Betfair Pty Limited v Western Australia (2008) 82 ALJR 600; [2008] HCA 11

In this case the High Court had occasion to consider the operation of s92 of the Constitution.

The first plaintiff, Betfair, held a licence under Tasmanian law to operate a betting exchange. A betting exchange is a means by which gamblers stake money on opposing outcomes of a sporting event, such as a horse race or football game. The possibility of 'backing to lose' distinguishes betting exchanges from traditional forms of wagering in Australia – with bookmakers or totalisators. The operator of the betting exchange only accepts a bet when it can match the bet with an opposing bet from another customer. Unlike a bookmaker, the operator does not 'hold a book' and does not carry any risk on the outcome of the event.

Betfair uploads onto a computer server at its Hobart premises information about each sporting event on which wagers may be placed, including, with respect to racing, the 'race field'. The race field is simply a list of the entrants in a race. Registered players place bets by means of telephone or Internet communications to Betfair's premises. The second plaintiff, a resident of Western Australia, is a registered player.

By amendments made to the *Betting Control Act 1954* (WA) commencing on 29 January 2007, it became an offence for a person in Western Australia to bet through the use of a betting exchange, wherever situated (s24(1aa)). In addition, a provision was introduced (s27D) prohibiting a person in Western Australia, or elsewhere, from publishing a WA race field, without Western Australian Executive approval. Betfair in Tasmania was refused permission to make available a WA race field for facilitating the making or receiving of offers by Internet.

The plaintiffs challenged the validity of the relevant provisions of the law of Western Australia, principally by reliance upon s92 of the Constitution.

The relevant terms of s92 are as follows:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The High Court unanimously upheld the plaintiffs' challenge. Heydon J delivered a separate judgment.

The nature of a s92 case post *Cole v Whitfield* (1988) 165 CLR 360 is one that involves the characterisation of the legislation as protectionist. As noted in the joint judgment, the term 'protection' is concerned with 'the preclusion of competition, an activity which occurs in a market for goods or services'. While the source of present doctrine in respect of s92 is *Cole v Whitfield* and the relevant cases decided shortly thereafter, the joint judgment states that 'it would be an error to read what was decided in *Cole v Whitfield* as a complete break with all that had been said by the court respecting the place of s92 in the scheme of the Constitution'. For example, Barwick CJ had rejected the proposition that the economic consequences of the operation of a law could not come within the purview of s92.

The joint judgment notes that there have been significant developments in the last 20 years in the Australian economic milieu in which s92 operates, including developments in the interpretation given to Ch IV of the Constitution in which s92 appears (cf *Ha v New South Wales* (1997) 189 CLR 465), the emergence of the 'new economy' in which Internet-dependent businesses like that of Betfair operate without regard to geographic boundaries and, finally, the development of a National Competition Policy and consequent legislative reforms.

The joint judgment considers the role of s92 in the creation and maintenance of a national economy expressive of political unity, and the relevance of pre-1900 United States decisions regarding the 'Commerce Clause' to construing, and understanding the provenance of, s92. That US line of authority stood at the time s92 was formulated. Those decisions were considered important for elucidating several propositions, including that a law, the practical effect of which is to discriminate against interstate trade in a protectionist sense, is not saved by the presence of other objectives, such as public health, which are not protectionist in character.

The joint judgment did not accept that the proposition, drawn from *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, that each state legislature has power 'to enact legislation for the well-being of the people of that state' would save legislation from the full operation of s92.

The High Court concluded that the prohibition on the publication of a WA race field burdened interstate trade and commerce both directly and indirectly. It did so directly because it denied to Betfair use of an element in its trading operations. It did so indirectly by depriving registered players of information about WA race fields through Betfair's website or telephone operators. Section 27D operated to the competitive disadvantage of Betfair and to the advantage of RWWA (being the controlling authority in WA for the conduct of racing and TAB wagering) and other in-state wagering operators. The court took into account that the prohibition upon publication of WA race fields did not apply to RWWA.

In relation to s24(1aa), the High Court concluded that the prohibition on persons in Western Australia betting through the use of a betting exchange also constituted a discriminatory burden on interstate trade of a protectionist kind. The evidence indicated cross-elasticity of demand and close substitutability between the various methods of wagering. Section 24(1aa) operated to protect the established wagering operators in WA, including RWWA, from the competition Betfair otherwise would present. It was therefore irrelevant that s24(1aa) also denied the particular form of betting to in-state wagering operators and their customers.

