law (Cth) – Freedom of interstate trade, commerce and intercourse – Limitations of proposition that each State legislature has power to enact legislation for "well-being" of people of State – Application of "appropriate and adapted" criterion to laws discriminating against interstate trade in protectionist sense – Application of criterion of "reasonable necessity".

Words and phrases – "appropriate and adapted", "free trade", "proportionality", "protection", "reasonable necessity".

Constitution, s 92.
Gaming Control Act 1993 (Tas), Div 5 Pt 4A.
Betting Control Act 1954 (WA), ss 24(1aa), 27D(1).
Betting and Racing Legislation Amendment Act 2006 (WA).

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, CRENNAN AND KIEFEL JJ. Since 10 January 2006 the first plaintiff ("Betfair") has held a licence under Tasmanian law to operate a "betting exchange". A registered customer of Betfair (whom it describes as a "registered player") may place bets by a call to a telephone call centre at premises of Betfair in Hobart or by use of a computer connected by the internet to a computer server operated by Betfair at its Hobart premises. Customers may be located outside Tasmania and Betfair seeks to attract such customers located in States of the Commonwealth including Western Australia. Thus there is an interstate dimension to the operation by Betfair of its betting exchange.

2 The second plaintiff, Mr Erceg, is a resident of Western Australia, and is a registered player. During the period 28 August 2006–24 January 2007 he used a computer connected to the internet to place with Betfair bets on horse and greyhound racing and other sporting events in Western Australia and other States. Over that period substantial amounts were bet with Betfair by registered players in Western Australia using telephones and the internet. The total sum, as to races in that State was more than $3.6 million, as to races elsewhere in Australia more than $9.6 million, and as to sporting and other events in Australia more than $2.5 million. However, by amendment to the law of Western Australia, which came into effect on 29 January 2007, it became an offence to bet through the use of a betting exchange. In addition, Betfair subsequently was refused the permission required under the amended law of Western Australia to make available important information, being "a WA race field" of horses or greyhounds, for facilitation of the making or receiving of offers by internet communication between the Hobart premises of Betfair and a place in another State.

3 This litigation, in the original jurisdiction of the Court, arises from the changes made to the *status quo ante* in Western Australia. The issues come before the Full Court on an Amended Special Case.

4 What might be called the out-of-State "supply" as well as the in-State "demand" side are represented by Betfair and Mr Erceg respectively. The importance in the determination of the ambit of any market of the supply and demand side, and of notions of substitution of various goods and services available in a market, is explained by McHugh J in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[1].

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1 (2003) 215 CLR 374 at 454-456 [248]-[254]; [2003] HCA 5.

5 Section 15 of the *Interactive Gambling Act* 2001 (Cth) creates an offence of providing an "interactive gambling service" to customers in Australia. An "excluded wagering service" is not an "interactive gambling service" (s 5(3), s 8A). No question of contravention of the federal statute arises. Moreover, s 69 expresses an intention not to exclude the operation of State laws capable of concurrent operation with the federal law. No argument based upon s 109 of the Constitution has been presented in these proceedings.

Betting exchanges

6 The introduction of the Tasmanian law under which Betfair is licensed and the changes to the law of Western Australia to which the plaintiffs object were preceded by the presentation on 10 July 2003 of a Report made to the Australasian Racing Ministers' Conference by a body styled the Betting Exchange Task Force ("the Report"). The Task Force comprised officers from the governments of the eight Australian States and internal Territories.

7 It will be convenient to make further references to the Report later in these reasons. What is to be observed here is that the Report described the introduction of betting exchanges in the United Kingdom by a related company of Betfair. It continued:

> "The emergence of Internet-based betting exchange wagering platforms raises several highly challenging issues for the future viability of the Australian racing industry, consumer protection of punters and for government revenue flows from wagering.
>
> Australia's situation is unique among the World's first level racing countries. This stems jointly from its status as a Federation and the co-existence in all jurisdictions of bookmakers and totalizators (TAB). Eight individual racing jurisdictions, together with eight State and Territory Governments with a range of often disparate racing and wagering legislation, heightens the challenge of developing and implementing a coordinated national response to the emergence of betting exchanges."

8 Under the heading "What is a betting exchange?" the Report continued further:

"A betting exchange is a means by which parties stake money on opposing outcomes of a future event – such as a horse race or football game. Exchanges are structured to facilitate customers betting that a particular outcome will or *will not* occur. It is this 'against backing' (or backing to lose) aspect particularly in which betting exchanges differ from the traditional forms of wagering in Australia – with bookmakers or totalizators (TABs).

...

The Internet is an ideal vehicle for betting exchange operations. It allows current exchange information to be displayed to a global audience in real time and facilitates automated wagering transactions against pre-established accounts and the efficient transfer of funds to and from accounts.

While Internet betting exchanges on sport have existed since the mid-1990s, it has been in the sphere of racing betting that betting exchanges have enjoyed phenomenal growth recently. The adaptation of betting exchange principles to a multi-outcome event such as a horse race is achieved by breaking down each race into a series of binary events: each horse to win or lose.

From the operator's perspective, a betting exchange is similar to a totalizator in terms of the absence of risk relating to the outcome of an event. In contrast to a bookmaker, the betting exchange operator is merely an intermediary – the risk is carried entirely by the customers themselves.

Under the betting exchange models currently operating in Britain, operators derive income by charging a commission – at a relatively low rate – on (net) winnings."

The plaintiffs' case

9 The plaintiffs (with the support of Tasmania, one of the interveners) challenge the validity of the relevant provisions of the law of Western Australia, principally by reliance upon s 92 of the Constitution. They put their case for the application of s 92 upon two bases. The first is that the legislation of Western Australia impermissibly precludes, with respect to internet transactions having a geographical connection with that State, that increase in competition, on the supply side, within the national market for betting services which would be provided, on the demand side, by the presence within Western Australia at any

one time of such persons as Mr Erceg. The second is that the legislation also applies to deny to the out-of-State operator in the position of Betfair access for the purposes of its Australia-wide operations to information respecting race fields which is generated by racing operators in Western Australia, whilst in-State wagering operators do not suffer that disadvantage. As will appear in these reasons, the case formulated by the plaintiffs in these terms should be accepted.

Continuity, change and s 92

10 All parties accept as the source of present doctrine respecting s 92 what was said 20 years ago in *Cole v Whitfield*[2] and further developed and applied in the authorities decided shortly thereafter, namely *Bath v Alston Holdings Pty Ltd*[3], *Castlemaine Tooheys Ltd v South Australia*[4] and *Barley Marketing Board (NSW) v Norman*[5].

11 Nevertheless, it would be an error to read what was decided in *Cole v Whitfield*[6] as a complete break with all that had been said in this Court respecting the place of s 92 in the scheme of the Constitution. For example, in his reasons in *Samuels v Readers' Digest Association Pty Ltd*[7] Barwick CJ rejected the proposition that the economic consequences of the operation of a law could not come within the purview of s 92. Barwick CJ also said in that case[8]:

> "No doubt the legislature of a State desiring to protect its traders from competition from traders in another State might well think that it would be of advantage to its traders to ban the kind of discount which its traders either did not wish to give or which its traders could not afford to

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2 (1988) 165 CLR 360.

3 (1988) 165 CLR 411.

4 (1990) 169 CLR 436.

5 (1990) 171 CLR 182.

6 (1988) 165 CLR 360.

7 (1969) 120 CLR 1 at 17-18.

8 (1969) 120 CLR 1 at 19.

give. But that protection is, to my mind, demonstrably one of the kinds of interference with freedom of trade and commerce which cannot be sustained. As Fullagar J observed in *McCarter v Brodie*[9]:

> 'The protection of the industries of one State against those of another State was, of course, one of the primary things which s 92 was designed to prevent.'

Or it may be that a State, according to the current philosophy of its government, may disapprove some trading practice and accordingly without any idea of protecting the trader ban it. But the economic consequence of a law cannot be disregarded and such a law is in no different case to a law designed to limit competition."

One corrective administered by *Cole v Whitfield* was to the width of such phrases in the above passage as "*one* of the kinds ..." and "*one* of the primary things ...".

12 Moreover, there have been significant developments in the last 20 years in the Australian legal and economic *milieu* in which s 92 operates. The first of these concerns an interpretation given to Ch IV of the Constitution by this Court in 1997. In *Ha v New South Wales*[10] the Court recognised both the character of State "licence fees" as duties of excise to which s 90 of the Constitution applied and, at a more general level, the place occupied by both s 90 and s 92 in Ch IV of the Constitution. The creation and fostering of national markets would further the plan of the Constitution for the creation of a new federal nation and would be expressive of national unity.

13 In that vein, *Ha* decided that the exclusivity of federal power to impose duties of excise is not limited to the more modest purpose of protection of the integrity of the tariff policy of the Commonwealth[11]. However, while s 90 is concerned with the imposition of duties of excise on goods, this case goes beyond that field and concerns the application of s 92 to services provided in commerce.

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9 (1950) 80 CLR 432 at 499.

10 (1997) 189 CLR 465.

11 (1997) 189 CLR 465 at 495-496.

14 Another development since *Cole v Whitfield* is indicated in what has been said above respecting the circumstances of the present litigation. This is the appearance of what Judge Posner has called "the new economy"[12] in which internet-dependent businesses, like that of Betfair, operate readily and deal with customers without regard to geographic boundaries. The point is illustrated by the activities of Betfair with respect to registered players in Western Australia before the changes to the law of that State.

15 *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. To focus upon the geographic dimension given by State boundaries, when considering competition in a market in internet commerce, presents practical and conceptual difficulties. Yet, Western Australia and supporting State interveners emphasised that s 92 permanently mandates that each State retain its own "economic centre". That proposition, as will appear from what is said later in these reasons, is overbroad.

16 The third development is the emergence since 1995, and by inter-government agreement under the auspices of the Council of Australian Governments, of a National Competition Policy. Elements of that policy include as a "guiding principle" that legislation should not restrict competition, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs and that the objectives of the legislation "can only be achieved by restricting competition"[13]. Further, provision of financial assistance by the Commonwealth to the States is made conditional upon progress in the implementation of the National Competition Policy[14]. Counsel for the plaintiffs emphasised that the greater the degree of implementation of the National Competition Policy, the less the occasion for recourse to s 92.

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12 Posner, "Antitrust in the New Economy", (2001) 68 *Antitrust Law Journal* 925.

13 Competition Principles Agreement, 11 April 1995, cl 5(1).

14 Agreement to Implement the National Competition Policy and Related Reforms, 11 April 1995.

17 Developments such as these illustrate the force of the following statement in *Cole v Whitfield*[15]:

> "Inevitably the adoption of a new principle of law, though facilitating the resolution of old problems, brings a new array of questions in its wake. The five traditional examples of protection of domestic industry which we gave earlier are by no means exclusive or comprehensive. The means by which domestic industry or trade can be advantaged or protected are legion. The consequence is that there will always be scope for difficult questions of fact in determining whether particular legislative or executive measures constitute discriminatory interference with interstate trade."

