NSW racing & wagering protecting its own? Don't bet on it

Susan Cirillo reports on *Betfair Pty Limited v Racing New South Wales* [2012] HCA 12 *Sportsbet Pty Limited v State of New South Wales* [2012] HCA

A wagering operator requires information about a race field so that punters can place bets. In *Betfair* and *Sportsbet* (heard together on appeal[1]), the High Court upheld the validity of the New South Wales racing industry's regime, implemented in 2008, of securing payment for the use of race field information from all wagering operators. Prior to this regime, only New South Wales operators contributed to the viability of the NSW racing industry, while interstate competitors freely used the information.[2]

Section 92 dictates that trade, commerce and intercourse among the states 'shall be absolutely free'. In contrast to the present cases, it will be remembered that in *Betfair Pty Ltd v Western Australia,*[3] the impugned WA legislation in that case attracted the ire of section 92 of the Constitution because it prohibited, without approval, the use of Western Australian race field information to an out of state operator such as Betfair that facilitates the making of bets by people in different states using the internet.

Background

Racing New South Wales (RNSW) and Harness Racing New South Wales (HRNSW) are the authorities responsible for the regulation of racing in New South Wales, each being a 'relevant racing control body' under the *Racing Administration Act 1998* (NSW) (the Act).

Section 33(1)(a) of the Act makes it an offence for a wagering operator to use New South Wales's race field information unless given an approval under section 33A. Section 33A(2)(a) of the Act provides that the relevant racing control body may impose a condition that the approval holder pay a fee. The regulations made under the Act provide that the fee payable must not exceed 1.5 per cent of the approval holder's 'wagering turnover' in respect of the races covered by the approval.

The approvals granted by each of RNSW and HRNSW (being in the nature of administrative decisions) imposed the 1.5 per cent fee with a $5 million fee-free threshold in respect of RNSW and a $2.5 million fee-free threshold in respect of HRNSW.

Betfair

Betfair is the only 'betting exchange' operator in Australia. It runs a call centre in Hobart and is licensed by Tasmania's gaming authority. Betfair sought declarations that the approvals granted to it were invalid, or invalid to the extent that they imposed a discriminatory fee contrary to section 92, and to recover the monies paid.

The plurality, French CJ, Gummow, Hayne, Crennan and Bell JJ,[4] observed that the standard fee was 'facially neutral' in that it applied to all types of operators (whether bookmakers, totalizators or betting exchanges), whether their activities and customers were located in NSW or not, and, whether the use of NSW race field information was for wagering activities spanning interstate trade or intrastate trade.[5]

A betting exchange allows punters to bet with each other on whether a particular event will occur on a fixed price basis – it will accept a wager if it is able to match it with an opposing wager. A totalizator pools the wagers in respect of a certain event and divides the pool once the outcome of the event is known and takes a commission.

Betfair established that on its current pricing structures, given its low margin, the conditional fee absorbed a higher proportion of its turnover on interstate transactions than that of the turnover of TAB Limited (TAB) (a totalizator), the principal intrastate wagering operator.[6] But in order to engage section 92, it was not enough for Betfair to show that the conditional fee was discriminatory because it had a greater impact upon its business than its non-betting exchange competitors.[7] Such a submission founded on Betfair's individual circumstances appeared to rely on the 'individual rights' theory of section 92 that was abandoned in *Cole v Whitfield*.[8]

Betfair had to show that the conditional fee was unauthorised because its practical effect was to discriminate against interstate trade and thereby protect intrastate trade of some kind.[9] Betfair failed to show, first, that operation of the fee showed 'an objective intention to treat interstate and intrastate trade in wagering transactions alike, notwithstanding a relevant difference between them' and secondly, that the fee 'burdens interstate trade to its competitive disadvantage'.[10] Therefore, it was unnecessary to consider whether such burden was necessary for NSW to achieve a legitimate non-protectionist purpose.[11]

Protectionism, and now competition?