Western Australia contended that the principal justification for prohibiting betting exchanges was the protection of the integrity of the racing industry in Western Australia. The court concluded that, even if that legislative object was legitimate, prohibition was not an 'appropriate and adapted' method to achieve it, given the avenue of regulation in a non-discriminatory manner (which, notably, Tasmania had adopted).

In the final analysis, in the words of the joint judgment, '[t]he effect of the legislation of Western Australia was 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 s92 of the Constitution'.

By reason of the operation of s92, the High Court did not rule on the plaintiffs' grounds of further challenge to the validity or operation of s27D, which included a challenge on the basis of the 'full faith and credit' provision of s118 of the Constitution.

By Georgina Wright

Mahmood v Western Australia (2008) ALJR 372 and Carr v Western Australia (2007) 82 ALJR 1

Western Australia and videotape evidence have occupied the High Court in two recent decisions.

In *Mahmood v Western Australia* (2008) ALJR 372 part of the evidence against the appellant accused of murdering his wife at their restaurant was an interview with the police on the day of the murder. At that time the appellant had blood on his clothes.

Further evidence was a videotape 'walk through' of the restaurant involving the accused made by the investigating police a week after the killing. In the taped 're-enactment' of some of the events on the day of the murder, the appellant sought to explain things he had recounted to the police in the earlier interview. These included a description by the appellant of his physical actions when he discovered and cradled his wife's body. This could have provided an innocent reason for the blood on his clothes.

During cross-examination of a police witness about the re-enactment video, defence counsel tendered a few minutes of the two hour plus tape.

In his final address the prosecutor drew the jury's attention to what was described as 'cold-bloodedness' and apparent lack of distress by the appellant as he described events in the tendered portion and the prosecutor invited the jury to draw an inference of guilt from this. In fact at other times on the full tape the appellant became quite emotional. The defence unsuccessfully applied to re-open and tender some further parts of the tape where the appellant portrayed this emotion.

The High Court unanimously allowed the appeal deciding that although the appellant's actions on the video did not originally form part of the Crown case, once comments were made about a few minutes of the tape by the prosecutor it was incumbent on the court to deal with the whole. In a joint judgment Gleeson CJ, Gummow, Kirby and Kiefel JJ drew a distinction between a direction and a comment by a trial judge (referred to in *Azzopardi v The Queen* (2001) 205 CLR at [49]-[52]) and said at [18]:

> It was necessary for the jury to be directed, in unequivocal terms, that they knew so little of the context in which the segment of the video recording appeared that they could not safely draw the inference that the prosecutor had invited them to draw, that is to say, that they should ignore the prosecutor's invitation and remarks.

Carr v Western Australia (2007) 82 ALJR 1 involved a tape made in different circumstances which resulted in an unsuccessful appeal by the offender.

The appellant stood trial on a charge of aggravated armed robbery of a Commonwealth Bank. Part of the evidence included admissions made by him at a police station following his arrest.

The appellant was aware that questioning in an interview room at the police station was being videotaped and he had been cautioned in the usual manner. No substantial admissions were made at that time.

Later, in the lock-up area of the station during routine activities relating to photographing and recording of personal details the appellant made substantial admissions which strongly suggested he was involved in the bank robbery. No further caution had been administered in the lock-up. The police involved in the conversations were aware of video recording facilities in that area, the appellant was not.

In the High Court the appellant submitted that he did not consent to and had no knowledge of the videotape being made and accordingly it was not admissible. This was said to follow from a provision in the Criminal Code of Western Australia requiring the need for videotaping of interviews. He also argued that the same provisions regarding the need for videotaping of interviews required a 'degree or element of formality' lacking in the lock-up conversation. In short, a mere conversation could not be described as an 'interview'.

Gleeson CJ dismissed the appeal. In a joint judgment Gummow, Hayden and Crennan JJ also dismissed the appeal ruling that the appellant's admissions were properly admitted and common law exclusionary rules had also not been infringed.

The whole circumstances of the case are a cautionary tale for any counsel offering advice to a suspect who is 'assisting with enquiries.' If a client is exercising a right to silence it should be constant when in the company of the police.

By Keith Chapple SC