18 The references in this passage to "domestic industry" highlight the practical and conceptual perplexity that arises in accommodating internet commerce to the notion of protectionism in intrastate trade and commerce. Further, subsequent references in *Castlemaine Tooheys*[16] 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.

19 Here, as elsewhere in debate respecting the operation of the Constitution[17], there is continued force in the sentiment expressed by O'Connor J[18] in the early years of the Commonwealth:

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15 (1988) 165 CLR 360 at 408-409.

16 (1990) 169 CLR 436 at 472-473.

17 See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565-566; *Sue v Hill* (1999) 199 CLR 462 at 487-488 [50]-[51]; [1999] HCA 30.

18 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368. See also, respecting s 92 itself, the remarks of Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 615.

> "[I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve."

20 Differences in judicial opinion respecting the construction and application of s 92 to diverse political and economic circumstances have stemmed from the "broad and general" terms in which the section is expressed. One significant outcome of *Cole v Whitfield*[19] was to return consideration of s 92 to the matters of political economy with a general understanding of which the provision was framed at the end of the 19th century. An appreciation of the somewhat fluid content of those matters at both the Imperial and colonial level assists an appreciation of the present operation of s 92 in the "new economy" in which Betfair operates in Australia. Yet, as indicated above, the distance from today of the times and circumstances of the colonial period requires that the admonition of O'Connor J be kept constantly in mind.

The provenance of s 92

21 The familiar but still debatable terms of s 92 state:

> "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
>
> But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation."

The operation of the second sentence of this provision is long spent and the case law has concerned the first sentence.

22 It is trite to observe that, with s 90, s 92 appears in Ch IV (ss 81-105A) of the Constitution and that this is headed "FINANCE AND TRADE". The

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19 (1988) 165 CLR 360.

relationship between s 90 and s 92 was explained as follows by Brennan CJ, McHugh, Gummow and Kirby JJ in *Ha v New South Wales*[20]:

> "It is clear that an objective of the movement to Federation was 'inter-colonial free trade on the basis of a uniform tariff' as this Court pointed out in *Cole v Whitfield*[21]. That objective could not have been achieved if the States had retained the power to place a tax on goods within their borders. If goods that attracted a State tax were imported into the State from outside the Commonwealth, Commonwealth tariff policy would have been compromised by the imposition of a State tax. The second paragraph of s 92[22] and the third paragraph of s 95[23] (by limiting the period of its operation) show that such a tax was alien to the scheme of Ch IV. If a State tax were imposed on goods brought into the State having been produced or manufactured elsewhere in the Commonwealth, the tax would affect the freedom of trade in those goods[24] and might be a duty of customs on the entry of the goods into the taxing State[25]. If a State tax were imposed on goods of local production or manufacture within the State, it would be a duty of excise on any view of the term."

However, as remarked earlier in these reasons, the trade and commerce of which s 92 speaks is not limited to dealings in goods and this indicates that Ch IV implemented a broader scheme of political economy.

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20 (1997) 189 CLR 465 at 494-495.

21 (1988) 165 CLR 360 at 386, citing the 1891 Report of the South Australian Royal Commission on Inter-Colonial Free Trade at vi.

22 [Set out above].

23 This states: "If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth."

24 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411.

25 Section 95 par 1 and see *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 430 per Isaacs J, 435 per Higgins J.

23 The inclusion of Ch IV in the Constitution illustrates the point made by Palgrave in his *Dictionary of Political Economy* which was published in London in 1896[26]:

> "*All known precedents lead us to associate the idea of commercial federation with that of political federation*. In the existing federal systems with which we are familiar, such as those of the United States, Germany, Switzerland, Austria-Hungary, and Canada, freedom of internal trade has been the result, even where it has not been the fundamental condition, of political unity. *In the system which has been proposed for the Australasian colonies one of the chief objects aimed at is the same freedom of internal trade. Free commercial intercourse, indeed, seems one of the most distinctive marks of national unity.* It appeals directly to the masses, and gives at once a sense of mutual interest and mutual benefit." (emphasis added)

24 But what was conveyed by such expressions as "commercial federation", "free commercial intercourse" and "freedom of internal trade"? In *Cole v Whitfield*[27], after remarking:

> "the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade",

the Court continued[28]:

> "*The expression 'free trade' commonly signified in the nineteenth century, as it does today, an absence of protectionism, ie, the protection of domestic industries against foreign competition*. Such protection may be achieved by a variety of different measures – eg, tariffs that increase the price of foreign goods, non-tariff barriers such as quotas on imports,

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26 Sir Robert Inglis Palgrave (ed), *Dictionary of Political Economy*, vol 2 (1896) at 45-46. Palgrave (1827-1919), English banker and economist, was editor of *The Economist* 1877-1883.

27 (1988) 165 CLR 360 at 392.

28 (1988) 165 CLR 360 at 392-393.

> differential railway rates, subsidies on goods produced and discriminatory burdens on dealings with imports – which, alone or in combination, make importing and dealings with imports difficult or impossible. Sections 92, 99 and 102 were apt to eliminate these measures and thereby to ensure that the Australian States should be a free trade area in which legislative or executive discrimination against interstate trade and commerce should be prohibited. 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. That was the historical object of s 92 and the emphasis of the text of s 92 ensured that it was appropriate to attain it." (emphasis added)

25 The emphasised passage juxtaposes the terms "free trade" and "protectionism" as marking out the field of controversy in the Australian colonies respecting fiscal policy which preceded the adoption of the Constitution. But, for example, to speak of *the colony* of New South Wales as "free trade" and that of Victoria as "protectionist" is apt to mislead. Not least is it apt to mislead because the use of the labels may mask the complexities of the debates about issues of protection and free trade that occurred during the second half of the 19th century and the early years of the 20th century. Debates about these issues took on political and social dimensions. But by the early years of the 20th century, "protection" had become so settled a national policy that Professor Hancock was later to write[29] that "[p]rotection ... has been more than a policy; it has been a faith and a dogma ... interwoven with almost every strand of Australia's democratic nationalism".

26 At the time of the framing of the Constitution, the command economies of 20th century totalitarian states lay in the future. It was not the colonies but individuals and trading and financial corporations that engaged in intercolonial trade and commerce and whose businesses were affected by the adoption by government of particular commercial policies. To perceive this does not mandate any return to an "individual rights" interpretation of s 92 which was discredited by *Cole v Whitfield*. Further, as counsel for the present plaintiffs correctly emphasised, that earlier interpretation had emphasised the position of those on

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29 See Hirst, "Protection", in Davison et al (eds), *The Oxford Companion to Australian History*, rev ed (2001) 536 at 537.

the out-of-State "supply" side to the exclusion of the in-State "demand" side of trade and commerce.

27 Notwithstanding the complexities of the debates about issues of protection and free trade, generally "protection" referred to the protection of local production of goods by tariff barriers and "free trade" was seen as its antithesis. An understanding of one way in which the terms "free trade" and "protectionism" were used at the time of federation is assisted by entries in Palgrave's *Dictionary of Political Economy*, a work to which reference has been made above. After describing the earlier use of the term "free trade", "somewhat vaguely" to denote an "absence of restraint in general", Palgrave wrote[30]:

> "Adam Smith's authority, and the direction given by him to economic thought, have caused its limitation to that system of commercial policy which draws no distinction between domestic and foreign commodities, and, therefore, neither imposes additional burdens on the latter nor grants any special favours to the former. Free trade in this now well-established sense does not require the removal of all duties on commodities; *it only insists that they shall be levied exclusively for revenue, not at all for PROTECTION* (*q.v.*). 'Our object,' said Cobden, 'is not to take away the queen's officers from the custom-house, but to take those officers away who sit at the receipt of custom to take tithe and toll for the benefit of particular classes' (*Speeches*, pop. ed. p 41)." (emphasis added)

However, it is important to note that the scheme of Ch IV of the Constitution insisted on more than is suggested by this statement; it did require removal of the customs houses at State borders.

28 Of the term "protection" it was said by Palgrave that "[i]n common with all systems of economic policy, protection springs from a set of conditions, sentiments, and beliefs"[31]. With particular relevance to attitudes taken in Australia, he wrote that "[t]o the loyal citizen the promotion of native industry

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30 *Dictionary of Political Economy*, vol 2 (1896) at 143. Of British politics by the 1860s, it is said that "a central orthodoxy" was "free trade – in its specific sense of an absence of protective tariffs": Matthew, "The Liberal Age (1851-1914)", in Morgan (ed), *The Oxford History of Britain*, rev ed (2001) 518 at 524.

31 *Dictionary of Political Economy*, vol 3 (1899) at 234.

and economic interests seems a duty nearly as imperative as the defence of the national territory against invasion. Protection is thus one side or aspect of national sentiment, influenced indeed by a special bias."

29 However, debate in the Australian colonies respecting fiscal policy took place in the broader surroundings provided by inclusion of the Australian colonies in the British Empire and the presence of ultimate power resting at Westminster and in the Colonial Office. The legislation of the mid-19th century which established responsible and representative government in the colonies of Canada and Australasia was enacted at the time of completion of the free trade reforms associated particularly with the second administration of Sir Robert Peel (1841-1846)[32]. By 1860, only 48 items remained on the British customs list and they were not needed to protect British industries[33]. When the south-eastern Australian colonies attained self-government, they gained control of at least some elements of their commercial policies[34] (including control of revenues derived from customs duties and excise[35], from the disposal of the wastelands of the Crown and from the mining of gold[36]). In the 1860s Victoria asserted its right to establish protectionist tariffs. In 1873 the Australian colonies asserted their right to discriminate in favour of each other, even to the disadvantage of other parts of the Empire, but, by force of the proviso to s 3 of the *Australian Colonies Duties Act* 1873 (Imp)[37], the colonies were bound not to levy or remit duties contrary to, or at variance with, any treaty for the time being between the Crown and any foreign power.

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32 Ward, *Colonial Self-Government: The British Experience 1759-1856*, rev ed (1976) at 203.

33 Heaton, *Economic History of Europe*, (1948) at 640.

34 Relevant constitutional arrangements differed between the colonies. See generally the discussion by Shann, "Economic and Political Development, 1860-1885", in Rose et al (eds), *The Cambridge History of the British Empire*, vol 7 pt 1 (1933) 296 at 316-323.

35 *Ha v New South Wales* (1997) 189 CLR 465 at 493-494.

36 Jenks, *A History of the Australasian Colonies*, (1896) at 231-232.

37 36 Vict c 22.

