FEDERAL COURT OF AUSTRALIA

Sportodds Systems Pty Ltd v State of New South Wales [2003] FCA 992

CONSTITUTIONAL LAW – freedom of interstate trade, commerce and intercourse – whether provisions in NSW legislation discriminatory and protectionist – where NSW legislation requires corporation applying for licence to be taken to be a corporation registered in NSW – where applicant is a corporate licensed bookmaker in ACT and WA – where NSW legislative scheme requires persons connected with corporate applicant for licence not to be connected with interstate corporate bookmaker – whether invalidity of part of legislative scheme affects other parts of scheme

Commonwealth Constitution ss 92, 109, 122
Australian Capital Territory (Self Government) Act 1988 (Cth) ss 22, 99
Racing Administration Act 1998 (NSW) ss 4, 16, 19, 26A, 26B, 27, 28, 29, 30, 31, 32, 33 Pt 4
Thoroughbred Racing Board Act 1996 (NSW) s 14A
Race and Sports Bookmaking Act 2001 (ACT)
Corporations Act 2001 (Cth) ss 119, 119A, 124
Totalizator Act 1997 (NSW) s 88
Racing Legislation Amendment (Bookmakers) Act 2002
Interpretation Act 1987 (NSW) s 34(1)
Harness Racing Act 2002 (NSW) s 25
Greyhound Racing Act 2002 (NSW) s 22
Unlawful Gambling Act 1998 (NSW) ss 8, 9
Betting Control Act 1954 (WA)

AMS v AIF (1999) 199 CLR 160 cited
Australian Railways Union v Victorian Railways Commissioners (1930) 44 CLR 319 cited
Bath v Alston Holdings Pty Ltd (1988) 165 CLR 411 applied
Breavington v Godleman (1988) 169 CLR 41 cited
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436 applied
Cole v Whitfield (1988) 165 CLR 360 applied
Cunliffe v Commonwealth (1994) 182 CLR 272 cited
Dow Jones & Company Inc v Gutnick (2003) 77 ALJR 255; 194 ALR 433 cited
Mansell v Beck (1956) 95 CLR 550 cited
Port MacDonnell Professional Fishermen's Association v South Australia (1989) 168 CLR 340 cited

SPORTODDS SYSTEMS PTY LIMITED v THE STATE OF NEW SOUTH WALES
N 1295 OF 2003

GYLES J
19 SEPTEMBER 2003
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1295 OF 2003**

BETWEEN:	**SPORTODDS SYSTEMS PTY LIMITED** **APPLICANT**
AND:	**THE STATE OF NEW SOUTH WALES** **RESPONDENT**

JUDGE: **GYLES J**
DATE OF ORDER: **19 SEPTEMBER 2003**
WHERE MADE: **SYDNEY**

THE COURT DECLARES THAT:

1. Subsections 14A(3) (so far as it includes 'that is taken to be registered in New South Wales for the purposes of the *Corporations Act 2001* of the Commonwealth') and 14A(4)(d) of the *Thoroughbred Racing Board Act 1996* (NSW) are invalid.
2. Subsections 25(3) (so far as it includes 'that is taken to be registered in New South Wales for the purposes of the *Corporations Act 2001* of the Commonwealth') and 25(4)(d) of the *Harness Racing Act 2002* (NSW) are invalid.
3. Subsections 22(3) (so far as it includes 'that is taken to be registered in New South Wales for the purposes of the *Corporations Act 2001* of the Commonwealth') and 22(4)(d) of the *Greyhound Racing Act 2002* (NSW) are invalid.

