HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

SPORTSBET PTY LTD APPELLANT

AND

STATE OF NEW SOUTH WALES & ORS RESPONDENTS

Sportsbet Pty Ltd v New South Wales [2012] HCA 13
30 March 2012
S118/2011

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

N J Young QC with T J North SC, R M Niall SC and A L Tokley for the appellant (instructed by Fitzpatrick Legal)

M G Sexton SC, Solicitor-General for the State of New South Wales and J K Kirk with A M Mitchelmore for the first respondent (instructed by Crown Solicitor (NSW))

B W Walker SC with N J Owens, J S Emmett and G E S Ng for the second and third respondents (instructed by Yeldham Price O'Brien Lusk)

M G Hinton QC, Solicitor-General for the State of South Australia with L K Byers for the fourth respondent (instructed by Crown Solicitor (SA))

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

R M Mitchell SC, Acting Solicitor-General for the State of Western Australia with E M Heenan intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

J C Sheahan SC with R C A Higgins intervening on behalf of TAB Limited and Tabcorp Holdings Limited (instructed by Freehills)

CATCHWORDS

Sportsbet Pty Ltd v New South Wales

Constitutional law (Cth) – Operation and effect of Constitution – Freedom of interstate trade, commerce, and intercourse – Approval of use of NSW race field information for fee on wagering turnover – Practical effect of imposition of fee – Connection between location of wagering operator business and turnover of that business – Prejudice upon trade and not upon particular traders – Whether power of approval under *Racing Administration Act* 1998 (NSW), s 33A confined by positive rule that trade and commerce between Territories and States shall be absolutely free – Whether legislation granting power of approval imposed discriminatory restraints and interferences of protectionist kind.

Constitutional law (Cth) – Operation and effect of Constitution – Inconsistency of laws – Effect of *Interpretation Act* 1987 (NSW), s 31 on questions of inconsistency between Commonwealth and State law – Whether *Northern Territory (Self-Government) Act* 1978 (Cth), s 49 limits State legislative power – Whether *Racing Administration Act*, ss 33 and 33A inconsistent with *Northern Territory (Self-Government) Act*, s 49 and invalid to extent of inconsistency – Whether *Northern Territory (Self-Government) Act*, s 49 interpreted in accordance with s 92 of Constitution.

Words and phrases – "free trade", "practical operation", "protectionism".

Constitution, ss 92, 109.
Interpretation Act 1987 (NSW), s 31.
Northern Territory (Self-Government) Act 1978 (Cth), s 49.
Racing Administration Act 1998 (NSW), ss 33, 33A.
Racing and Betting Act (NT), s 90.
Racing Administration Regulation 2005 (NSW), Pt 3.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. This appeal by Sportsbet Pty Ltd ("Sportsbet") from the Full Court of the Federal Court (Keane CJ, Lander and Buchanan JJ)[1] was heard concurrently with that in *Betfair Pty Ltd v Racing New South Wales*[2] ("*Betfair*"). The reasons in the two appeals should be read together.

2 In the Sportsbet litigation, the Full Court had before it two appeals against the decision of the primary judge (Perram J)[3]. The first was an appeal by Racing New South Wales ("RNSW") and Harness Racing New South Wales ("HRNSW") against declarations of invalidity respecting approvals under s 33A of the *Racing Administration Act* 1998 (NSW) ("the Act") which were given to Sportsbet by RNSW and HRNSW respectively on 15 August 2008 and 1 September 2008. These approvals permitted "use of NSW race field information" otherwise forbidden by s 33 of the Act, but were on condition of payment of a fee on "wagering turnover". The condition was imposed in exercise of the power conferred upon RNSW and HRNSW by cl 16(2), which is found in Pt 3 (cll 14-20), of the Racing Administration Regulation 2005 (NSW) ("the Regulation"). His Honour also entered judgment against RNSW for a sum representing payments to it by Sportsbet of that fee[4]. The Full Court set aside that judgment and the declarations.

3 The Full Court dismissed the second appeal. This had been brought by Sportsbet against the rejection by Perram J of Sportsbet's claim of invalidity, which extended beyond the conditioning of approvals by the fee stipulation to include the invalidity of ss 33 and 33A of the Act, and the whole of Pt 3 of the Regulation[5]. His Honour held that, when construed as required by s 31 of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act"), the provisions were valid[6]. (It will be necessary later in these reasons to refer further to the operation of s 31.)

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1 *Racing New South Wales v Sportsbet Pty Ltd* (2010) 189 FCR 448.

2 [2012] HCA 12.

3 *Sportsbet Pty Ltd v New South Wales* (2010) 186 FCR 226.

4 (2010) 186 FCR 226 at 268-269 [162].

5 (2010) 186 FCR 226 at 267 [155]-[156].

6 (2010) 186 FCR 226 at 267 [156].

4 In this Court, Sportsbet seeks the reversal of the outcome in the Full Court. It seeks declarations of the invalidity of s 33 and s 33A of the Act and Pt 3 of the Regulation, and of the conditions of approval requiring the payment of fees, and variation in the judgment entered by Perram J by substituting "$6,188,122" for "$2,061,000". RNSW and HRNSW submit, correctly, that whatever the scope of relief to which Sportsbet may be entitled, were it to make good its case, this could not extend to the invalidity of these sections of the Act and the whole of Pt 3.

