

Betfair Pty Ltd v Western Australia
(2008) 244 ALR 32

The principal judgment in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 adopted a criterion of “proportionality” as a way of setting limits to the *prima facie* assumption that State legislators should be allowed a broad area of discretion in enacting regulatory measures seen as conducive to “[472] the well-being of the people of that State”. In *Betfair Pty Ltd v Western Australia* (2008) 244 ALR 32, that *prima facie* assumption was made subject to severe reservations.

The case involved the “betting exchange” system introduced in the 1990s, which enables members of the public to bet *against each other*, in relation to horse racing and other sporting events, by placing bets *for and against* a particular outcome by using an internet website which advertises the competitive field, and charges a small commission on the winnings, but does not itself engage in betting. A report presented on 10 July 2003 to the Australasian Racing Ministers’ Conference concluded that the new system “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”. Tasmania responded to this report by enacting the *Gaming Control Amendment (Betting Exchange) Act 2005* (Tas), which introduced a regulatory licensing system for betting exchanges. The plaintiff company (“Betfair”) was granted a licence under that legislation. Western Australia responded to the report by amendments made in 2006 to the *Betting Control Act 1954* (WA). The amendments effectively prohibited the operation of betting exchanges. In particular, a new s 24(1aa) provided that: “A person who bets through the use of a betting exchange commits an offence. Penalty: \$10,000, or 24 months imprisonment, or both.” In addition, a new s 27D(1) made it an offence, in the absence of prior approval, to publish in the course of business “in this State or elsewhere” the details of a Western Australian race field.

The High Court unanimously held that both the above provisions infringed s 92. Section 24(1aa) was invalid both because it impaired the freedom of Betfair to deal with customers in Western Australia, and because it impaired the freedom of Western Australian punters to use an interstate betting exchange. Similarly, s 27D(1) was invalid both because of its restrictive effect on Betfair’s trading operations, and because its restriction on the information which Betfair was able to provide to punters in Western Australia would be to the competitive disadvantage of Betfair as compared with other betting operators in that State. In particular, both provisions tended to give a protectionist advantage to the various betting services operated within the State by the statutory body operating under the title “Racing and Wagering Western Australia” (referred to in the judgments as “RWWA”).

In *R v Connare; Ex parte Wawn* (1939) 61 CLR 596 and again in *R v Martin; Ex parte Wawn* (1939) 62 CLR 457, it was held that a prohibition of interstate lotteries did not infringe s 92 – possibly because a gambling transaction can never constitute “trade and commerce”; or possibly because the legislation took as its criterion of operation the “aleatory” nature of the transaction, rather than any element of “trade” or “commerce”; or possibly because, although the legislation permitted a State-run lottery, it was not “discriminatory” since (with that exception) intrastate as well as interstate lotteries were banned. In *Mansell v Beck* (1956) 95 CLR 550, that decision was reaffirmed, though again on ambiguous grounds. In defending its legislation against betting exchanges, Western Australia did not rely on these cases – perhaps because of their lack of a clear majority *ratio decidendi*, or perhaps because the reasoning might not extend to a statute which was unambiguously discriminatory. (See Michael Coper,

Freedom of Interstate Trade under the Australian Constitution (1983) 78-81, 150-55.) Accordingly, the *Befair* judgment did not refer to this issue, except incidentally to its wider reservations about any general principle of deference to the regulatory power of the States. Those reservations were expressed as follows.

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Gleson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ: [56] 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” [(1990) 169 CLR 436 at 472]. 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.

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.

By way of contrast, the *Melbourne Corporation* doctrine ... 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 ...

There are difficulties, also ..., 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, but to any person present there at any time.

[57] 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* [(2004) 219 CLR 444, where the consignment of drugs by air from Sydney was held to be within the statutory definition of “supply” in Western Australia].

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”.

Attempts of this kind were made in cases decided before *Cole v Whitfield*. Barwick CJ [in *Samuels v Reader’s Digest Association Pty Ltd* (1969) 120 CLR 1 at 19-20] 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.

Earlier, in *Mansell v Beck* [(1956) 95 CLR 550 at 596], 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.

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. On the other hand [in *R v Connare; Ex parte Wawn* (1939) 61 CLR 596, at 620-21], 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.

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* [22 US (9 Wheat) 1, at 208 (1824)]. 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”.