THE COURT ORDERS THAT:

1. The respondent pay the applicant's costs save for costs of and incidental to the expedition of the hearing.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
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BETWEEN:	**SPORTODDS SYSTEMS PTY LIMITED APPLICANT**
AND:	**THE STATE OF NEW SOUTH WALES RESPONDENT**

JUDGE:	**GYLES J**
DATE:	**19 SEPTEMBER 2003**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The substantive relief claimed by the applicant, Sportodds Systems Pty Limited ('Sportodds') against the respondent, the State of New South Wales ('the State') is as follows:

> *'1. A declaration that sections 28, 29, 30, 31 and 33 of the* Racing Administration Act 1998 *(NSW) are invalid and void by reason of s 92 of the Constitution.*
>
> *2. In the alternative, a declaration that sections 28, 29, 30, 31 and 33 of the Racing Administration Act are invalid to the extend* [sic] *that they are inconsistent with a law of the Commonwealth (namely the Australian Capital Territory (Self-Government) Act 1988) by reason of s 109 of the Commonwealth Constitution.*
>
> *3. In the alternative, a declaration that sub-sections 14A(3) and 14A(4)(d) of the Thoroughbred Racing Board Act 1996, subsections 25(3) and 25(4)(d) of the Harness Racing Act 2002 and sub-sections 22(3) and 22(4)(d) of the Greyhound Racing Act 2002 are invalid and void by reason of s 92 of the Constitution.*
>
> *4. In the alternative, a declaration that sub-sections 14A(3) and 14A(4)(d) of the Thoroughbred Racing Board Act 1996, sub-sections 25(3) and 25(4)(d) of the Harness Racing Act 2002 and sub-sections 23(3) and 22(4)(d) of the Greyhound Racing Act 2002 are invalid to the extend* [sic] *that it is inconsistent with a law of the Commonwealth (namely the Australian Capital Territory (Self-Government) Act 1988)*

by reason of s 109 of the Commonwealth Constitution.'

2 The principal issue is whether the legislation in question invalidly burdens trade, commerce and intercourse between New South Wales and each of the Australian Capital Territory and Western Australia, contrary to s 69 of the *Australian Capital Territory (Self Government) Act 1988* (Cth) ('the *Self Government Act*') (in combination with s 109 of the Commonwealth Constitution) and to s 92 of the Commonwealth Constitution respectively. The impugned provisions are part only of the respective statutes in which they appear, and those statutes, in turn, are only part of the web of legislation and legislative instruments which govern gaming and betting in New South Wales.

3 The applicant sought and was granted very significant expedition of the final hearing of this proceeding because of commercial arrangements relating to the imminent Rugby World Cup. These reasons will be expressed more briefly than might have been the case if time were not a consideration. In order to assist delivery of judgment in a timely fashion, the parties were asked to co-operate in relation to findings as to fact and as to the regulatory scheme. This has been done. The account of the legislative scheme which follows is agreed between the parties.

Summary of Relevant Legislation

4 The following abbreviations are used:

Racing Administration Act 1998 (NSW) ('the RAA')
Thoroughbred Racing Board Act 1996 (NSW) ('the TRB')
Harness Racing Act 2002 (NSW) ('the HRA')
Greyhound Racing Act 2002 (NSW) ('the GRA')
Unlawful Gambling Act 1998 (NSW) ('the UGA')

Reference will also be made to the *Totalizator Act 1997* (NSW) ('the *Totalizator Act*') and to the *Race and Sports Bookmaking Act 2001* (ACT) (the '*Race and Sports Bookmaking Act*').

5 Broad prohibitions on betting and bookmaking in New South Wales are contained in sections 8 and 9 of the UGA. These provide as follows:

'8 Offences relating to unlawful betting

(1) For the purposes of this section, the following forms of betting are

prohibited:

(a) betting on any event or contingency if the person is not present at a licensed racecourse and the bet is made with a bookmaker,

(b) betting on any event or contingency (other than a horse race, harness race, greyhound race or sports betting event) when the person is present at a licensed racecourse,

(c) betting on any event or contingency when the person is present at a racecourse and a trial meeting (within the meaning of the Racing Administration Act 1998) is being held at that racecourse,

(d) betting on any event or contingency when the person is present at a racecourse and a race meeting is being held at that racecourse in contravention of the Racing Administration Act 1998.