30 The course of Imperial affairs with respect to commercial policy was summed up by Professor Hancock in 1930 as follows[38]:

> "Until 1846 the British Empire had been a single economic unit in its commercial relations, with a Protectionist policy made in Great Britain. In 1846 Great Britain became a Free Trade country. But she still assumed that the Empire would remain a commercial unity, with a common Free Trade policy. The self-governing colonies thought otherwise. In 1859 Canada asserted her right to set up a Protectionist tariff, even against Great Britain[39]. In 1873 the Australian colonies asserted their right to discriminate in favour of each other, even to the disadvantage of other parts of the Empire. It was not long before the new order of things began to affect the foreign relations of the Empire. In the seventies the Australian colonies won recognition of their right to adhere separately to trade treaties made by Great Britain, or, if it pleased them, not to adhere at all. Later on they exercised a right of withdrawing from trade treaties which Great Britain had negotiated in the past. Finally they began, in association with British representatives, to negotiate their own treaties. The Commonwealth [of Australia] to-day is party to many treaties which deal with commerce, postal affairs, scientific and humanitarian concerns, and all sorts of technical matters. At last, in 1907, Canada negotiated a commercial treaty with France, without any intervention at all of British officials. That event marked the end of the process. Before the war the self-governing Dominions could bargain with foreign countries, in commercial matters, on terms of complete equality and independence[40]."

31 The developing federal movement in the Australian colonies had been faced with the need to formulate commercial policy bearing both a foreign and a domestic aspect. As to the former, the federal legislative power conferred by s 51(i) and the exclusive power over uniform duties of customs and excise conferred by s 90 enabled Australia to take its place in international trade as a

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38 Hancock, *Australia*, (1930) at 257-258.

39 Skelton, "Canada Under Responsible Government, 1854-1867", in Rose et al (eds), *The Cambridge History of the British Empire*, vol 6 (1930) 333 at 349-350.

40 See also *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 476-478.

single trading unit but behind a protectionist wall which was to remain for many years.

32 The domestic aspect of trade and fiscal policy was not dealt with so readily. Looking at the subject of domestic protectionism and the operation of s 92, it may be suggested that the emergence of global institutions, including the International Labour Organisation (1919), the General Agreement on Tariffs and Trade (1947) and the World Trade Organisation (1995), some of which appear to be premised on the economic value of "free trade", is a development which properly fuels "an implicit assumption that anti-protectionist rules in national legal systems share that same normative foundation"[41]. However, domestic political pressures in the Australian colonies and the Imperial context in which the colonies conducted their affairs meant that more was involved in the formulation of s 92.

The relevance of the United States decisions

33 Counsel for the plaintiffs properly emphasised that assistance in framing s 92 was derived from the contemporary law in the United States. That country after 1890 pursued a protectionist policy as regards foreign trade, in contrast to the position of the United Kingdom[42], where the protection of domestic industry from foreign competition was seen as defiance of the laws of political economy. However, within the United States the "negative Commerce Clause" had been developed by the Supreme Court to support an exclusive federal legislative power and to foster a national economy rather than an economy comprising markets constrained by legislation based upon the geographical limits of the States.

34 That development had been in response to an apparent, albeit at times inconvenient, truth. This is that legislators in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers.

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41 Simpson, "Grounding the High Court's Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone", (2005) 33 *Federal Law Review* 445 at 463.

42 Ensor, *England 1870-1914*, (1936) at 276.

35 Professor Tribe, writing on the Commerce Clause in the United States Constitution, has remarked[43]:

> "That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents. That role is one that they will inevitably try to fulfill even at the expense of citizens of other states.
>
> In this context, the rhetoric of judicial deference to the democratically fashioned judgments of legislatures is often inapposite. The checks on which we rely to curb the abuse of legislative power – election and recall – are simply unavailable to those who have no effective voice or vote in the jurisdiction which harms them. This problem is most acute when a state enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the state's borders."

The thought expressed here had been captured in the statement by Cardozo J in the United States Supreme Court in *Baldwin v G A F Seelig, Inc*[44]:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

Earlier in those reasons, and in a passage upon which the present plaintiffs rely, Cardozo J said of the New York law which was successfully challenged in *Baldwin*[45]:

> "New York asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of

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43 *American Constitutional Law*, 3rd ed, vol 1 (2000) at 1051-1052 (footnotes omitted).

44 294 US 511 at 523 (1935).

45 294 US 511 at 521 (1935).

> Vermont is less than would be owing in like circumstances to farmers in New York. The importer in that view may keep his milk or drink it, but sell it he may not.
>
> Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."

36 Counsel for Western Australia emphasised in oral submissions 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. This may be accepted, but it does not deny the utility of the United States decisions.

37 Nevertheless, in *Barley Marketing Board (NSW) v Norman*[46] the Court remarked:

> "The United States decisions provide limited assistance. That is because some of them proceed according to the view that the object of the commerce clause was to bring into existence a free market economy or a free trade area in the sense that restrictions on competition are unconstitutional. That interpretation of the commerce clause gives it a more wide-ranging operation than *Cole v Whitfield* accords to s 92 with its guarantee of freedom from discriminatory burdens of a protectionist kind."

38 To some degree, acceptance for s 92 of a *laissez-faire* interpretation of the kind identified in *Norman* would further a revival of an "individual rights" theory of s 92. Hence, perhaps, the reservation expressed in *Norman*. However, those United States decisions upon the Commerce Clause, discussion of which preceded the statement in *Norman*, were decided well after 1900 and did not reflect the line of United States authority as it stood in the last part of the 19th century when s 92 was formulated.

39 In *Castlemaine Tooheys*[47] (which preceded *Norman*) five Justices had said that assistance in applying s 92 could be derived from a particular group of

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46 (1990) 171 CLR 182 at 203-204.

47 (1990) 169 CLR 436 at 468-470.

United States authorities, including the 1935 decision in *Baldwin v G A F Seelig, Inc*[48]; reference has been made above to the reasons of Cardozo J in that case. The United States authorities concentrated not upon "broader notions of free trade", but upon such matters as "economic barriers" to interstate trade, the existence of a "national economic unit" and the protection of "the free market forces" in that union so as to protect "the domestic producer or trader against the out-of-State producer or trader". That consideration of the United States authorities in *Castlemaine Tooheys* requires adjustment to allow for both the demand and supply side, but, with that qualification, it rightly plays a significant part in the case presented by the plaintiffs.

The pre-1900 United States decisions

40 The pre-1900 Commerce Clause authorities provide assistance in construing s 92 of the kind approved in *Castlemaine Tooheys*[49]; they also indicate the provenance of s 92 in terms consistent with its text and present doctrine respecting its meaning and the case presented by the plaintiffs. Their effect was summed up as follows by Barton J in *Fox v Robbins*[50]:

> "The Constitution of the United States contains no such provision as our s 92. The framers of that instrument gave Congress the right to regulate trade and commerce with other countries and among the States. In terms, that right is not exclusive. The Supreme Court however has repeatedly held it to be exclusive of any State legislative power, 'so far ... that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, *as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction*:' *Brown v Houston*[51]. The Australian Constitution, for more abundant caution, has enacted in s 92 that: 'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be

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48 294 US 511 (1935).

49 (1990) 169 CLR 436 at 468-470.

50 (1909) 8 CLR 115 at 122-123.

51 114 US 622 at 630 (1885).

> absolutely free.' In this respect the Australian Constitution is stronger than the American." (emphasis added)

41 It will be seen that the treatment of "free and unrestrained intercourse and trade", in the sense of *laissez-faire*, was considered in *Brown v Houston* in the light of the supremacy of federal law; hence the attachment of the words "as Congress has left it". The succeeding proposition, that referring to discrimination and thus relevant to s 92, was expressed in terms narrower than the first, and in the sense of a negative implication restrictive on State legislative power rather than with reference to any actual exercise by Congress of its power.

42 *Guy v Baltimore*[52] concerned the so-called "dormant" Commerce Clause. The Supreme Court held that an ordinance of the City of Baltimore, Maryland, conflicted with the power conferred on Congress by the Commerce Clause. The ordinance required payment for the use of public wharves at Baltimore by vessels laden with the products of other States, fees not exacted from vessels landing the products of Maryland itself. Harlan J said that these fees[53]:

> "although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the city's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States".

He added[54]:

> "Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations."

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52 100 US 434 at 443-444 (1879).

53 100 US 434 at 443 (1879).

54 100 US 434 at 443 (1879).

Most significantly for an understanding of the provenance of s 92, Harlan J, after referring to earlier decisions of the Supreme Court, said[55]:

> "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

43 In the present case counsel for the plaintiffs related that passage in *Guy v Baltimore* to the position of his clients by referring to the "more onerous public burden" being imposed by the law of Western Australia upon the business of Betfair than that imposed upon competing or "like" businesses of its own territory.

44 Further, it was this passage in *Guy v Baltimore*[56] which Sir Henry Parkes quoted on 10 February 1890 at the Australasian Federation Conference in Melbourne, adding[57]:

> "The case seems to set at rest, in the most emphatic manner, what is sometimes disputed – the question of existence of entire freedom throughout the territory of the United States. As the members of the Conference know, she has created a tariff of a very severe, and in some cases almost prohibitive character against the outside world; but as between New York and Massachusetts, and as between Connecticut and Pennsylvania, there is no custom-house and no tax-collector. Between any two of the States – indeed from one end of the States to the other – the country is as free as the air in which the swallow flies. We cannot too fully bear in mind this doctrine of the great republic, a doctrine supported in the most convincing manner by the case to which I have alluded."

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55 100 US 434 at 439 (1879).

56 100 US 434 at 439 (1879).

57 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, (Melbourne), 10 February 1890 at 46.

45 Professor La Nauze surmised that it was Inglis Clark who may have drawn the attention of Parkes to *Guy v Baltimore*[58]. At all events, it was in evident accord with these views that at the Sydney Convention on 4 March 1891 Sir Henry Parkes moved[59]:

> "That the trade and intercourse between the federated colonies, whether by means of land carriage or coastal navigation, shall be absolutely free."

46 It also should be noted that in 1890 *Guy v Baltimore*[60] had been applied in *Minnesota v Barber*[61]. A law of Minnesota invalidly required the inspection in that State before slaughter of any animals from which meat was taken for sale in the State for human consumption. Again the judgment of the Supreme Court was delivered by Harlan J. He looked to the practical effect of the law[62] and both to the demand and supply side, remarking[63]:

> "A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. ... The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or

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58 La Nauze, "A Little Bit of Lawyers' Language: The History of 'Absolutely Free', 1890-1900", in Martin (ed), *Essays in Australian Federation*, (1969) 57 at 69.

59 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 4 March 1891 at 23.

60 100 US 434 (1879).

61 136 US 313 (1890).

62 A point made by Barton J in his dissenting reasons in *Duncan v State of Queensland* (1916) 22 CLR 556 at 598.

63 136 US 313 at 326 (1890).

pork, however free from disease may have been the animals from which it was taken."

47 Commerce Clause decisions such as *Minnesota v Barber* are important for a further reason. They indicate that a law the practical effect of which is to discriminate against interstate trade in a protectionist sense is not saved by the presence of other objectives such as public health which are not protectionist in character. The promotion of litter control and of energy and resource conservation were propounded objects of the law which was held to fail in *Castlemaine Tooheys*[64]. That law sought to achieve those objects by exempting refillable bottles from the requirement for the payment of a mandatory deposit[65]. But this was no answer to the practical effect of the law which was held to be an impermissible discrimination of a protectionist kind against interstate trade.