A dichotomy ... was established in the United States decisions between State laws invalid as regulation of interstate commerce and those valid as “police power regulation” ... [58] [This] left the States free to regulate those aspects of commerce so local in character as to demand diverse treatment ...

Whilst these doctrines were current when s 92 was framed, 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 [*Legislative, Executive and Judicial Powers in Australia* (5 ed 1976) 232-33], 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.

Their Honours also had reservations about the passage in *Castlemaine Tooheys* expressing judicial reluctance to override legislative policy judgments because this would “[473] place the Court in an invidious position” and encroach upon questions “best left for resolution to the political process.” They insisted that on issues of constitutional validity, the courts have a duty to decide; and that in any event the judgment in *Castlemaine Tooheys* had gone on to consider whether the impugned legislation was “appropriate and adapted” and “not disproportionate” to its environmental objectives. However, since none of the parties had questioned the “fundamental consideration” articulated in *Castlemaine Tooheys*, their Honours concluded that “[58] further attention to its derivation from and place in the Constitution is not required here”.

As to the test of whether legislation is “appropriate and adapted” to a non-protectionist purpose, their Honours observed:

Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ: [59] [W]ith 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.

That “proportionality” must give significant weight to ... 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 ... [These factors] suggest the application here, as elsewhere in constitutional, public and private law, of a criterion of “reasonable necessity”. For example, in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* [(1975) 134 CLR 559, at 608], Mason J said:

“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 to remarks in a similar vein by the Privy Council in *The Commonwealth v Bank of NSW* [[1950] AC 235 at 311].

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* 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 [165 CLR at 409-410] 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”.

Their Honours also noted another formulation used in *Castlemaine Tooheys*, namely whether the asserted legislative objectives offered “[477] an *acceptable explanation or justification* for the differential treatment given to the products of the Bond brewing companies” (emphasis added). Accepting this as an appropriate formulation of the relevant test, the joint judgment in *Betfair* proceeded to ask whether the Western Australian legislation was supported by “an acceptable explanation or justification”. It focused for this purpose on the explanations given to Parliament by Mr Mark McGowan, the Minister for Racing and Gambling (Western Australia, *Hansard*, Legislative Assembly, 4 May 2005, p 1254).

The first of these was a simple assertion that betting exchanges “make no contribution to the racing industry in Australia”. The judgment refuted this by noting that Betfair had agreed to make an appropriate contribution in Victoria, and would presumably be willing to make a similar agreement with Western Australia. The second explanation focused on the fact that the betting exchange system allows punters to bet that a particular horse will *lose*:

Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ: [61] [T]he second reason to which the Minister referred ... 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 to the integrity of the racing industry which was said by Western Australia to justify the course taken by its legislation.

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.

Part 4A of the Tasmanian Act contains ... detailed regulatory provisions ... 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.

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.

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.

In short, despite the earlier reservations, the actual result can be understood as an orthodox application of *Cole v Whitfield* and *Castlemaine Tooheys*.

Notice, however, the use in the preceding discussion of phrases like “[56] the maintenance of a national economy”, “[59] market forces operating within the national economy”, and “[57] the ‘new economy’”. Where the judgment in *Cole v Whitfield* had sought to restrict the reach of s 92 by locating it in its original context of the economic ideology prevailing in the late nineteenth century, an elaborate preamble to the *Betfair* judgment apparently sought to expand its reach by locating it in the contemporary context provided by the economic ideology prevailing in the early twenty-first century. This recontextualisation was said to be

justified by the enjoiner, in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, of the need to adapt the interpretation of the Constitution “[368] to the varying conditions which the development of our community must involve” (see Chapter 7, §6). The new context was built up by the allusive use of language from a variety of sources, including:

- “[36] 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”, as explained by McHugh J in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR at 454-56 – hence the insistence on the impact of the impugned legislation on Western Australian punters (“the demand side”) as well as on *Betfair* (“the supply side”);
- Sir Garfield Barwick’s insistence in *Samuels v Readers’ Digest Association Pty Ltd* (1969) 120 CLR 1 that “[19] the economic consequence[s] of a law”, whether or not intended, must be taken into account as well as its purely legal operation;
- The decision in *Ha v New South Wales* (1997) 189 CLR 465, with its recognition (as the *Betfair* judgment now put it) that “[38] [t]he 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”;
- Richard Posner’s account (“Antitrust in the New Economy” (2001) 68 *Antitrust Law Journal* 925) of a “new economy” encompassing “[925] three distinct though related industries ... [namely] the manufacture of computer software ... Internet-based businesses (Internet access providers, Internet service providers, Internet content providers) ... [and] communications services and equipment designed to support the first two markets” – these industries being characterized *inter alia* by “[926] falling average costs ... over a broad range of output, modest capital requirements ..., very high rates of innovation, quick and frequent entry and exit, and economies of scale in consumption”;
- The National Competition Policy embodied in the intergovernmental agreements of 11 April 1995 (see National Competition Council, *Compendium of National Competition Agreements* (2 ed 1998)) – responding to the *Report by the Independent Committee of Inquiry on National Competition Policy*, Parliamentary Paper No 747 of 1993 (“the Hilmer Report”), and adopting what the *Betfair* judgment saw as “[38] 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”.

Perhaps incongruously, this sketch of contemporary postulates was accompanied (a) by a brief history of protectionism in the Australian colonies and the British Empire (*inter alia* making the point that the beneficiaries of protectionism are not States, but individuals and other commercial entities); and (b) by a review of United States decisions prior to 1900 on the limited power of the States to interfere with interstate commerce.

Although the significance of their Honours’ review of contemporary economic postulates was never clearly spelled out, the relevant passages seemed to imply (a) that a law will be “discriminatory” if it imposes a competitive disadvantage on an interstate supplier of goods and services as compared with intrastate suppliers of similar goods and services, *or of different goods and services which may appeal to a similar class of consumers*; and (b) that a law will be “protectionist” simply if it restricts or impairs competition. Arguably, these assumptions would subvert *Cole v Whitfield* even while retaining its language. Ironically, Michael Coper’s discussion (cited above) of the earlier cases on gambling had concluded that the total exclusion of gambling from the operation of s 92 might be justified, not for any of

the reasons given in the earlier judgments, but because “[155] from the perspective of national economic unity . . . , one might say that despite the flow of money there is nothing productive of the wealth of the nation in the redistribution of money by chance. No goods are produced, though no doubt people are employed . . . [This] suggests that the objects of s 92 are remote from the creation of a right to run or participate in a lottery.”

As we have seen, the *Betfair* judgment went on to treat the legislation as “discriminatory in a protectionist sense” even on a conventional understanding of *Cole v Whitfield*. But it also sought to locate that finding in the contemporary economic context as follows:

Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ: [61] 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 [62] 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.

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.

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.

The references in this passage to “cross-elasticity” and “substitutability” are intended to convey the idea that since different methods of betting satisfy similar desires, they are likely to be interchangeable in the sense that a gambler will readily move from one form of betting to another. Thus one method is “substitutable” for another, and the demand for them is “elastic”. It follows that the different methods can be regarded as competing within the one market.

Heydon J reached the same result in a separate judgment focused more directly on the immediate issues. As to s 24(1aa), making it an offence to use a betting exchange, he said:

Heydon J [64]: [T]he prohibitions on trading activity created by s 24(1aa) . . . 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.

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 [65] and 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.

As to s 27D(1), making it an offence, in the absence of ministerial approval, to publish “in this State or elsewhere” the details of a Western Australian race field, Heydon J explored more closely the possibility that Betfair, or any other interstate betting exchange, might also be granted ministerial approval to publish such details. Without such approval it was clear, as the plaintiffs argued, that their inability to publish such details prevented them “[65] from engaging in the trade of offering facilities [enabling punters] to bet in the fashion they desire”, while leaving approved operators in Western Australia “free to trade in that fashion”. But what if Betfair could itself obtain such approval? The joint judgment had set that possibility aside because: “[62] Given the stated legislative purpose of prohibition ... of betting exchanges, a matter to which the 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.” Heydon J spelled out that argument more fully:

Heydon J: [66] According to the plaintiffs ... there are three relevant forms of discrimination created by s 27D(1).

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 fact that those bookmakers contribute to the local racing industry through the payment of a betting levy [is treated] as a matter that can be taken into account in the process of granting approval [and the consequence] is that they are more likely to gain approval.

[67] 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.

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.

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 ...

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 ... and its supposed impact on the “integrity or perceived integrity of Western Australian races”.

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 [68] 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”.

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 ... 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.

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.

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 [69] 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.