(2) A person who engages in betting that is prohibited by subsection (1) is guilty of an offence.
Maximum penalty: 50 penalty units or imprisonment for 12 months (or both).

(3) A person must not make a bet on any horse race, harness race or greyhound race that is to be held anywhere in Australia if:

(a) the bet is made by telephone or electronically by means of the Internet, subscription TV or other on-line communications system, and

(b) the bet is made with another person whom the person making the bet knows (or would be reasonably expected to know):

(i) is not a legal bookmaker, or

(ii) is not a person who is authorised under the law of any State or Territory to conduct totalizator betting.

Maximum penalty: 50 penalty units or imprisonment for 12 months (or both).

(4) For the purposes of subsection (3):
***legal bookmaker** means:*

(a) a licensed bookmaker, or

(b) a person who is authorised under the law of any other State or Territory to carry on bookmaking activities.

(4A) Subsection (3) extends to a bet that is made by a person while in the State even though the other person with whom the bet is made is outside the State (including outside Australia).

(5) To remove any doubt, subsection (3) does not operate to impose any criminal liability on any person other than the person making the bet as referred to in that subsection.

(6) The following forms of betting are not prohibited by or under this section (except subsection (3)):

(a) betting on a horse race, harness race or greyhound race if the

betting takes place at a race meeting that is held at a licensed racecourse on any day approved by the controlling body responsible for the type of racing concerned,

(b) betting on a horse race, harness race, greyhound race or sports betting event if the betting takes place in an authorised betting auditorium,

(c) betting on a sports betting event if the betting is carried on by an authorised sports betting bookmaker at a licensed racecourse in accordance with a sports betting authority,

(d) betting on any event or contingency if the betting is carried on by a licensed bookmaker in accordance with an authority under section 16 of the Racing Administration Act 1998 ,

(e) betting on a horse race, harness race, greyhound race or sports betting event if the betting is made with a totalizator conducted by a licensee under the Totalizator Act 1997 or is otherwise authorised under that Act,

(f) betting on a horse race, harness race, greyhound race or sports betting event if the betting takes place at a licensed racecourse:

(i) during so much of the day arranged for a race meeting at the racecourse as remains after the conclusion, postponement or abandonment of the race meeting, or

(ii) at any time on a day arranged for a race meeting (after the time arranged for the start of the meeting) if the race meeting was cancelled or postponed the day before.

(7) In subsection (6), ***authorised betting auditorium****,* ***authorised sports betting bookmaker****,* ***controlling body****,* ***sports betting authority*** *and* ***sports betting event*** *have the same meanings as in the Racing Administration Act 1998 .'*

…

9 Offence of unlawful bookmaking

(1) A person must not carry on bookmaking unless the person is a licensed bookmaker.

Maximum penalty:

- *for a first offence—100 penalty units or imprisonment for 2 years (or both),*
- *for a second or subsequent offence—500 penalty units or imprisonment for 2 years (or both).*

(2) A person who is a licensed bookmaker must not carry on bookmaking except:

(a) at a licensed racecourse, and

(b) when it is lawful for betting to take place at the racecourse.

Maximum penalty:

(a) for a first offence, 200 penalty units (in the case of an offence committed by a corporation) or 100 penalty units or imprisonment for 2 years or both (in the case of an offence committed by an individual), or

(b) for a second or subsequent offence, 1,000 penalty units (in the case of an offence committed by a corporation)

or 500 penalty units or imprisonment for 2 years or both (in the case of an offence committed by an individual).

(3) Subsection (2) does not apply in relation to any doubles betting, or call of the card betting, carried on by a licensed bookmaker in accordance with the approval of the Minister.

(4) The Minister's approval under subsection (3) is subject to such conditions as the Minister thinks fit to impose.