48 The Commonwealth, as intervener, submitted that it is sufficient for validity of a law if one of several objectives is non-protectionist. That submission is inconsistent both with *Castlemaine Tooheys* and with the United States decisions before federation which influenced the framing of s 92. If accepted, the Commonwealth submission would impermissibly weaken the force of the imperative demand of s 92. It would do so by allowing to stand legislation which imposes upon interstate trade a discriminatory burden of a protectionist kind, merely because of the presence of other objectives.

49 With the above general considerations respecting s 92 in mind, we turn to consider first the methods of wagering which predated the arrival of the betting exchange in Tasmania, and then the legislation of Tasmania and that of Western Australia.

Bookmakers, totalisator betting and the betting exchange

50 One form of betting lawfully conducted in Australia has been pari-mutuel or totalisator or "TAB" betting. This is commonly called "starting price" betting. It involves the determination of dividends in respect of a particular event by reference to the size of the betting pool (less the commission charges of the

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64 (1990) 169 CLR 436.

65 (1990) 169 CLR 436 at 464, 474-475.

operator) and the number of successful bets[66]; one consequence of this system, as the Report noted, is the absence of risk to the totalisator relating to the outcome of the event.

51 Another form of betting is "fixed odds" betting which is conducted by licensed bookmakers. The legislation considered in this case contained no helpful definition of what is involved in the business of a bookmaker. In *Fingleton v Lowen*[67] Zelling J said of the original meaning of the term "bookmaker":

> "A bookmaker was one who made up a book on all the horses in a given race, adjusting the odds and the volume of money he took on any particular horse, so that if his calculations were correct, at the end of the race, no matter what horse won, the book would show a profit to the bookmaker."

52 The evidence shows that, at the present day, when provided by bookmakers, "fixed odds" involves the punter always placing a "back" bet that an outcome (a win or place) will occur, whilst the bookmaker is always "laying" the bet by betting that the outcome will not occur; however, the bookmaker may seek to balance the "book" (and reduce risk) by "betting back", that is to say, by placing bets with another bookmaker in favour of the result which has been wagered not to occur.

53 All Australian States provide for the licensing of corporate bookmakers, for licensed bookmakers to bet by telephone or over the internet with persons not on a racecourse, and for licensed bookmakers to bet on sporting events. All States also allow TAB betting to be accepted by telephone or over the internet and to be placed on sporting events.

54 In 2005-2006 the total betting turnover for bookmakers in Australia was more than $4.5 billion, and, of the more than $2.8 billion derived from betting on thoroughbred races, 70.4 per cent was derived from telephone and internet betting. In the same period the total TAB betting turnover was more than $13.3

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66 See the discussion by Hale J in *Totalisator Agency Board v Wagner* [1963] WAR 180 at 190-191.

67 (1979) 20 SASR 312 at 314.

billion and, of the more than $8.7 billion derived from thoroughbred races, 20 per cent was derived from telephone and internet betting on off-course totalisators.

55 In Western Australia, bookmakers are required to pay an annual licence fee calculated as a percentage of annual turnover, and a levy to those racing clubs on whose course the bookmaker conducts business, again calculated as a percentage of turnover. Racing clubs conducting on-course totalisators are also required to pay an annual licence fee calculated in the same way.

56 There are currently 47 bookmakers licensed in Western Australia; all are licensed to accept bets on races conducted in that State and elsewhere. Some 18 are licensed to accept bets by telephone or over the internet. Of that group 17 are licensed to accept bets over the internet by a website operated by Best Bookies Pty Ltd which is accessible to any person with an internet connection.

57 An essential difference between fixed odds betting conducted by Betfair and that conducted by bookmakers is that Betfair does not "hold a book" and does not carry any risk on the outcome of the event. Another is that whilst punters cannot back an entrant to "lose" when placing bets with a bookmaker (or on a TAB), they can do so with Betfair.

58 Betfair uploads onto its computer server information about each racing and sporting event in Australia on which wagers may be placed; the information includes, with respect to racing, the race field. Betfair charges a commission of generally between two and five per cent of net winnings, which is provided by registered players. Betfair requires registered players to deposit sufficient funds to cover the bets they wish to make. Betfair uses its computer program to match opposing bets by other registered players which have not been previously matched. Payments are made from a "Hobart account" of Betfair to the nominated bank account in Australia of the registered player concerned.

<u>The arrival in Australia of the betting exchange</u>

59 In the Summary provided in the Report to the Racing Ministers to which reference has been made, the following appeared:

> "1 The appeal to punters of betting exchanges on racing lies mainly in:
>
> - The fact bets are struck at fixed odds – in contrast to totalizator (TAB) betting.

- Availability of better odds – relative to bookmakers and TABs. These attractive odds are available partly because punters are able to transact directly with each other (no intermediary required to bear the risk of the wager) and, as is currently the case with Betfair's London-based operations on Australian racing, for example, betting exchanges benefit from operating in regimes characterised by low (or nil) contributions to the racing industry and betting taxes.

- The facility for punters to bet against ('lay') runners.

- Punter-friendly commission structures.

- Punters' anonymity viz-a-viz each other (in contrast to betting with bookmakers).

2 If betting exchanges are allowed to (continue to) operate on Australian racing under circumstances where they are able to operate profitably while charging customers an advertised commission rate ranging from 5% down to 2% (on net winnings per event), betting exchanges will likely prove a popular alternative to betting on Australian racing with TABs or licensed Australian bookmakers. This will likely be at significant expense to these existing operators – and hence to racing industry and State/Territory revenue streams from wagering.

The extent of betting exchanges' future popularity among Australian punters will depend to a degree upon whether one or more betting exchange operators are able to acquire an 'authorisation' from the Australian racing industry and/or Australian Governments to operate on Australian racing (or sport) and accept bets from Australian punters."

60 Under the heading "Commercial and revenue repercussions" the Report read:

"Some advocates of betting exchanges suggest that exchange operations on Australian racing will 'create a purely additive revenue stream for the (racing) industry', ie the turnover through betting exchanges will be entirely 'new money'. The Task Force is not convinced. Rather, it concludes that betting exchanges on Australian racing would pose a serious threat to current betting turnover levels of the three categories of

licensed wagering operator in Australia – TABs, traditional bookmakers and corporate bookmakers.

Hypothetically, in the extreme scenario of a national, fully 'authorised' betting exchange on Australian racing operating under a local regime similar to that presently applying in Britain, the Task Force forecasts that, over the medium term (five years), transfers of racing betting turnover from existing licensed Australian wagering operators could be as high as 20% in the case of TABs and traditional bookmakers, rising to 30% in the case of corporate bookmakers."

The 2005 Tasmanian legislation represented the legislative response to these considerations by one State. The subsequent response in Western Australia was quite different. We turn first to the situation in Tasmania.

The Tasmanian legislation

61 On 10 January 2006, Betfair was granted a licence under Div 5 (ss 76ZDA-76ZDM) of Pt 4A of the *Gaming Control Act* 1993 (Tas) ("the Tasmanian Act") to operate a "betting exchange"[68]. From its premises in Hobart, Betfair commenced operation of a betting exchange by means of a telephone call centre on 16 June 2006, and by means of computers connected to the internet on 28 August 2006.

62 For the purposes of the Tasmanian Act a "betting exchange" is defined[69] as meaning:

"a facility that enables persons to –

(a) place or accept, through the betting exchange operator, wagers with other persons; or

(b) place with the betting exchange operator wagers that, on acceptance, are matched with opposing wagers placed with and accepted by the operator (so as to offset all risk to the operator)".

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68 The licence was surrendered and replaced on 25 May 2007.

69 In s 76ZDB.

63 Division 5 of Pt 4A was added to the Tasmanian Act by the *Gaming Control Amendment (Betting Exchange) Act* 2005 (Tas) ("the 2005 Tasmanian Act"). The conduct of a gaming activity in accordance with, and subject to, a licence granted and in force under Pt 4A is rendered lawful by s 76A; this provision operates to lift what otherwise would be the operation of "any other law".

64 In the Second Reading Speech in the Legislative Assembly on the Bill for the 2005 Tasmanian Act, the Treasurer said that the decision to license betting exchanges had not been made lightly and added:

> "In making this decision the Government has weighed up all the arguments. We have listened to the wide-ranging views held on betting exchanges. We have considered arguments about probity, integrity, funding for the racing industry and about jobs for Tasmanians. On all of these essential elements the Government believes that the licensing of betting exchanges is the right decision."

He said later in his speech:

> "As part of the extensive probity and integrity measures to be applied to betting exchanges, only registered persons will be able to use the betting exchange services. The requirement for the completion of a registration check similar to the banks' 100-point check will ensure that there is a complete audit trail of the betting activity of individuals. An important part of the legislation before the House is the requirement that any licensed betting exchange must, for the purpose of ensuring the probity of brokered wagering and brokered wagering events, furnish regulatory agencies with such information in such time and manner as the Tasmanian Gaming Commission instructs the licensed betting exchange.
>
> ...
>
> There are a number of other important integrity and probity provisions included in this bill. These include:
>
> - the prevention of wagering on illegal events;
> - the capacity of the Gaming Commission to disallow any betting exchange rules on a number of bases including that they are deemed to be oppressive and unfair;

- the capacity for the betting exchange to freeze player funds immediately where inappropriate activity is suspected; and

- the prevention of wagering on any event which the Commission considers is not a fit subject for betting exchange wagering.

Not only are these strong probity and integrity requirements supported by heavy penalties for individuals found to breach the requirements but heavy penalties can also be imposed on the licensed betting exchange operator.

This bill provides for a licensed betting exchange to be subject to fines of up to $10 million and loss of licence for the breach of their conditions of licence. This level of penalty reflects the importance which the Government has placed on ensuring the integrity and probity of betting exchange operations."

65 With respect to matters of finance the Treasurer said:

"[T]o ensure that funding to the racing industry is not compromised, there will be a requirement that betting exchange operators underwrite the level of funding to the industry at its 2004-05 level. This requirement will remain in place for five years and will be set out in regulations. In addition, Betfair will be required to pay an upfront contribution of $5 million to the Tasmanian racing industry in the first year of operation covered by a deed of agreement between the Crown and Betfair. It will also be required to guarantee $5 million in taxes and product fees in the second year over and above the guaranteed funding level.

The latter requirement will be set out in regulations. That is, the Tasmanian racing industry will receive an additional $5 million in each of the first two years of operation compared to what it would have otherwise received. However, funding levels are expected to exceed this amount in the future. Should Betfair's share of the market reach 4 per cent, it is estimated that the operation of Betfair Australia will provide, by 2009-10, an additional $35 million to $40 million a year to the Tasmanian racing industry."

The law in Western Australia

66 At all material times, the only authorised wagering operations sited in Western Australia have been licensed bookmakers, on-course totalisators

operated principally by racing and turf clubs, and the authority known as RWWA which is established by s 4 of the *Racing and Wagering Western Australia Act* 2003 (WA) ("the RWWA Act").