5 New South Wales is the first respondent, RNSW and HRNSW are the second and third respondents, and South Australia, which had intervened in the Full Court, is the fourth respondent. The appeal attracted interventions by the Commonwealth, Victoria, Western Australia and Queensland. Leave to intervene and present written and oral submissions was granted to TAB Limited ("TAB") and TABCORP Holdings Limited ("Holdings").

6 It is important to note that Sportsbet has its registered office and principal place of business not in a State but in the Northern Territory. It holds a sports bookmaking licence under s 90 of the *Racing and Betting Act* (NT) which authorises it to accept bets by telephone and over the internet on races, sporting and other events. At its Darwin premises Sportsbet operates a call centre accessible by telephone from anywhere in Australia, and a computer server connected to the internet. The events on which customers may place wagers with Sportsbet include thoroughbred and harness races using NSW race field information.

7 Sportsbet engages in commerce extending beyond the Northern Territory and TAB engages in commerce extending beyond New South Wales. Each has customers dealing with it from beyond the Northern Territory or New South Wales. However, Sportsbet has conducted its case by treating TAB as the proxy for intrastate wagering transactions; the corollary in its case has been that the alleged preference given to TAB stamps the New South Wales legislation as a protectionist measure. The reservations expressed in the reasons in the *Betfair* appeal[7], as to treatment of the circumstances of particular traders as indicative of the state of the trade in which they participate, apply here. This particularly is so

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7 [2012] HCA 12 at [45] per French CJ, Gummow, Hayne, Crennan and Bell JJ, [113]-[115], [141] per Kiefel J.

with respect to Sportsbet's emphasis on alleged preferential treatment given to TAB by reason of the settlement of a contractual dispute with RNSW and HRNSW[8].

8 However, two distinctions between this appeal and the *Betfair* appeal should be made immediately. The first is that Sportsbet does not operate a betting exchange and is not a "low cost operator" in the sense used in the *Betfair* appeal. Sportsbet conducts business as a corporate bookmaker, so that its "wagering turnover", for the purpose of computation of the fees payable to RNSW and HRNSW, differs from that of Betfair. The second distinction is that, for the reasons that follow, s 92 of the Constitution, which speaks of trade and commerce "among the States", cannot be directly engaged in this appeal.

The Self-Government Act, s 49

9 Section 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ("the Self-Government Act") was considered by Gleeson CJ, McHugh and Gummow JJ in *AMS v AIF*[9], with the agreement of Hayne J[10], as follows:

> "Section 49 of the Self-Government Act states:
>
> > 'Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.'
>
> This reproduces, but with reference to the Territory, the terms of s 92 of the Constitution. It replaces what was s 10 of the *Northern Territory (Administration) Act* 1910 (Cth), inserted by s 6 of the *Northern Territory (Administration) Act* 1931 (Cth).
>
> It was submitted that s 49 was to be interpreted in accordance with the body of doctrine construing s 92 as it had developed at the time of the commencement of the Self-Government Act on 1 July 1978 (s 2(2)). The

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8 See [2012] HCA 12 at [29]-[32] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

9 (1999) 199 CLR 160 at 175-176 [35]-[36]; [1999] HCA 26.

10 (1999) 199 CLR 160 at 232-233 [220]-[221].

contrary submission, that the section is to be given an ambulatory interpretation to follow the course of decisions construing s 92, should be preferred. That is what was done in *Lamshed v Lake*[11]. Dixon CJ there construed the predecessor of s 49 not in accordance with the state of authority as it stood in 1931 but in accordance with the judicial decisions which, as it then seemed, had given some settled definition to the meaning and effect of s 92."

10 Section 49 of the Self-Government Act is expressed as a command[12]. But it is not addressed to the States as an attempted limitation or prohibition upon their legislative powers of the kind on occasion stigmatised as a device to produce "manufactured" inconsistency[13]. Rather, as explained by Dixon CJ in *Lamshed v Lake*[14], a federal law in the terms of s 49 is a "positive rule" relating to the government of the Territory and thus supported by s 122 of the Constitution; how else, his Honour asked, could freedom of trade with the Territory be assured?

11 In *AMS v AIF* their Honours went on[15]:

"*Lamshed v Lake*[16] also establishes that provisions such as s 49 of the Self-Government Act are laws of the Commonwealth which attract the operation of s 109 of the Constitution. As a species of what is often identified as 'operational inconsistency'[17], this supremacy of

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11 (1958) 99 CLR 132 at 147; [1958] HCA 14.

12 *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1022-1023 [229]-[231]; 280 ALR 221 at 292-293; [2011] HCA 34.

13 See *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 628-629 [36]-[37]; [2004] HCA 19; Leeming, *Resolving Conflicts of Laws*, (2011) at 171-172.

14 (1958) 99 CLR 132 at 147.

15 (1999) 199 CLR 160 at 176 [37].

16 (1958) 99 CLR 132 at 148.

17 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 417, 439-440, 478; [1999] HCA 5.

> Commonwealth law operates to exclude, in relation to the matters to which it applies, the operation of the laws of a State, such as the [*Family Court Act* 1975 (WA)], under which the jurisdiction of a court of that State may otherwise be exercised and orders made[18]."