(5) For the purposes of this section:
***call of the card betting** means betting that is carried on in relation to a racing event on a day before the event takes place.*
***doubles betting** means betting that is carried on in relation to 2 separate racing events and in respect of which a successful bet requires the selection of the winners of both events.'*

6 The licensing of bookmakers is then dealt with in the RAA, along with the TRB, HRA and GRA.

7 Section 4 of the RAA defines a 'licensed bookmaker' to mean:

'a person who is authorized by a controlling body to carry on bookmaking.'

8 Section 4 of the RAA also defines the term 'controlling body' to mean:

'… any one of the following:
(a) the NSW Thoroughbred Racing Board,
(b) Harness Racing New South Wales,
(c) Greyhound Racing New South Wales.'

9 Amongst the other definitions found in section 4 are the following:

*'**authorized sports betting bookmaker** means a licensed bookmaker who is authorized to take bets under section 19.'*

*'**licensed racecourse** means a racecourse licensed under this Act.'*

*'**race meeting** means a meeting for horse racing, meeting for greyhound racing, or meeting for harness racing.'*

10 Part 3 of the RAA provides for the authorization of certain betting activities as follows:

Section 16 permits the Minister to authorize:

> *'… a licensed bookmaker to accept or make bets:*
> *(a) by telephone, or*
> *(b) electronically by means of the Internet, subscription TV or such other on-line communications systems as may be approved by the Minister,*
> *while the bookmaker is at a licensed racecourse at a time when it is lawful for betting to place at the racecourse.'*

Section 17 makes it an offence for a licensed bookmaker to accept or make a bet by telephone or electronically unless, at the time the bet is accepted or made, the bookmaker is authorized under section 16 to do so.

By section 19, the Minister may:

> *'… in writing, authorize a licensed bookmaker to take bets, on any sports betting events specified in the authorization, at any licensed racecourse.'*

11 Part 3A of the RAA provides for the authorization of bookmakers.

12 Section 26A of the RAA provides:

> *'(1) A person must not carry on business as a bookmaker on any racecourse (or part of a racecourse) unless the person:*
> *(a) is the holder of a licence, certificate of registration or permit authorising the person to do so, issued by the relevant controlling body, and*
> *(b) is the holder of a licence, certificate of registration or permit authorizing the person to do so, issued by the racing club that conducts race meetings at that racecourse, and*
> *(c) is the holder of a State bookmakers authority in force under this Part.'*

13 Section 26B permits 'a controlling body' to authorise a person to act for a bookmaker during that bookmaker's absence. It provides:

> *'(1) A controlling body that issued a licence, certificate of registration or permit authorising a person to carry on business as a bookmaker may, on application made by the person:*
> *(a) declare any period during which the bookmaker is or is to be absent to be an approved period, and*
> *(b) issue a written authority to a person nominated by the bookmaker to carry on the business of the bookmaker during the approved period.'*

14 The registration of persons as bookmakers is dealt with by the cognate provisions of the GRA (s 22), the HRA (s 25) and the TRB (s 14A). Each of those provisions is, materially,

in identical terms.

15 References in the following paragraphs are to the provisions of the TRB.

16 An application for bookmaker licence is the subject of subs 14A(1), which provides:

> *'(1) An application for a bookmaker licence may be made by:*
> *(a) a natural person of or over the age of 18 years, or*
> *(b) by a proprietary company.*
> (see also s 22(1) of the GRA and S25(1) of the HRA).'

17 Subsection (3) provides as follows:

> *'For the purposes of this section an* **eligible company** *means a proprietary company that is taken to be registered in New South Wales for the purposes of the* Corporations Act 2001 *of the Commonwealth and in which:*
> *(a) each director, shareholder and person concerned in the management of the company is of or over the age of 18 years, and*
> *(b) each director is licensed as an individual as a bookmaker under this Act, and*
> *(c) each director is a shareholder and person concerned in the management of the company, and*
> *(d) each shareholder who is not a director is a close family member of a director, and*
> *(e) each shareholder or person concerned in the management of the company who is not a director is, in the opinion of the Board, a fit and proper person to be licensed as an individual as a bookmaker under this Act, and*
> *(f) subject other regulations, no person (other than a shareholder) has any interest in the shares or assets of the company.*
> (see also s 22(3) of the GRA and s25(3) of the HRA).'