The plurality agreed with Kiefel J that the question whether any effect of lessening competition in a market that operates without reference to state boundaries is contrary to section 92 was one for another day[12] (even though the court invited submissions on the point). Her Honour observed that if such a principle applied – in light of the developments in the Australian legal and economic milieu in which section 92 operates, such as a National Competition Policy – the requirement that a legislative measure be seen as protectionist in effect may not be essential.[13]

Heydon J asserted that the meaning of section 92 cannot be affected by legislative innovations three quarters of a century after 1900 (i.e., trade practices legislation) directed towards testing substantial lessening of competition in a market.[14] The question of whether there is a burden on interstate trade, being one simply of 'fact and degree', is not to be encumbered by analysis of such a test.[15]

Sportsbet

Sportsbet is a corporate bookmaker operating out of the Northern Territory and holds a bookmaking licence pursuant to NT legislation. Unlike Betfair, it is not a 'low cost operator'.

Section 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ('the NT Act'), provides that trade, commerce and intercourse between the territory and the states 'shall be absolutely free'. This 'positive rule' attracts the operation of section 109 of the Constitution (dictating that a Commonwealth law prevails in the event of an inconsistency with a state law); so that any exercise of judicial discretion in respect of a state law that is inconsistent with section 49 will be liable to appellate correction – the state law remains valid.[16]

Therefore, by seeking declarations that sections 33 and 33A of the Act and the corresponding regulations were invalid, Sportsbet sought relief that was too widely framed. The question was simply whether the power of conditional approval granted by those provisions is confined by the positive rule created by section 49 of the NT Act.[17] A similar analysis to that employed when a law is challenged under section 92 of the Constitution applied.[18]

The plurality[19] observed again that the provisions were facially neutral[20] and that a minute analysis that focussed on the business models of particular traders, rather than trade was to be avoided.[21] Furthermore, section 49 was held to depend on the effect of the measure concerned, not the intention of those responsible for the implementation of the measure.[22]

The court concluded that the practical operation of the fee-free thresholds of $5 million (RNSW) and $2.5 million (HRNSW) was not to provide a protectionist measure to insulate the New South Wales on-course bookmakers from the burden of the fee. Both intrastate and out of state competitors could benefit from threshold.[23] The evidence even showed that 16 on-course bookmakers in NSW did have to pay the fee.[24]

Finally, at the time of the introduction of the impugned fee arrangements, the TAB was a party to an agreement with RNSW and HRNSW entitling it to a 'royalty-free licence' to use 'NSW Racing Information' on condition that it pay substantial fees. The introduction of the 1.5 per cent approval fee meant that this information was no longer free to TAB and that RNSW was arguably in breach of the agreement. The dispute which ensued was settled by way of a deed of release permitting repayment to the TAB for the fees charged to it for a certain period (in an amount less than that payable by TAB pursuant to its approval fee). The court found that this compromise did not demonstrate any prior agreement that the TAB would be insulated from the fee, and in any case, did not give TAB a discriminatory or protectionist advantage over Sportsbet or interstate trade.[25]

Endnotes

1. In *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 Keane CJ, Lander and Buchanan JJ dismissed Betfair's appeal against Perram J's orders: *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723. In *Racing New South Wales v Sportsbet Pty Ltd* (2010) 189 FCR 448, Keane CJ, Lander and Buchanan JJ upheld Racing New South Wales's appeal against Perram J's orders, and dismissed Sportsbet's appeal against Perram J's orders: *Sportsbet Pty Ltd v New South Wales* (2010) 186 FCR 226.
2. See Heydon J in *Sportsbet* [2012] HCA 13 at [38] and [40].
3. (2008) 234 CLR 418.
4. Heydon and Kiefel JJ agreeing, each writing separately and providing similar reasoning.
5. *Betfair* [2012] HCA 12 at [29].
6. *Betfair* [2012] HCA 12 at [55]. See also Kiefel J at [97] – [98].
7. *Betfair* [2012] HCA 12 at [34] – [35].
8. (1988) 165 CLR 360. See *Betfair* [2012] HCA 12 at [42] – [50].
9. *Betfair* [2012] HCA 12 at [36]. See also Heydon J at [62] and Kiefel J at [110].
10. *Betfair* [2012] HCA 12 at [52].
11. Ibid.