12 With respect to State legislation entailing the exercise of judicial discretion, their Honours added, in *AMS v AIF*[19]:

> "Where the law in question confers jurisdiction entailing the exercise of judicial discretion, that discretion will effectively be confined so that an attempt to exercise it inconsistently with s 49 of the Self-Government Act involves, at least, an error of law which is liable to appellate correction. On that footing, the State law itself retains its validity. These conclusions follow by parity of reasoning with that of Brennan J, concerning the operation of s 92 itself upon discretionary licensing schemes, in *Miller v TCN Channel Nine Pty Ltd*[20]."

This reasoning is applicable to the power conferred upon RNSW and HRNSW to attach conditions to approvals given to the use of NSW race field information. It serves to explain why the relief sought by Sportsbet is, as indicated above[21], too widely framed.

13 It will be apparent that s 31 of the Interpretation Act does not speak to the situation where the issue is not one of the absence of State legislative power, but is one of the extent of inconsistency, by operation of s 109 of the Constitution, of a State law made in exercise of concurrent power. Section 31 requires the construction of a State statute or an instrument made thereunder, including an instrument "made under any such instrument" (s 3(1)), so as not to exceed the

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18 See *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 472, 479; [1980] HCA 32; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 284-285; [1996] HCA 32; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 463; [1997] HCA 36.

19 (1999) 199 CLR 160 at 176 [37].

20 (1986) 161 CLR 556 at 596-597, 614-615; [1986] HCA 60.

21 At [4].

legislative power of the State. As submitted, particularly by South Australia, and contrary to what was said in *Peters v A-G (NSW)*[22], s 31 is not addressed to cases of *inconsistency* between otherwise valid laws.

The issues on the appeal

14 What in the course of argument emerged as central issues on the appeal may now be stated. The first issue is whether the power of approval, upon conditions as to payment of a fee, which is conferred by s 33A(2) of the Act upon RNSW and HRNSW, is confined, lest s 33A of the Act "alter, impair or detract"[23] from the operation of the positive rule created by s 49 of the Self-Government Act that trade and commerce between the Territory and the States shall be free from discriminatory restraints and interferences of a protectionist kind. The second issue is whether, if the power is not so confined, s 33A, to the extent of the inconsistency, is invalid, with the consequence that cl 16 of the Regulation is wholly or partially invalid as beyond the regulation making power.

15 For the reasons which follow, the first issue should be resolved adversely to Sportsbet, and the second issue then does not arise.

16 The substance of the case pleaded by Sportsbet was: (a) that the State legislation imposed a burden or disadvantage on trade and commerce between the Northern Territory and New South Wales which was not imposed on intrastate trade and commerce of the same kind; and (b) that (i) the legal effect, or (ii) the practical effect, of the State legislation was to protect wagering operators "in" New South Wales "from competition from wagering operators in the [Northern Territory]".

17 The focus of the pleading upon the situs of wagering operators in a particular political and geographic subdivision in Australia tends to mislead where, as is the case here, wagering operators and their customers conduct transactions across the borders of those subdivisions, as well as wholly within

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22 (1988) 16 NSWLR 24 at 30.

23 *Victoria v The Commonwealth* ("*The Kakariki*") (1937) 58 CLR 618 at 630; [1937] HCA 82; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1025-1026 [244]-[245], 1028-1029 [261], 1039 [317]; 280 ALR 221 at 296-297, 300, 315.

them. It misleads by distracting attention from the impact of the New South Wales law, as a legal and practical matter, upon trade and commerce represented by wagering operations conducted between the Territory and the State. Further, the New South Wales law, as emphasised in the reasons in the *Betfair* appeal, is facially neutral. Its legal effect is not discriminatory in a protectionist sense. The question then becomes whether, as a matter of its practical operation or effect, the Act does have that character.

Practical operation or effect

18 In the period before the adoption of the prevailing doctrine in the Court, when s 92 was to be interpreted with regard to the "criterion of operation" of the impugned law[24], nevertheless there were decisions which appeared to rest upon the substance of a law as a protectionist measure rather than upon its form. For example, in *Vacuum Oil Co Pty Ltd v Queensland*[25], the terms of the Queensland law which was held to be invalid required the licensing of persons who sold motor spirit for delivery in that State and required licensees to buy an amount of power alcohol manufactured in Australia proportionate to the quantity of motor spirit sold by the licensee. The plaintiff had no use for power alcohol in its business, except in negligible quantities. In fact, power alcohol was produced only in Queensland, from sugar cane. No petrol motor fuel was produced in that State; the plaintiff imported petrol from New South Wales for sale in Queensland.

19 Thereafter, the concept of "circuitous device" was put forward as an addendum to the "criterion of operation". This, as Mason J explained in *Miller v TCN Channel Nine Pty Ltd*[26], was done:

> "because that doctrine, with its focus on the legal, rather than on the practical, operation of a law, was vulnerable to circumvention".

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24 Zines, *The High Court and the Constitution*, 2nd ed (1986) at 106-107.

25 (1934) 51 CLR 108; [1934] HCA 5.

26 (1986) 161 CLR 556 at 575.

His Honour added[27]:

> "But the concept was not developed in such a way that it became a doctrine in its own right, grounded in the practical operation of a law, identifying practical or economic consequences as impediments to interstate trade. As I shall show by reference to the decided cases, the concept seems to have been virtually devoid of content. No law has ever been struck down on the expressed ground that it burdened interstate trade by means of a circuitous device, though it has been suggested that *Vacuum Oil Co Pty Ltd v Queensland*[28]; *Fish Board v Paradiso*[29], and *Wilcox Mofflin Ltd v New South Wales*[30], may be capable of explanation on this footing."