67 With respect to the law of Western Australia, Mr Erceg had been at liberty to bet as he did before 29 January 2007 as a Betfair "registered player", by reason of the "offshore betting" provision then made by s 27A of the *Betting Control Act* 1954 (WA) ("the WA Act"). At that stage, Betfair qualified (along with out-of-State licensed bookmakers and totalisator agencies) as an "authorised person" for s 27A because it was authorised under the law of another State or Territory to engage in or conduct betting on races[70]. That remains the position of Betfair under the laws of the other Australian States. However, since 29 January 2007 it has ceased to be so under the WA Act. Hence this litigation.

68 On 29 January 2007 some of the critical provisions of the *Betting and Racing Legislation Amendment Act* 2006 (WA) ("the 2006 WA Act") commenced[71]. This statute made amendments and additions to the WA Act, the validity of some of which the plaintiffs challenge.

69 As s 27A now stands, it still remains open to a person in Western Australia, such as Mr Erceg, to make bets with bookmakers and totalisator organisations authorised under the law of another State or Territory. This acceptance by Western Australia of the licensing systems of the other States and Territories reflects what has been called the "Gentleman's Agreement" between these polities. All wagering operations are free to accept bets on events held in any State or Territory, but each polity collects fees and taxes only from wagering operators which they have licensed. However, as a result of the changes made by the 2006 WA Act, Western Australia alone has legislated a special regime in respect of betting exchanges.

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70 The "offshore betting" provision in s 27A of the WA Act was amended in 2006 so that an "authorised person" includes a person authorised by the law of another State or Territory to engage in or conduct betting on sporting events, as well as on races.

71 The new sections 27B, 27C and 27D had not commenced when the Further Amended Statement of Claim was filed on 28 May 2007. That did not make the institution of the present litigation premature: *Croome v Tasmania* (1997) 191 CLR 119 at 135. In any event, these provisions commenced on 9 July 2007, before the hearing of the Amended Special Case.

70 The first relevant provision introduced into the WA Act by the 2006 WA Act is s 27B(1). This states:

> "A person who establishes or operates a betting exchange commits an offence.
>
> Penalty: $10,000, or 24 months imprisonment, or both."

The term "betting exchange" is defined in s 4AA in terms resembling those in the Tasmanian Act and applicable to Betfair. However, s 4AA concludes with the words:

> "but does not include a facility, electronic or otherwise, that enables persons to place bets only with a bookmaker or a totalisator".

It should be added that when used in the WA Act the phrase "to bet" is so defined (s 4) that the event or contingency must be with respect to any horse or greyhound race or sporting event in relation to which betting is authorised under that statute.

71 The first of the two provisions the validity of which the plaintiffs challenge is s 24(1aa). This states:

> "A person who bets through the use of a betting exchange commits an offence.
>
> Penalty: $10,000, or 24 months imprisonment, or both."

This provision must be read with ss 12 and 13 of the *Criminal Code* (WA) ("the Code"). The result of the operation of s 12 of the Code is that it is sufficient that at least one of the acts that make up the elements necessary to constitute the offence under s 24(1aa) of the WA Act occurs in Western Australia[72]. Thus, s 24(1aa) would be attracted by the use by Mr Erceg in Western Australia of a computer to place bets with Betfair. Secondly, s 13 of the Code would render Betfair liable for aiding, counselling or procuring an offence under s 24(1aa) even if all of the acts of Betfair occurred outside Western Australia.

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72 *Pinkstone v The Queen* (2004) 219 CLR 444 at 453-454 [16], 464 [55]-[56]; [2004] HCA 23.

72 The second provision challenged by the plaintiffs is s 27D(1). Section 27D(1) of the WA Act reads:

> "A person to whom this section applies who, in this State or elsewhere, publishes or otherwise makes available a WA race field in the course of business commits an offence unless the person –
>
> (a) is authorised to do so by an approval; and
>
> (b) complies with any condition to which the approval is subject.
>
> Penalty: $5000."

The information comprising a "WA race field" in the ordinary course of events would be readily available to the public, at least from sources in the print media. This is apparent from the terms of the definition in s 27C(1) of the expression "WA race field". The expression means:

> "information that identifies, or is capable of identifying, the names or numbers of the horses or greyhounds –
>
> (a) that have been nominated for, or that will otherwise take part in, an intended race to be conducted in this State; or
>
> (b) that have been scratched or withdrawn from an intended race to be conducted in this State".

73 The prohibition imposed by s 27D(1) applies to persons including those who in Western Australia "or elsewhere" act as a bookmaker, conduct betting by the operation of a totalisator, or operate a betting exchange (s 27C(2)).

74 Provision is made in s 27D(2)-(7) for the Minister to grant, suspend, and revoke approvals. Betfair holds no such approval. Its application was refused by the Minister on 8 October 2007. In her written reasons for the refusal the Minister said that she had had regard to the regulatory policy of the WA Act as now stated in the Act's long title. That title had been amended by the 2006 WA Act to include in the objects of the WA Act, "to prohibit betting through, and the establishment and operation of, betting exchanges".

RWWA

75 Something should be said here of the significant position occupied by RWWA. The effect of s 27C(3) of the WA Act is that, regardless of what otherwise might be the case, the prohibition upon publication of WA race fields which is imposed by s 27D has no application to RWWA in respect of the performance of its functions in accordance with the RWWA Act. Trading variously as "TAB", "Ozbet" and "Sportsbet", RWWA has established totalisator agencies at locations in Western Australia, a telephone call centre and an internet facility for the making of wagers at fixed price odds on horse and greyhound races and sporting events in Western Australia and elsewhere.

76 The total turnover in 2005-2006 for RWWA for all bets was $1,324,196,000, and for internet bets was $109,800,000. (For bookmakers the total turnover for all bets was $102,790,000 and for telephone and internet bets it was $26,976,000; for on-course totalisators the turnover was $75,283,000.)

77 RWWA does not conduct a betting exchange. Counsel for Western Australia submitted (and the plaintiffs disputed) that as the RWWA Act presently stands it has no power to conduct a betting exchange and, in any event, if it sought to do so it would be faced by the general prohibition upon betting exchanges now imposed by s 27B(1) of the WA Act. The case may be decided on the footing that these submissions by Western Australia are correct. But the presence of s 27B(1) does not meet the point that RWWA and Betfair competed before 29 January 2007 for wagers placed by internet and telephone and but for the changes then instituted by statute would have continued to do so.

Fees and levies

78 RWWA is a "State/Territory body" within the meaning of Pt III, Div 1AB of the *Income Tax Assessment Act* 1936 (Cth) and as such is exempt from income tax. At the State level, RWWA pays a special tax levied on moneys received by it on wagers made. This is fixed by the *Racing and Wagering Western Australia Tax Act* 2003 (WA) as five per cent in respect of totalisator wagers and 11.91 per cent in respect of off-course wagers.

79 RWWA has been obliged since 31 July 2006 to allocate its funds in the manner specified in s 106 of the RWWA Act. This includes provision for grants and loans to racing clubs and payments or credits to thoroughbred, harness and greyhound racing clubs registered with RWWA.

80 In Western Australia, licensed bookmakers are required to pay a "betting levy" to the racing club on whose racecourse the licensee carries on business; the levy is (a) 0.5 per cent of betting turnover in respect of approved sporting events and (b) two per cent of other betting turnover. The racing club must retain 50 per cent of the amounts received in respect of (a) and all amounts received under (b), and may apply the amount retained to such purposes as the club thinks fit. The balance must be remitted to the Gaming and Wagering Commission ("the Commission") established by statute in 1987.

81 The operator of an on-course totalisator must pay to the Commission an annual licence fee at a prescribed rate assessed on total turnover during the preceding year.

The Amended Special Case

82 The Amended Special Case reserves for the opinion of the Full Court questions framed to encapsulate the several grounds upon which the plaintiffs assert the constitutional invalidity of s 24(1aa) and s 27D(1). First, the plaintiffs seek declaratory relief that s 24(1aa) of the WA Act is invalid to the extent that it otherwise applies to a person who makes or accepts offers to bet through the use of Betfair's betting exchange, by means of telephone or internet communications between a place in Western Australia and the Hobart premises of Betfair. They also seek declaratory relief that s 27D(1) of the WA Act is invalid to the extent that it otherwise applies to the conduct of Betfair in publishing or otherwise making available a WA race field, whether by way of telephone or internet communication between its Hobart premises and a place in another State, or for the purpose of making or receiving offers through the use of the Betfair betting exchange by telephone or internet communication between its Hobart premises and a place in another State.

83 The plaintiffs (with the support of Tasmania) submit that these provisions are rendered invalid in their application to the operation of the Betfair betting exchange by s 92 of the Constitution. A further challenge is made to the validity of s 27D(1), which it will be recalled proscribes certain acts committed in Western Australia "or elsewhere", and, the plaintiffs contend, thereby purports to prohibit Betfair from engaging in conduct authorised by its licence under the Tasmanian Act in Tasmania and elsewhere. This operation of s 27D(1) is said to be rendered invalid or inoperative by either or both of the "full faith and credit" provision of s 118 of the Constitution, and an implication drawn from the text and structure of the Constitution and restraining such an extraterritorial reach of State legislative power.

84 The Amended Special Case may be disposed of without ruling on these grounds of further challenge to the validity of s 27D(1). This is because the plaintiffs should have the declaratory relief they seek respecting the invalidity of s 24(1aa) and s 27D(1), by reason of the operation of s 92.

State regulation

85 In explaining the reasons for that outcome, it is convenient first to consider a particular proposition drawn from *Castlemaine Tooheys*[73]. Western Australia, and supporting interveners, rely upon that proposition for a sufficient answer to the success the plaintiffs otherwise might have in demonstrating that the impugned provisions are discriminatory in a protectionist sense.

86 In their joint reasons in *Castlemaine Tooheys*, Mason CJ, Brennan, Deane, Dawson and Toohey JJ said that account must be taken of a "fundamental consideration"[74]. This was that each State legislature has power "to enact legislation for the well-being of the people of that State". Western Australia submits that the legislation under attack by the plaintiffs is of this character.

87 But such State legislative power, as their Honours also said in *Castlemaine Tooheys*, must be "subject to the Constitution". Section 92 applies in peremptory terms and (unlike, for example, s 51) it is not restrained by the presence of those opening words.

88 By way of contrast, the *Melbourne Corporation* doctrine applies to the exercise of federal legislative powers and the implication involved finds some textual root in the phrase in the opening words of s 51, "subject to this Constitution". There is to be found in s 92 no such textual root for any implication saving legislation (and the policies it may implement) from the full operation which that provision otherwise has in any given case. That is not a cause for surprise when regard is had to the operation of s 92 in the maintenance of a national economy. Further, such a state of affairs is consistent with those pre-1900 United States decisions to which reference has been made earlier in these reasons.

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73 (1990) 169 CLR 436.

74 (1990) 169 CLR 436 at 472.