12. *Betfair* [2012] HCA 12 at [127].
13. *Betfair* [2012] HCA 12 at [123].
14. *Betfair* [2012] HCA 12 at [64].
15. *Betfair* [2012] HCA 12 at [65].
16. *Sportsbet* [2012] HCA 13 at [10] – [12].
17. *Sportsbet* [2012] HCA 13 at [14]. Compare Heydon J at [41].
18. *Sportsbet* [2012] HCA 13 at [41].
19. This time including Kiefel J; Heydon J agreeing and providing similar reasoning.
20. *Sportsbet* [2012] HCA 13 at [17].
21. *Sportsbet* [2012] HCA 13 at [20].
22. *Sportsbet* [2012] HCA 13 at [23] to [24]. The plurality commented that Perram J at first instance appeared to base his decision in favour of Sportsbet on inferences that there was an intention that the TAB and NSW on-course bookmakers would be insulated from the economic effects of the conditional fee: (2010) 186 FCR 226 at [101].
23. *Sportsbet* [2012] HCA 13 at [27].
24. *Sportsbet* [2012] HCA 13 per the plurality at [27] and per Heydon J at [44].
25. *Sportsbet* [2012] HCA 13 per the plurality at [32] and per Heydon J at [50].

Correction

In the Recent Developments section of the Autumn 2012 edition of *Bar News*, bylines for articles by Benjamin Jacobs ('Expert evidence', pp.18–19) and Catherine Gleeson ('Restitution, illegality and assignment', pp.31–33) were omitted.

This error occurred during the production process and *Bar News* apologises to Ben and Catherine.

DNA evidence

Laura Thomas reports on *Aytugrul v The Queen* (2012) 286 ALR 441; [2012] HCA 15

The appellant was convicted of murder. The prosecution case at trial was circumstantial. It included DNA evidence from analysis of a hair found on the deceased's thumbnail. The hair was subjected to mitochondrial DNA testing. An expert called by the prosecution gave evidence that the appellant could have been the donor of the hair and that one in 1,600 people in the general population would be expected to share that DNA profile (the frequency ratio). She then gave evidence that this equated to an exclusion probability of 99.9 percent (the exclusion percentage). That is, 99.9 percent of the population would not be expected to have that DNA profile.

The appellant argued on appeal that the evidence expressed as an exclusion percentage should not have been admitted. It was submitted that s 137 of the *Evidence Act 1995* (NSW) requires courts to refuse to admit DNA evidence expressed as an exclusion percentage because its probative value is outweighed by danger of unfair prejudice to the accused. In the alternative, it was submitted that the only proper exercise of the discretion under s 135 of the Evidence Act was to refuse to admit the evidence.[1]

By majority (Simpson and Fullerton JJ), the New South Wales Court of Criminal Appeal denied Aytugrul's appeal. McClellan CJ at CL dissented. His Honour surveyed academic literature on the presentation of DNA evidence and held that the trial judge should not have admitted evidence of the exclusion percentage because it 'invited a subconscious 'rounding-up' to 100'[2] and 'the Crown should not have the advantage of the 'subliminal impact' of statistics to enhance the probative value of the evidence.'[3] His Honour found that the trial judge's warnings were not sufficient because the 'exclusion percentage figures were too compelling.'[4] Due to their 'potential to overwhelm the jury' his Honour would have ordered a new trial.[5]

The High Court unanimously dismissed Aytugrul's appeal. The plurality (French CJ, Hayne, Crennan and Bell JJ) held that a New South Wales court could not take judicial notice of research on the persuasive power of different forms of expressing DNA statistics. The evidence did not fall within s 144 of the Evidence