20 The term "practical operation", in its present use as a criterion of constitutional validity, is not "virtually devoid of content". However, its imprecision in meaning and application is apt to generate significant differences of opinion when the term is applied in particular disputes. Both in this case and *Betfair* the appellant fixes upon the practical operation of the fee structure in the State licensing systems upon its business operations as an interstate (or extra-Territorial) trader and contrasts this with the position of what it categorises as one or more competitors who are intrastate traders. But the minute analysis of business models, as applied from time to time, which this approach invites distracts attention from the concern of s 92 with effect upon trade, not prejudice to particular traders.

21 The point is further illustrated by the division between Mason CJ, Brennan, Deane and Gaudron JJ, and Wilson, Dawson and Toohey JJ, in *Bath v Alston Holdings Pty Ltd*[31]. The case was argued immediately after *Cole v Whitfield*[32] and judgment was given a month after that in the latter case.

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27 (1986) 161 CLR 556 at 575-576.

28 (1934) 51 CLR 108.

29 (1956) 95 CLR 443; [1956] HCA 60.

30 (1952) 85 CLR 488; [1952] HCA 17.

31 (1988) 165 CLR 411; [1988] HCA 27.

32 (1988) 165 CLR 360; [1988] HCA 18.

22 The minority in *Bath* emphasised that if regard were had to the practical operation of the *Business Franchise (Tobacco) Act* 1974 (Vic), it would be seen that the object of the legislation was not to favour Victorian trade at the expense of the interstate trade in tobacco. All trade in tobacco in Victoria was subjected to the franchise fee at one point or another, whether wholesale or retail, and the economic effect of the tax was the same, whether the retailer acquired the tobacco from a local wholesaler who was liable to pay the tax, or an out of State wholesaler who was not liable to pay it[33]. On the other hand, the majority directed attention to a particular market – "the Victorian retail tobacco market" – and to the effect of the tax on the supply of goods to that market. Their Honours added that[34]:

> "[t]he effect of an equivalent tax on transactions at another stage in the chain of distribution of the same goods ... is immaterial".

It may perhaps be said, and it is unnecessary to pursue the matter here, that, by the focus upon a "market" solely at the retail level, the majority in *Bath* favoured the legal operation of the tax at the expense of the practical operation of the statute as a whole.

23 In the present case, the primary judge appears to have gone beyond the distinctions which divided this Court in *Bath*. His Honour appears to have based his decision that the approvals granted by RNSW and HRNSW were invalid upon the premise that the evidence supported the inference that each of the State of New South Wales, RNSW and HRNSW had intended to engage in discriminatory protectionism[35], and that RNSW and HRNSW had intended that neither TAB nor New South Wales on-course bookmakers would be economically affected by the fee for use of NSW race field information[36]. These conclusions were reached, notwithstanding his Honour's appreciation that "the concepts in play are constitutional concepts"[37]. To that may be added the point

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33 (1988) 165 CLR 411 at 431-432.

34 (1988) 165 CLR 411 at 428-429.

35 (2010) 186 FCR 226 at 239-240 [44].

36 (2010) 186 FCR 226 at 256-257 [101].

37 (2010) 186 FCR 226 at 239 [43].

that to attribute an "intention" to a body politic is to apply something of a fiction[38].

24 The Full Court[39] held that these findings by the primary judge were not open on the pleadings or as the case had been conducted. Their Honours added, with respect correctly, that, in any event[40]:

> "whether the imposition of the fee by RNSW and HRNSW as a condition of Sportsbet's approval is contrary to s 49 of the [Self-Government] Act does not depend upon the subjective intentions or motives of those responsible for the adoption of the measure; the operation of s 49 depends upon the effect of the measure, not on whether those responsible for its adoption and implementation were correct in their understanding of the operation of s 92 of the Constitution. The crucial issue in this case concerns the objective effect of the imposition of the fee upon interstate trade relative to intrastate trade."

RNSW and HRNSW add to what was said by the Full Court, in the passage just set out, by emphasising that the proper inference to be drawn from the evidence was a concern to remedy the situation where interstate wagering transactions by operators who were not licensed in New South Wales but who used NSW race field information did not supply any revenue to support the generation of the New South Wales racing spectacles. There was no concern to advantage intrastate wagering transactions at the expense of the interstate activities.

25 Something now should be said of the practical operation of the fee condition upon on-course bookmakers and TAB.

On-course bookmakers

26 The fee condition imposed by RNSW gave to all wagering operators the benefit of an exemption in respect of the first $5 million of turnover. Locally based wagering operators, such as on-course bookmakers, with a turnover of less than $5 million were not liable to pay the fee. Out of State based wagering

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38 *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 [159]; [2004] HCA 43.

39 (2010) 189 FCR 448 at 474 [83].

40 (2010) 189 FCR 448 at 483 [112].

operators likewise escaped liability if their turnover was below the threshold. All operators paid the fee on so much of their turnover as exceeded $5 million. With respect to the HRNSW fee, those operators with a turnover in excess of $2.5 million on New South Wales harness racing paid a fee on the whole amount of turnover.