89 There are difficulties, also as noted above at [18], in the use in *Castlemaine Tooheys* of the expression "the people of" a State. The State laws under challenge here apply not merely to those citizens who are resident in Western Australia[75], but to any person present there at any time.

90 Thus, the "fundamental consideration" identified in *Castlemaine Tooheys* of a condition of localised well-being will not encompass much modern State regulatory legislation in the "new economy". This is so particularly where the State law is given a "long-arm" territorial reach of the kind considered in *Pinkstone v The Queen*[76].

91 Perhaps more significantly, it appears that the "fundamental consideration" proceeds from circular reasoning. This will be so, unless the circle be broken and the postulated limitation found in the text of s 92 itself, albeit by some gloss upon the words "absolutely free".

92 Attempts of this kind were made in cases decided before *Cole v Whitfield*[77]. Barwick CJ saw s 92 as applying "in a society based on free competition in trade", in the sense "that freedom is understood in organized and civilized societies"; the consequence was that laws dealing with fraudulent or deceptive conduct in trade and with monopolisation would be "compatible" with that freedom[78].

93 Earlier, in *Mansell v Beck*[79], Taylor J observed that from the moment of first European settlement lotteries could not be conducted except in violation of law and that it was difficult to see how such activities ever had assumed in Australia the character of trade and commerce. No such submission was made respecting the forms of gambling with which this case is concerned. Given the evidence respecting the extensive revenues presently provided to government from licensed gambling, such a submission would have been at best incongruous.

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75 cf Constitution, s 117.

76 (2004) 219 CLR 444.

77 (1988) 165 CLR 360.

78 *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 19-20.

79 (1956) 95 CLR 550 at 596.

94 Much of what was said in the older cases respecting the failure of s 92 to reach quarantine and inspection laws seems to have been based upon a perception of the "true nature" of such legislation as aids not hindrances to interstate commerce[80]. On the other hand, Evatt J looked for "postulates or axioms demanded alike by the dictates of common sense and by some knowledge of what was being attempted by the founders of the Australian Commonwealth"; this supported the validity of laws suppressing or restricting, "in the public interest", the practice of gambling[81].

95 At first blush, the reference by Evatt J to what was attempted by those who drew the Constitution might provide support for a gloss upon s 92 which would be consistent with what was said in *Castlemaine Tooheys* and would build upon a distinction apparently first drawn by Marshall CJ in *Gibbons v Ogden*[82]. Marshall CJ there distinguished between "commerce" and "police" regulation. The latter was a residual aspect of sovereignty not surrendered by the States to Congress. The Chief Justice spoke of "[t]he acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens".

96 A dichotomy, conclusory in nature, then was established in the United States decisions[83] between State laws invalid as regulation of interstate commerce and those valid as "police power regulation". The Supreme Court developed a doctrine which left the States free to regulate those aspects of commerce so local in character as to demand diverse treatment. In *Cooley v Board of Wardens of the Port of Philadelphia*[84] it was held that the engagement of local pilots by ships leaving or entering that port was a matter of "local" rather than "national" regulation. But, even so, such regulations could not discriminate between ships from different States[85].

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80 See the reasons of the Privy Council in *James v The Commonwealth* (1936) 55 CLR 1 at 52-53; [1936] AC 578 at 623-625.

81 *R v Connare; Ex parte Wawn* (1939) 61 CLR 596 at 620-621.

82 22 US 1 at 208 (1824).

83 By such cases as *Willson v Black-bird Creek Marsh Co* 27 US 245 (1829).

84 53 US 299 (1851).

85 See *Spraigue v Thompson* 118 US 90 (1886).

97 Whilst these doctrines were current when s 92 was framed[86], they would sit uncomfortably with the text of s 92 as adopted and provide an unsatisfactory basis today for the "fundamental consideration" discerned in *Castlemaine Tooheys*. They proceeded from a view taken from time to time in the United States of distinct and dual sovereignty which in Australia the Court has not accepted for over 80 years. In addition, as Wynes emphasised[87], the "police power" of the States operated as a check upon the *exclusive* nature of federal legislative power found in the Commerce Clause, whereas s 51(i) of the Constitution is not such a power. Further, as this case illustrates, what is purely "local" commerce today may not be readily distinguished at any practical level from interstate commercial activity.

98 In *Castlemaine Tooheys* their Honours continued[88]:

> "It would extend the immunity conferred by s 92 beyond all reason if the Court were to hold that the section invalidated any burden on interstate trade which disadvantaged that trade in competition with intrastate trade, notwithstanding that the imposition of the burden was necessary or appropriate and adapted to the protection of the people of the State from a real danger or threat to its well-being. And it would place the Court in an invidious position if the Court were to hold that only such regulation of interstate trade as is in fact necessary for the protection of the community is consistent with the freedom ordained by s 92. The question whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process."

99 This passage may present some obscurities. If a criterion of validity of legislation is possession of a particular attribute, then Ch III of the Constitution commits to the federal judicial power the determination of that issue. Further, it may be noted that in *Castlemaine Tooheys* their Honours went on to answer

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86 Cooley, *The General Principles of Constitutional Law in the United States of America*, (1880) at 74-75.

87 Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 232-233.

88 (1990) 169 CLR 436 at 472-473.

adversely to South Australia the ultimate questions, which they identified in conventional terms as follows[89]:

> "[T]he validity of the 1986 legislation rests on the proposition that the legislative regime is *appropriate and adapted* to the protection of the environment in South Australia from the litter problem and to the conservation of the State's finite energy resources and that its impact on interstate trade is incidental and *not disproportionate* to the achievement of those objects." (emphasis added)

100 Neither the plaintiffs nor Tasmania challenged the existence of a "fundamental consideration" of the general nature discerned in *Castlemaine Tooheys*. Accordingly, further attention to its derivation from and place in the Constitution is not required here.

101 However, with respect to the "appropriate and adapted" criterion expressed in *Castlemaine Tooheys*, counsel for the plaintiffs and for Tasmania submitted that necessarily it involves the existence of a "proportionality" between, on the one hand, the differential burden imposed on an out-of-State producer, when compared with the position of in-State producers, and, on the other hand, such competitively "neutral" objective as it is claimed the law is designed to achieve.

102 That "proportionality" must give significant weight to the considerations referred to earlier in these reasons when discussing *Castlemaine Tooheys*[90]. These involve the constraint upon market forces operating within the national economy by legal barriers protecting the domestic producer or trader against the out-of-State producer or trader, with consequent prejudice to domestic customers of that out-of-State producer or trader. They suggest the application here, as elsewhere in constitutional, public and private law, of a criterion of "reasonable necessity"[91]. For example, in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[92], Mason J said:

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89 (1990) 169 CLR 436 at 473-474.

90 (1990) 169 CLR 436 at 468-470.

91 See the discussion by Gleeson CJ in *Thomas v Mowbray* (2007) 81 ALJR 1414 at 1428-1429 [20]-[26]; 237 ALR 194 at 208-209; [2007] HCA 33.

92 (1975) 134 CLR 559 at 608.

> "As the defendant has failed to show that the discriminatory mode of regulation selected is necessary for the protection of public health, it is in my judgment not a reasonable regulation of the interstate trade in pasteurized milk."

His Honour also referred[93] to remarks in a similar vein by the Privy Council in *The Commonwealth v Bank of NSW*[94].

103 That view of the matter should be accepted as the doctrine of the Court. It is consistent with the explanation given in *Cole v Whitfield*[95] of the justification of the total prohibition in the Tasmanian legislation on the sale of all undersized crayfish, irrespective of origin, as supplied by its objective of the conservation of the stock of Tasmanian crayfish. The Court held[96] that the prohibition was a "necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters" because that State "cannot undertake inspections other than random inspections and the local crayfish are indistinguishable from those imported from South Australia".

104 Further reference also should be made here to the resolution in *Castlemaine Tooheys*[97] by Mason CJ, Brennan, Deane, Dawson and Toohey JJ of the question of the validity of the South Australian legislation at stake there. They concluded from the facts, that the legislature of that State had "reasonably apprehended" that the sale of beer in non-refillable bottles manufactured in South Australia constituted a threat to the reserves of that State of natural gas[98]. Their Honours then said that it might have been expected that State legislation would have prohibited the sale in South Australia of beer in non-refillable bottles produced in that State. They went on to note that an alternative measure might have been the prohibition of the manufacture in South Australia of such bottles,

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93 (1975) 134 CLR 559 at 615.

94 (1949) 79 CLR 497 at 640-641; [1950] AC 235 at 311.

95 (1988) 165 CLR 360 at 409-410.

96 (1988) 165 CLR 360 at 409-410.

97 (1990) 169 CLR 436 at 477.

98 (1990) 169 CLR 436 at 477.

either at all, or with the use of natural gas. However, neither of these measures was adopted.

105 With that in mind, their Honours concluded[99]:

> "Instead a regime was introduced which subjected the Bond brewing companies' interstate trade to serious competitive disadvantages by reason of their selling beer in non-refillable bottles, even though those bottles are manufactured outside the State and do not, as far as we know, involve the use of South Australian natural gas. ...
>
> [N]either the need to protect the environment from the litter problem nor the need to conserve energy resources offers an *acceptable explanation or justification* for the differential treatment given to the products of the Bond brewing companies. Accordingly, in our view, that treatment amounted to discrimination in a protectionist sense in relation to their interstate trade." (emphasis added)

Acceptable explanation or justification?

106 The reasons for the policy adopted by Western Australia were spelled out in the legislative preamble as being "to prohibit betting through, and the establishment and operation of, betting exchanges". Those reasons had been expressed earlier by an answer given by the Minister for Racing and Gambling to a question asked in the Legislative Assembly on 4 May 2005. The Minister had said:

> "The racing industry is very important to the state of Western Australia. It is one of the six biggest industries in the state. It employs thousands of citizens across the state. It provides a great deal of interest and enjoyment for many hundreds of thousands of Western Australian citizens.
>
> ... The reasons we are opposed to betting services are that, *first*, they make no contribution to the racing industry in Australia and, *secondly*, betting exchanges allow punters to bet on any of the racing codes and lose. That means that the integrity of the racing industry is put under threat by betting exchanges. They are absolutely opposed by all three racing industry codes in Western Australia. They are opposed by the

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99 (1990) 169 CLR 436 at 477.

government. They are opposed by virtually all state governments. However, we have a problem: we cannot control the Internet. We have written to the federal government and to the minister for communications asking whether she will ensure that betting exchanges are made illegal under the Interactive Gambling Act. She has declined to do so." (emphasis added)

107 First, as to the absence of contribution to the racing industry in Australia, so far as that may be relevant. The evidence shows that by agreement with the Victorian regulator, Betfair undertook to return an amount equivalent to one per cent of the value of bets taken by it on races in Victoria; this is the same level of return as that required from bookmakers in that State. Betfair has been meeting that obligation. There is no reason to doubt the assertion by Betfair that it remains ready to undertake obligations of this kind in Western Australia and to ensure that the organisers of races in that State obtain a reward from Betfair as well as from other wagering operators in that State.