27 Respecting the practical operation of the $5 million and $2.5 million exemptions, there was evidence that: (a) 17 locally based wagering operators (TAB and 16 on-course bookmakers) and 22 wagering operators based outside the State (seven totalizator operators, Betfair, ten corporate bookmakers and four on-course bookmakers) have a turnover on New South Wales thoroughbred racing in excess of $5 million and thus paid the fee; and (b) the fee would be payable on approximately the same percentage of wagering turnover, within and without the State, on New South Wales harness racing (95.9 per cent to 98.7 per cent). The practical operation of the thresholds is not to provide a protectionist measure to insulate New South Wales on-course bookmakers from the economic burden of the fee. Both intrastate and out of State competitors could benefit from the threshold, and, in any event, there was no necessary connection between the location from which a wagering operator conducted its business and the turnover of that business.

28 There remains the contention that TAB was insulated from liability to bear the fees imposed by RNSW and HRNSW.

TAB

29 From 1 July 2008, s 33 of the Act imposed the prohibition upon "publishing" and, from 3 December 2008, it prohibited "using", NSW race field information (as defined in s 27) without approval of the relevant racing control body under s 33A.

30 At the time of the introduction of this statutory licensing scheme, which applied to TAB as a wagering operator, TAB and Holdings, with RNSW and HRNSW, were parties to the Racing Distribution Agreement dated 11 December 1997 ("the RDA"), as amended by the Deed of Accession dated 22 December 2004. The RDA contained (in Sched 2) a definition of "NSW Racing Information" which appears to have included NSW race field information. Clause 8.2 entitled TAB to a "royalty-free licence" to use the NSW Racing Information but, in consideration of "all the services" provided to it under the RDA, TAB agreed to pay substantial fees (cl 9.1). The contention by Sportsbet

that no part of the payments made under the RDA is "directly attributable" to the supply and use of NSW race field information should not be accepted.

31 Pursuant to the statutory licensing scheme in respect of NSW race field information, during the period 1 September 2008 to 30 June 2009, TAB paid fees of approximately $19.826 million, and, in addition, the sum paid by TAB under the RDA exceeded the 1.5 per cent statutory turnover fee. Of the situation that thus arose, the Full Court observed[41]:

> "TAB was subject to a real liability to pay the 1.5% fee imposed on it as a condition of its approval. It paid that fee. Had it not done so, it would have been in breach of this condition of its approval and it would have been at risk of the loss of its approval and prosecution for an offence. It was because it was, in truth, obliged to pay and did pay the licence fee to RNSW that RNSW was in breach of the RDA. Prima facie, the measure of the damages payable by RNSW by way of compensation for that breach was the amount of the fee, because that was the amount TAB was now obliged to pay in order to use the race field information to which it was already entitled under the RDA. Under the RDA, RNSW had bound itself to ensure that TAB had that benefit without any further payment."

32 The upshot was that on 27 November 2008, TAB served Dispute Notices pursuant to cl 24 of the RDA. These alleged that the fee condition attached to the approvals to use the NSW race field information was in breach of the RDA because upon its proper construction the RDA entitled TAB to use NSW race field information without further charge. The Dispute Notices disclosed that TAB complained of the obligation, in respect of the period 1 September 2008 to 30 June 2009, to pay the further fees under the statutory scheme, as requiring a double payment, in derogation of its contractual rights under the RDA. By Deed of Release dated 25 November 2009 ("the Release") the dispute was settled. Clause 5 contained a release by TAB of RNSW and HRNSW from any claim for damages and cl 6(a) obliged TAB not to make any claim to recover fees paid under the RDA. In exchange, cl 2 provided for the payment to TAB of $13,882,935 in respect of RNSW and $2,587,724 in respect of HRNSW, in each case exclusive of GST. The parties accepted that these payments did not represent a return or refund of any NSW race field fees (cl 3).

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41 (2010) 189 FCR 448 at 475 [90].

33 The Full Court correctly concluded[42]:

> "The amount paid to TAB by RNSW by way of compromise under [the Release] was much less than the amount payable by TAB, by way of the fee under its approval under [the Act]. TAB did not obtain a discriminatory advantage, protectionist or otherwise over Sportsbet by virtue of the payment to TAB under [the Release]. The compromise in [the Release] was a form of vindication of the pre-existing entitlement of TAB, an entitlement which it enjoyed, not because it was an intrastate trader, but because it had been, since the execution of the RDA in 1997, obliged to make substantial contributions to horse racing in New South Wales in return for rights correlative to its contributions."

To that it may be added that the settlement was limited to the fees charged to TAB under the Act for the period 1 September 2008 to 30 June 2009.

Relevant authorities?

34 The decision in *Boardman v Duddington*[43] provides some support for the conclusion expressed by the Full Court. The principal issue was whether an amendment, which provided for reduction of the amount of a licensing fee for the use of Queensland roads by commercial vehicles, destroyed the uniformity of the application to inter-State and intra-State carriers of another impost, a road maintenance charge. Dixon CJ concluded that it was not possible to say that the "total effect" of the legislation was to put the intra-State operator in a better position than the inter-State operator "with respect to an equivalent operation"[44]. His Honour said[45]:

> "The same people remained under the same obligations to pay the same sums of money in the same events. The money thus raised fell into the same fund and continued applicable exclusively to road maintenance.