108 In its submissions Western Australia also contended that any practical effect of the impugned legislation in protecting the turnover of in-State operators from diminution as a result of competition from Betfair, with consequent prejudice to the returns to the racing industry and in-State revenue provided by it, could not be protectionist in nature. But a proposition which asserts that an object of revenue protection of this kind may justify a law which discriminates against interstate trade is contrary to authority[100]. And it is contrary to principle, for such a justification, if allowable, would support the re-introduction of customs duties at State borders.

109 Much effort on this branch of the case was expended in developing the second reason to which the Minister referred in the above passage. This was to the effect that Betfair's operations, if permitted by the law of Western Australia, would or would be likely to have, or were reasonably apprehended to have, an adverse effect upon the integrity of the racing industry conducted in that State. It was said to be easier to lose a multiparty sporting event than to win it. To permit punters to back an entrant to lose rather than to win, as does Betfair, was said in the Report to pose a threat to the integrity of the process above that which might be thought to be present already in the racing industry. It was this alleged threat

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100 *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411 at 426-427; *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 80.

to the integrity of the racing industry which was said by Western Australia to justify the course taken by its legislation.

110 What is involved here is an attempt at an evidentiary level to measure something of an imponderable. But, allowing for the presence to some degree of a threat of this nature, a method of countering it, which is an alternative to that offered by prohibition of betting exchanges, must be effective but non-discriminatory regulation. That was the legislative choice taken by Tasmania and it cannot be said that that taken by Western Australia is necessary for the protection of the integrity of the racing industry of that State. In other words, the prohibitory State law is not proportionate; it is not appropriate and adapted to the propounded legislative object.

111 Part 4A of the Tasmanian Act contains the detailed regulatory provisions which the Treasurer had outlined. It does not discriminate against interstate trade and commerce. Counsel for Tasmania points to evidence which indicates that the prescribed standards have been fully satisfied by Betfair. Seen from the other perspective, there was a lack of evidence of any increase in Australia of dishonest practices attributable to the operation of the betting exchange by Betfair. It will be recalled that Betfair's exchange remains accessible under the laws of the other States.

112 In that setting, it cannot be found in this case that prohibition was necessary in the stated sense for the protection or preservation of the integrity of the racing industry.

113 Both the plaintiffs and Tasmania put the case initially at the level that the protection of integrity was not a "substantial purpose" or "the real object" of the legislation. It is unnecessary to decide the case by ruling on that submission. This is because these parties also submitted that even if that object be seen as legitimate, the means adopted, prohibition, was not appropriate and adapted to achieve it given the avenue of regulation in a non-discriminatory manner.

The market

114 The evidence shows that there is a developed market throughout Australia for the provision by means of the telephone and the internet of wagering services on racing and sporting events. Indeed, the evidence shows that such a market may be international. Within the Commonwealth the events may take place in one State, the customer be in another and the licensed bookmaker or TAB be in a third. Before the commencement of the legislation of Western Australia which is

under challenge, this market included the services supplied by the betting exchange which Betfair had established under licence in Tasmania. In the other States this remains the case. The inhibition to competition presented by geographic separation between rival suppliers and between supplier and customer is reduced by the omnipresence of the internet and the ease of its use.

115 The apprehension expressed in the Report as to the operations of betting exchanges, with lower commission rates, upon the revenue streams derived by TABs and licensed bookmakers, is indicative of cross-elasticity of demand and thus of close substitutability between the various methods of wagering[101].

116 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.

117 It is now convenient to determine whether the plaintiffs are entitled to the relief they seek respecting the two provisions under challenge.

Section 27D(1)

118 This provision applies to the conduct of Betfair in publishing or otherwise making available a WA race field. This burdens interstate trade and commerce, both directly and indirectly. It does so directly because it denies to Betfair use of an element in Betfair's trading operations. It does so indirectly by denying to Betfair's registered players receipt and consideration of the information respecting the latest WA race fields by access to Betfair's website or by communication with its telephone operators. These effects of s 27D(1) operate to the competitive disadvantage of Betfair and to the advantage of RWWA and the other in-State wagering operators. The law in its application to Betfair answers the description of a discriminatory burden on interstate trade of a protectionist kind.

119 The provision for authorisation may be put to one side so far as concerns Betfair. Given the stated legislative purpose of prohibition of betting through and the establishment and operation of betting exchanges, a matter to which the

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101 See *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 455 [250].

Minister is bound to have regard when considering an application under s 27D, the prospect of Betfair obtaining approval must be illusory. The evidence of the refusal of the application which Betfair made bears this out.

Section 24(1aa)

120 The relevant effect of this provision is to prohibit a person in Western Australia from placing a particular form of fixed odds bet by means of a cross-border electronic communication, and to render the out-of-State wagering operator liable for aiding, counselling or procuring an offence by Betfair's registered players even if all its acts occurred outside Western Australia.

121 It is true that this particular form of fixed odds betting also is denied to in-State wagering operators and their customers. But that does not deny to s 24(1aa) its character of a discriminatory burden on interstate trade of a protectionist kind. The sub-section operates to protect the established wagering operators in Western Australia, including RWWA, from the competition Betfair otherwise would present. What has been said above respecting cross-elasticity of demand is relevant here. The intrastate trade and interstate trade are of "the same kind"[102], whether the subject matter be different species of fixed odds betting or the general field of wagering upon racing and sporting events.

122 That view of the matter proceeds from the evidence indicating cross-elasticity of demand. Some analogy is provided by the situation in *Castlemaine Tooheys*[103]. There the discrimination was between bottles having different characteristics; here it is between different but competing forms of wagering on racing and sporting events. The effect of s 24(1aa) is to prohibit Betfair, an out-of-State wagering operator, from providing a betting exchange for registered players in Western Australia, leaving the in-State operators able to supply customers with their services without the competition to their revenue which Betfair would present. This is another discriminatory burden of a protectionist kind.

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102 *Cole v Whitfield* (1988) 165 CLR 360 at 407-408; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 204-205.

103 (1990) 169 CLR 436.

Other grounds

123 The foregoing conclusions make it unnecessary to consider whether s 27D(1) is invalid by reason of the alleged direct conflict between it and the authority given to Betfair by its licence under s 76A of the Tasmanian Act. This is not the occasion to consider what may be the controlling constitutional principles were there demonstrated to be such a clash of State legislation.

Orders

124 The plaintiffs have succeeded in their reliance upon s 92 of the Constitution and are entitled to declaratory relief in the particular form identified earlier in these reasons.

125 Western Australia submitted that the appropriate outcome respecting s 24(1aa) would be to read it down so as not to apply to betting in the course of interstate trade and commerce and thus leave it to apply to betting in intrastate trade and commerce or betting in trade and commerce with other countries. However, rather than thereby attempt textual reconstruction of s 24(1aa), the preferable course is to grant to the plaintiffs declaratory relief in the limited form indicated. Given the absolute terms and penal effect of the impugned provisions, it might exceed the function of the Court to re-express them[104].

126 The costs of the plaintiffs of the Amended Special Case should be borne by Western Australia.

127 Question 1 should be answered:

> "Section 24(1aa) of the *Betting Control Act* 1954 (WA) is invalid to the extent that it would apply to a person including the second plaintiff, who makes or accepts offers to bet through the use of the first plaintiff's betting exchange by telephone or internet communication between a place in Western Australia and the Tasmanian premises of the first plaintiff."

128 Question 2 should be answered:

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104 See *Pidoto v Victoria* (1943) 68 CLR 87 at 109; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 501-503.

"Section 27D(1) of the *Betting Control Act* 1954 (WA) is invalid to the extent that it would apply to conduct of the first plaintiff in publishing or otherwise making available a WA race field:

(i) by way of telephone or internet communication between the Tasmanian premises of the first plaintiff and a place in another State; or

(ii) for the purpose of making or receiving offers to bet through the use of the first plaintiff's betting exchange by telephone or internet communication between the Tasmanian premises of the first plaintiff and a place in another State."

129 Question 3 should be answered:

"Unnecessary to answer."

130 HEYDON J. The background is set out in the joint judgment[105]. So are s 92 of the Constitution[106] and the legislation it is alleged to invalidate[107].

131 The plaintiffs correctly submitted that where the practical effect of a law is to burden inter-State trade to a significantly greater extent than it burdens intra-State trade, the law contravenes s 92 unless there is some other end achieved by the law which is compatible with s 92.

132 The plaintiffs further submitted that the practical effect of both s 24(1aa) and s 27D(1) is to burden inter-State trade to a significantly greater extent than each burdens intra-State trade, and that there was no other end achieved by each provision which is compatible with s 92. These submissions are correct for both s 24(1aa) and s 27D(1).

The validity of s 24(1aa)

133 Section 24(1aa) isolates for prohibition certain types of trading activity. It prohibits a gambler in Western Australia from placing a particular type of bet. Hence, when read with s 13 of the *Criminal Code* (WA), it prohibits persons offering gamblers the facility of betting in that way, whether those persons carry out any act in Western Australia or not. Western Australia relied on the fact that the legislation prevented persons in Western Australia from betting through a betting exchange whether that exchange operated from Western Australia or elsewhere. That is, it prevented Western Australian traders from employing a betting exchange in their trade as much as it prevented non-Western Australian traders from doing so. However, the prohibitions on trading activity created by s 24(1aa) do burden inter-State trade to a significantly greater extent than they burden intra-State trade. This is because they protect the Western Australian traders who offer gamblers the facility of betting from the rivalry they would otherwise face from inter-State traders employing the prohibited forms of trading activity. The trading activity prohibited and the trading activity protected are not identical, but they are each part of the same overall trading activity – offering facilities to gamblers to bet.

134 Western Australia argued that s 24(1aa) was not invalid by reason of s 92, because it advanced the end of preserving the integrity of racing in Western Australia by preventing persons who have the twin characteristics of possessing the capacity to affect adversely the performance of a horse in a race and

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105 At [1]-[9] and [75]-[81].

106 At [21].

107 At [70]-[74].

possessing the desire to profit from that capacity by laying a bet that it will lose, from doing so. That argument must be rejected. The width of the technique adopted in s 24(1aa) reveals that that is not the end advanced. The technique adopted was a prohibition on a very wide class of would-be gamblers – persons in Western Australia who might wish to place a back bet or a lay bet on a horse race or any sporting event anywhere in the world – from doing so. The technique employed is wider than the end advanced in not being limited to horse racing, but in extending to sporting events in relation to which no "integrity" problems have been claimed. Thus s 24(1aa) cannot advance the integrity of horse racing in Western Australia by preventing Western Australians from betting in a particular way on a tennis match in Sydney or a cricket match in Adelaide where the organisers of those events do not object to betting in that particular way. Further, the technique employed is wider than the end advanced in not being limited, as Western Australia's formulation of that end is limited, to horse racing in Western Australia: it extends to horse racing anywhere. Section 24(1aa) cannot advance the integrity of horse racing in Western Australia by preventing Western Australians from betting in a particular way on a Melbourne horse race where the organisers of that race do not object to betting in that particular way. And the technique is not limited to the very narrow class of persons who might wish to exploit a capacity to affect adversely the performance of a horse in a race by laying a bet on it to lose, but extends to the much wider class of would-be gamblers described above. So wide is the technique adopted – so ill-suited is it to achieve the end supposedly advanced – that it must be inferred that the only purpose is protectionist. Hence s 24(1aa) is invalidated by s 92.