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42 (2010) 189 FCR 448 at 476 [94].

43 (1959) 104 CLR 456 at 468-470; [1959] HCA 64.

44 (1959) 104 CLR 456 at 470.

45 (1959) 104 CLR 456 at 469.

> What it did was to treat the payment so made by a person who also incurred a liability to another exaction – a tax – as a ground of relief *pro tanto* from that exaction. Now this concession could not matter unless in some way it gave an advantage to the carriers obtaining it over inter-State carriers. It does not increase the liabilities of inter-State carriers; it does not reduce the liability of intra-State carriers to the contribution to roads maintenance charge. What it does is to reduce *pro tanto* the latter's liability, from which the inter-State carrier is free, to pay licence fees."

35 Sportsbet referred to the legislative scheme considered by the United States Supreme Court in *West Lynn Creamery Inc v Healy*[46]. The Massachusetts legislation which fell foul of the Dormant Commerce Clause required payment to a fund in respect of all fluid milk sold by dealers to Massachusetts retailers. This fund was distributed to Massachusetts dairy farmers, although by far the greater amount of milk in question was produced out of State. In his concurring opinion Scalia J succinctly described the situation in the case as[47]:

> "a nondiscriminatory tax upon the industry, the revenues from which are placed into a segregated fund, which fund is disbursed as 'rebates' or 'subsidies' to in-state members of the industry".

In *CSX Transportation Inc v Alabama Department of Revenue*[48], Kagan J referred to that opinion of Scalia J as indicative of what amounts to a discriminatory tax.

36 RNSW and HRNSW accept, as they must, that the combination of otherwise apparently innocuous elements in a legislative scheme may disclose a protectionist measure which engages s 92. But, correctly, they submit that the operation upon TAB of the Release with respect to the period 1 September 2008 to 30 June 2009 cannot be said to have produced discrimination against interstate trade, let alone discrimination of a protectionist nature.

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46 512 US 186 (1994).

47 512 US 186 at 210 (1994).

48 179 L Ed 2d 37 at 48 (2011); 131 S Ct 1101 at 1108-1109.

Conclusion and orders

37 The practical operation of the Act with respect to the fees payable by Sportsbet was not to alter, impair or detract from the "positive rule" mandated by s 49 of the Self-Government Act, and s 109 of the Constitution was not engaged. The appeal should be dismissed with costs.

38 HEYDON J. The background to this appeal is set out in *Betfair Pty Ltd v Racing New South Wales*[49]. To that might be added the following eloquent statement by the Solicitor-General for the State of New South Wales (the first respondent):

> "In Australia a large and sophisticated wagering industry has developed, the main object of which is racing. The wagering industry obtains a substantial benefit from the racing industry – an object of wagering – without any corresponding obligation to pay for that benefit. The organisation and hosting of races costs substantial sums of money, including amounts associated with the maintenance of racetracks, the organisation of meetings, the provision of safe facilities for the benefit of participants in the industry and spectators, and prize money, so as to give appropriate incentives to owners, breeders and trainers to provide employment to jockeys and all of the others employed to look after horses.
>
> It is in the interests of both the wagering and racing industries that the former be required to make some payments to the latter, so as [to] ensure the continued ready availability of racing."

Like *Betfair Pty Ltd v Racing New South Wales*[50], this case concerns the legality of one technique for securing those payments.

39 The appellant, Sportsbet Pty Ltd, is a bookmaker based in the Northern Territory. Its complaint centres on the following matters. On 18 June 2008, the Board of Racing New South Wales determined that a fee of 1.5% of wagering turnover should be imposed on wagering operators subject to a threshold of $5 million. On 15 August 2008, Racing New South Wales granted the appellant an approval to publish New South Wales thoroughbred race fields subject to a fee condition of 1.5% of wagering turnover. It also granted TAB Ltd, an intrastate competitor of the appellant, a similar approval to publish New South Wales thoroughbred race fields in the same terms. On 23 September 2008, the Board of Harness Racing New South Wales determined that a fee of 1.5% of wagering turnover should be imposed on wagering operators subject to a threshold of $2.5 million. Both the appellant and TAB Ltd were granted harness racing approvals. Before these events, on-course bookmakers in New South Wales paid a fee of 1% of wagering turnover to the metropolitan racing clubs on the premises of which they operated. After these events, the metropolitan racing clubs lowered their fee from 1% to 0.33% on the first $5 million and zero thereafter. Hence as a result of the Racing New South Wales threshold, at least 95% of the registered bookmakers in New South Wales were not required to pay

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49 [2012] HCA 12 at [2], [4]-[5], [8]-[13], [15] and [22]-[23].

50 [2012] HCA 12.

any fee. Taking into account the reduction in fees from the metropolitan racing clubs, no bookmaker was worse off unless that bookmaker's turnover was more than $11.7 million per year. Further, as a result of the Harness Racing New South Wales threshold, no New South Wales registered bookmaker was required to pay any fee to Harness Racing New South Wales. The appellant, like other interstate bookmakers, was required to pay the fee without regard to the fees that it paid as a condition of its licence in the Northern Territory. In about November 2009, TAB Ltd was paid $13,882,935 and $2,587,724. These payments were made pursuant to a Deed of Release dated 25 November 2009. According to the appellant, each sum paid was equal to the amounts TAB Ltd paid by way of fee to Racing New South Wales and Harness Racing New South Wales respectively for the period 1 September 2008 to 30 June 2009. The appellant alleged that in effect, therefore, TAB Ltd did not bear the economic burden of the new fee.

40 On the strength of these matters, the appellant made the following allegations. When it was decided to impose the fee conditions, Racing New South Wales and Harness Racing New South Wales each intended and understood that TAB Ltd would be economically insulated from the fee because any sums it paid pursuant to the fee condition would be refunded. When Racing New South Wales decided to impose the fee condition, it intended and understood that New South Wales on-course bookmakers would be economically insulated from the fee by the $5 million fee-free threshold. To the extent that a small number of on-course bookmakers might not fall below that threshold, the appellant alleged that Racing New South Wales intended and understood that those bookmakers would be economically insulated from the fee because Racing New South Wales would procure the racing clubs to reduce standing fees and other levies they imposed on on-course bookmakers. Racing New South Wales would then fund that reduction in fees by making an equivalent distribution to the racing clubs out of the race field information approval fees it received. At the time it decided to impose the fee condition, Harness Racing New South Wales intended and understood that the $2.5 million fee-free threshold would ensure that no New South Wales on-course bookmakers would be required to pay the fee. The appellant alleged that but for the measures just described, Racing New South Wales and Harness Racing New South Wales would not have imposed the fee conditions that applied uniformly to interstate and intrastate wagering operators. New South Wales, Racing New South Wales and Harness Racing New South Wales, alleged the appellant, intended to engage in discriminatory protectionism. The purpose, object or intention of the fee conditions was to protect the revenues of TAB Ltd and on-course bookmakers in New South Wales by protecting them from competition from interstate traders.

41 The appellant's Second Further Amended Application sought a declaration that ss 33 and 33A of the *Racing Administration Act* 1998 (NSW) are invalid. It also sought a declaration that Pt 3 of the Racing Administration Regulation 2005 (NSW) is invalid. It sought a declaration that the condition of the approval to publish New South Wales thoroughbred racing fields that Racing New South

Wales granted on 15 August 2008, namely that the appellant pay the 1.5% fee, was invalid. And it sought a declaration that the condition of the approval to publish New South Wales harness racing fields that Harness Racing New South Wales granted to the appellant on 1 September 2008, namely that the appellant pay the 1.5% fee, was also invalid. Whether the third and fourth declarations should be made depends on whether those conditions were within the power conferred by the impugned legislation correctly construed, and, if so, on whether the legislation is invalid. Whether the legislation is invalid depends on whether, by permitting the imposition of the 1.5% fee, it can be said to have permitted the creation of a discriminatory burden on interstate trade of a protectionist kind in contravention of s 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth)[51]. That question, in turn, depends on applying a similar analysis to that employed when a law is challenged under s 92 of the Constitution. The effect of the impugned legislation on interstate trade compared with intrastate trade must be considered[52].

42 The appellant, then, relied on three main arguments. One was that the $5 million and $2.5 million thresholds immunised New South Wales on-course bookmakers from the 1.5% fee. The second concerned the existing fee applying to on-course bookmakers, which was substantially reduced by the metropolitan racing clubs from 1% to 0.33% on the first $5 million and zero thereafter. The third was that the Deed of Release immunised TAB Ltd from the 1.5% fee. But the appellant was left exposed to the fee.

43 The appellant's first argument fails because the appellant did not analyse the effect of the impugned legislation on interstate trade compared with intrastate trade. Instead, it examined its own position and, primarily, that of TAB Ltd.

44 The appellant's submission that New South Wales on-course bookmakers were insulated from the 1.5% fee by reason of the $5 million threshold is unconvincing. The proposition is misleading. In fact, the fee applies to 88% of wagering turnover in New South Wales on thoroughbred New South Wales races and to 86.8% of wagering turnover outside New South Wales on thoroughbred New South Wales races. The threshold excludes approximately the same percentage – 90% – of New South Wales wagering operators and non-New South Wales wagering operators. There are 17 New South Wales wagering operators (TAB Ltd and 16 on-course bookmakers) and 22 interstate wagering operators (seven totalisator operators, 10 corporate bookmakers, one betting exchange and four on-course bookmakers) that do pay the fee. Thus Racing New South

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51 See above at [2] and [9].

52 See *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12 at [60]-[69].

Wales's challenged fee on wagering turnover, in practice, applies equally to intrastate trade and to interstate trade, as does the $5 million threshold.

45 The same is true of Harness Racing New South Wales's challenged fee on wagering turnover. That fee is payable on approximately the same percentage of wagering turnover in New South Wales on harness racing in New South Wales (95.9%) as it is on wagering turnover outside New South Wales on harness racing in New South Wales (98.7%). It is, however, true that the percentage of interstate operators in relation to harness racing in New South Wales who are not subject to the fee is much lower than the percentage of intrastate operators who are not subject to the fee (38.9% compared to 91.7%). That TAB Ltd is the dominant participant in the New South Wales wagering industry in relation to harness racing explains this. Outside New South Wales there are more small operators who do not reach the $2.5 million threshold. But the appellant did not demonstrate that the difference was decisive.