The validity of s 27D(1)

135 The plaintiffs advanced the following arguments in relation to s 27D(1). The sub-section, in prohibiting unlicensed persons from publishing or otherwise making available a WA race field, prevents persons in the position of the first plaintiff from engaging in the trade of offering facilities to bet in the fashion they desire while leaving other persons, particularly Western Australian rivals of persons in the position of the first plaintiff, free to trade in that fashion. That consequence flows for the following reasons. Before giving approval under s 27D(2) the Minister is to have regard to the prescribed criteria: s 27D(5). Section 33(1) enables the Governor to make regulations "prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act". By the Betting Control Amendment Regulations (No 2) 2007 (WA), the Betting Control Regulations 1978 (WA) were amended contemporaneously with the commencement of s 27D on 9 July 2007. The amendments prescribe criteria for the purpose of s 27D(5) (reg 99) and also require an application for approval to be in a form prescribed by the Minister (reg 100). The criteria prescribed for the purpose of s 27D(5) include the criterion that the applicant for approval is authorised to conduct wagering by the law of Western Australia or another jurisdiction in which the applicant operates, if the law so requires: reg 99(1)(a).

They also include the criterion that the Minister is satisfied that the applicant is a "fit and proper person" to hold an approval: reg 99(1)(c). The form prescribed by the Minister under reg 100(1)(a) in Pt A par 4 requires the applicant to provide details of all wagering types intended to be offered or facilitated using WA race fields including full details of any "betting to lose"[108]. The Guide to Obtaining Approval to Publish/Use Western Australian Race Fields states that the "detail provided in relation to this section [of the form] will be integral in assessing wagering operations". That Guide also states:

> "An approval given by the Minister (or delegate) does not give automatic right to wagering service providers to publish/use Western Australian race field information. As a condition of an approval, wagering service providers approved must enter into a commercial arrangement with [RWWA] before obtaining Western Australian race field information."

The imposition of this condition was anticipated by the *Betting and Racing Legislation Amendment Act* 2006 (WA) when it amended the *Racing and Wagering Western Australia Act* 2003 (WA) to confer on RWWA the function of entering into contracts or arrangements for the commercial exploitation of information held by it in relation to racing in Western Australia (s 35(1)(ba)) and the power to provide WA race fields on a commercial basis (s 30(2)(ba)).

136 In short, the plaintiffs contended, since the first plaintiff conducts a betting exchange, since betting through that facility is prohibited by s 24(1aa) and since the first plaintiff facilitates "betting to lose", the first plaintiff is unlikely to experience a favourable exercise of the Minister's discretion to grant approval. It is also within the legislative contemplation that the principal Western Australian rival of the first plaintiff, namely RWWA, would not be likely to enter a commercial arrangement with the first plaintiff. In addition, the legislation favours RWWA over inter-State traders in that s 27C(3) excludes RWWA from the need to obtain authorisation. And the legislation also gave Western Australian bookmakers the benefit of an exemption until 6 August 2007[109],

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108 The form was prescribed by the Minister under reg 100(1)(a) before 19 June 2007 (when the commencement date of s 27D as 9 July 2007 was proclaimed).

109 Section 27C(4)(a) provides that s 27D does not apply to a person holding a licence under Pt 2 until the day specified under s 27C(5), or 8 July 2008, whichever occurs first. By notice published in the *Western Australian Government Gazette*, No 149, 20 July 2007 at 3647 pursuant to s 27C(5), the Minister notified 6 August 2007 as the day on and from which s 27D applies to those persons. Hence the exemption lasted until 6 August 2007.

thereby favouring them over inter-State traders. In the relevant Second Reading Speech the Minister said[110]:

> "Local bookmakers will also need to gain an authority and negotiate a fee with RWWA, but the fact that these bookmakers currently contribute to the local racing industry through the payment of a betting levy will be a matter that can be taken into account."

137 According to the plaintiffs, it follows that there are three relevant forms of discrimination created by s 27D(1).

138 The first is that s 27D(1) applies to out-of-State wagering operators but not to in-State wagering operators, namely RWWA and Western Australian bookmakers. In relation to RWWA, that is the direct effect of the exemption in s 27C(3). In relation to Western Australian bookmakers, that is the direct effect of the exemption in s 27C(4) until 6 August 2007. After that date, the practical effect of treating the fact that those bookmakers contribute to the local racing industry through the payment of a betting levy as a matter that can be taken into account in the process of granting approval is that they are more likely to gain approval.

139 The second form of discrimination arises from the need which the prohibition in s 27D(1) creates to obtain approval under s 27D(2). That approval can be withheld as a matter of discretion, whether by reference to the "fit and proper person criterion" or as part of the Minister's residual discretion. Discrimination also arises from the announced intention to treat "betting to lose" as integral to the assessment of a wagering operator as a fit and proper person. The intended practical effect is to prevent or inhibit out-of-State wagering operators, and particularly the first plaintiff, from offering or accepting bets on Western Australian races.

140 The third form of discrimination arises from the imposition, as a condition of approval, of the requirement for a wagering operator to enter into a commercial arrangement with RWWA. The effect is to require an out-of-State wagering operator to enter into a commercial arrangement with a particular in-State wagering operator which is a substantial competitor, if the out-of-State wagering operator is to offer or accept bets on a Western Australian race. Whether or not such commercial arrangement should be entered into, and if so on what terms, are matters left for the legally unreviewable judgment of RWWA.

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110 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 June 2006 at 4067.

141 In short, the preferential treatment afforded to RWWA, both by its exemption from s 27D(1) and through the intended practical operation of conditional approvals to be granted under s 27D(2), is of its nature preferential treatment afforded to an in-State wagering operator at the expense of any out-of-State wagering operator who seeks to compete with RWWA using the means of publishing or otherwise making available a WA race field. The imposition of a prohibition subject to a discretion to grant permission contravenes s 92 where the mere existence of the prohibition (with or without the discretion) has the immediate practical effect of discriminating in a protectionist way.

142 Thus, the plaintiffs concluded, the intended practical operation of s 27D is as a prohibition on an out-of-State offeror of wagering services to gamblers being able to use as an element of its services information about race fields generated by Western Australian racing operators. It was thus no accident, submitted the plaintiffs, that by 26 October 2007, of the 115 applications for approval to publish or otherwise make available WA race fields made pursuant to s 27D, 110 had been approved, four had not yet been determined and one had been refused – that of the first plaintiff. The Minister's letter refusing approval referred to the first plaintiff's operation of a betting exchange enabling the laying of bets and its supposed impact on the "integrity or perceived integrity of Western Australian races".

143 Western Australia submitted that the period during which Western Australian bookmakers enjoyed exemption from s 27D was only a short one, ending on 6 August 2007, so that any discriminatory effect was spent. Western Australia also submitted that even if it was possible that the discretionary power conferred by s 27D(2) might be exercised in a protectionist fashion, it should not be assumed that it would be; and even if it were so exercised, it would be particular protectionist decisions which were void, not the legislation itself. It also submitted that those decisions were open to administrative and judicial review. Western Australia additionally submitted that if the prohibition by s 24(1aa) on the use of betting exchanges were valid, s 27D(1) could not be rendered invalid by relying on the Minister's power to refuse approval to traders offering a betting exchange. That submission entailed a significant, but inevitable, concession: that the Minister would take into account as an "integral" – a crucial – factor the extent to which an applicant encouraged "betting to lose".

144 The difficulty in the position advocated by Western Australia commences with the fact that it was earlier concluded that s 24(1aa) is invalid. The Minister's capacity to take into account "betting to lose" is a capacity to take into account something which is prohibited, but invalidly. It is true that Western Australian bookmakers only enjoyed exemption from the requirements of s 27D for a short time – between 9 July 2007, when s 27D came into force, and 6 August 2007. But the practical operation of the legislation thereafter was likely to continue to favour them for reasons given by the plaintiffs. The nature of the legislative

scheme contemplated by ss 27C-27F, as revealed by the regulations contemporaneously made for the purposes of s 27D(5), the form contemporaneously prescribed under those regulations, and the Guide to that form, reveals that it will have a protectionist effect, and intentionally so. As the plaintiffs submitted, the protectionist prohibition in s 27D(1) could not be saved by granting a discretion to create exemptions, for the "discretion [was] simply a smokescreen for a prohibition". Thus the plaintiffs are correct in submitting that s 27D(1) burdens inter-State trade to a significantly greater extent than it burdens intra-State trade.

145 But does s 27D(1) advance any other end? The answer must be in the negative. Western Australia submitted that the other end advanced was the same as that which it submitted was advanced by s 24(1aa). But like s 24(1aa), s 27D(1) goes so far beyond the end of preserving the integrity of racing in Western Australia as to exclude the possibility of that being its purpose. It is not directed to persons who have the twin characteristics of possessing the capacity to affect adversely the performance of a horse and possessing the desire to profit from that capacity by laying a bet on that horse to lose. Section 27D(1) prevents persons who as a tool of their trade wish to publish or otherwise make available a WA race field from doing so, thereby affecting a class much wider than the class of persons possessing the twin characteristics against which the sub-section is said by Western Australia to be directed. Those who are authorised under s 27D(1) to publish or otherwise make available a WA race field are at liberty to accept back bets or lay bets from the class with the twin characteristics as well as all other persons; those who are not authorised under s 27D(1) also have that liberty, but cannot publish or otherwise make available a WA race field. The mismatch between the technique employed in s 27D and the end supposedly achieved is so great as to prevent that end being treated as its purpose.

146 Western Australia also argued that s 27D(1) had another non-protectionist end. This was the end of ensuring that persons who seek to utilise the horse and greyhound races conducted in Western Australia for the purposes of a wagering business make a contribution to the persons who conduct those races. However, s 27D(1) does not in terms provide for any operator of a wagering business to make any contribution, whether by fee or otherwise, let alone a contribution which was neutral as between traders within Western Australia and traders outside it. Whatever contribution was made would depend on what RWWA stipulated in the commercial arrangement between it and an applicant for s 27D(2) approval, which was contemplated as a condition of approval. Instead of providing in terms for a neutral contribution to the persons conducting Western Australian races, s 27D(1) has a tendency to exclude persons in the position of the first plaintiff, namely would-be entrants from outside Western Australia into the trade of supplying wagering services to gamblers, from that trade. That tendency operates to the advantage of Western Australian suppliers of those services.

Orders

147 For those reasons Western Australia's case in relation to s 92 must fail. I agree with the joint judgment that s 24(1aa) should not be read down, and with the answers and orders proposed by the joint judgment.