46 Before the challenged fee was introduced non-New South Wales traders were better off because only intrastate wagering operators contributed to the funding of the New South Wales racing industry, even though interstate operators benefited from its activities. The introduction of the challenged fee worsened, in this respect, the relative position of non-New South Wales traders. But the appellant did not demonstrate that the application of the challenged fee to both intrastate traders and interstate traders in a manner worsening the position of the latter created a discriminatory burden on interstate trade of a protectionist kind. By itself, the removal of a disadvantage for New South Wales traders by imposing a regime that applied equally to non-New South Wales traders does not violate s 49. The appellant argued that *Bath v Alston Holdings Pty Ltd*[53] did not support the Full Court of the Federal Court of Australia. The appellant also submitted that nothing in the case was inconsistent with its position. But the appellant did not demonstrate, and in the end did not even attempt to demonstrate, that that case bound this Court to uphold its position. The appellant submitted that the case showed that a burden cannot be imposed on interstate traders that their transactions alone bear because it is felt that intrastate traders are already bearing an equivalent burden. The present case is not of that kind. It is similar to the instance given by Mason CJ, Brennan, Deane and Gaudron JJ[54]:

> "If the Act imposed the ad valorem licence fee by reference to the value of all tobacco products sold by a retailer in the relevant period, the imposition of the fee would not contravene s 92 since it would not differentiate between tobacco purchased in Victoria and tobacco

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53 (1988) 165 CLR 411; [1988] HCA 27.

54 (1988) 165 CLR 411 at 424-425.

> purchased outside Victoria; a fortiori it would not discriminate in a protectionist sense against the purchase of tobacco outside Victoria."

The present case is crucially different from that case. It struck down a statutory regime which burdened purchases by retailers of tobacco from interstate wholesalers. But for the regime struck down, the retailers would have enjoyed a competitive advantage over retailers purchasing tobacco in intrastate trade. The legislative regime considered in the present case imposed a burden uniformly on interstate and intrastate traders, as in the example given by their Honours.

47 The reasoning in the previous paragraph also refutes the appellant's second argument, based on the steps taken by metropolitan racing clubs to relieve on-course bookmakers of the 1% fee levied on them. Those bookmakers alone were subject to that fee. No interstate trader was.

48 The appellant's third argument, which relates to the Deed of Release, does not improve its position. That is so even if it is considered in combination with the first two arguments. In the course of putting its submissions in relation to the third argument in the Federal Court of Australia and in this Court, the appellant said a number of pejorative things about the behaviour of Racing New South Wales (but not Harness Racing New South Wales). If those submissions were sound, questions might arise about the enforceability of the Deed of Release in relation to those who were parties to it but not parties to the litigation. Thus difficulties in relation to that non-joinder might arise. But the submissions are not sound.

49 On 18 June 2008, the Board of Racing New South Wales noted a report of its Chief Executive. That report assumed that, if the 1.5% fee were introduced pursuant to what became the Racing Administration Regulation 2005 (NSW), there would be no impact on the revenue Racing New South Wales received from TAB Ltd. The assigned reason was that "any fees imposed … would be offset by compensation required to be paid to [TAB Ltd] under clause 8" of the Racing Distribution Agreement. Clause 8.2 of the Racing Distribution Agreement was thought to mean that Racing New South Wales promised TAB Ltd that it would have a "royalty-free licence" to use "NSW Racing Information" which included New South Wales racing field information.

50 The effect of introducing the 1.5% fee payable by TAB Ltd was that New South Wales racing field information was not free to TAB Ltd. That placed Racing New South Wales in breach of cl 8.2. Before 27 August 2008, TAB Ltd complained to Racing New South Wales that it was not liable for the fee. The Board of Racing New South Wales resolved to seek advice from senior counsel on that question. TAB Ltd then wrote a letter alleging that Racing New South Wales had breached the Racing Distribution Agreement. On 20 October 2008, the Board resolved that the Chief Executive should commence negotiations with TAB Ltd. On 27 November 2008 TAB Ltd issued notices of dispute alleging

that Racing New South Wales had breached the Racing Distribution Agreement. After considerable negotiations, the Deed of Release was executed on 25 November 2009. There is no reason to believe that the clause in the Deed of Release permitting payment equal to the impugned fee in relation to the period 1 September 2008 to 30 June 2009 demonstrates any prior agreement that TAB Ltd would be economically insulated from the fee. The evidence reveals only that the imposition of the fee would have the effect of putting Racing New South Wales into contractual difficulties, and that the Board resolved those difficulties by negotiations which involved the give and take characteristic of genuine commercial settlements. The appellant submitted that it is far from clear that the introduction of the fee, backed as it was by legislation, caused Racing New South Wales to be in breach of cl 8.2. However that may be, there is no reason to doubt that Racing New South Wales thought that it did.

51 But even if the appellant's allegations about the Deed of Release were sound, they would not demonstrate that TAB Ltd's economic insulation from the fee had the effect of a discriminatory burden on interstate trade of a protectionist kind. Again, that is because the appellant's allegations did not analyse the effect of the impugned legislation on interstate when compared with intrastate trade.

52 To some extent the appellant's submissions rested on the allegation that the introduction of the fee, the Deed of Release and the change in what the metropolitan race clubs charged were part of a single arrangement or group of coordinated arrangements. Even if that is so, it does not alter the conclusion.

53 The appeal should be dismissed with costs.