18 Subsection (4) provides for the conditions of a grant of a bookmaker licence, as follows:

> *'(4) It is a condition of a bookmaker licence granted to a company that:*
> *(a) the company continues to be an eligible company, and*
> *(b) no shareholder or person concerned in the management of the company, other than a director, is licensed as an individual as a bookmaker under this Act, and*
> …
> *(d) no director, shareholder or person concerned in the management of the company:*
> *(i) is licensed or otherwise authorised as an individual to carry on, or carries on, the business of a bookmaker, bookmaker's clerk or turf commission agent, or a*

totalizator business, in another Australian State or Territory, or

(ii) is a director, shareholder or person concerned in the management of a corporation, or is a member of a partnership, that is licensed or otherwise authorised to carry on, or that carries on, any such business in another Australian State or Territory, or

(iii) is an employee or agent of any individual, partnership or corporation referred to in the preceding subparagraphs, or

(iv) has a financial interest in the business of a bookmaker or turf commission agent, or a totalizator business, that is authorised to be carried on or is carried on in another Australian State or Territory, …'

(see also s 22(4) of the GRA and s 25(4) of the HRA).

19 Subsection (6) provides:

'(6) The condition set out in subsection (4) (d) does not extend to a person who is a director of a company that is licensed as a bookmaker under this Act if:

(a) the person is the sole director of the company, and

(b) the relevant matters referred to in subsection (4) (d) (i), (ii), (iii) or (iv) are disclosed in writing to the Board at the time the company applies for a bookmaker license under this Act or, if they do not occur until after that time, within 2 working days after they occur.'

(see also s 22(6) of the GRA and s 25(4) of the HRA; the word "Board" is replaced by the word "Authority").

20 The NSW Thoroughbred Racing Board is empowered by subs (7) to suspend or cancel a bookmaker licence if any of the conditions referred to in subs(4)is contravened in respect of the company. Subsection (7) stipulates:

'(7) The Board may suspend or cancel a bookmaker licence granted to a company if satisfied that any condition referred to in subsection (4) is contravened in respect of the company. This does not limit the powers of the Board to suspend or cancel the registration of a company as a bookmaker under section 14.

(see also s 22(7) of the GRA and s 25(7) of the HRA; the word "Board" is replaced by the word "Authority".)'

21 Returning to the RAA, Part 4 provides for the prohibition and the relaxation of the prohibition against supplying betting information and advertising. The provisions of that part are set out below.

*'27 **Definitions***
In this Part:

***advertisement** includes any information or material in the nature of an advertisement.*

***betting information** includes information or advice as to:*
(a) the betting or betting odds on any race that is to be held at a race meeting, or
(b) the betting or betting odds on a sports betting event that is to be held.
betting or betting odds includes totalizator dividends.

***publish** means disseminate, exhibit, provide or communicate by oral, visual, written, electronic or other means (for example, by way of newspaper, radio, television or through the use of the Internet, subscription TV or other on-line communications system), and includes cause to be published.*

***race meeting** includes a race meeting in any part of Australia or any other place.*

28 Publication or advertising of certain dividends or betting odds not affected
(1) Nothing in this Part prohibits or restricts the publication or advertising of any information relating to the dividends or betting odds, or probable dividends or betting odds, payable in respect of any betting conducted in accordance with the Totalizator Act 1997 .

(2) Nothing in this Part prohibits or restricts the publication, by a person or body prescribed by the regulations, of information relating to the dividends or betting odds, or probable dividends or betting odds, payable in respect of a totalizator operation conducted in another State or Territory by a person or body authorised under the law of that other State or Territory to conduct totalizator operations.

(3) Nothing in this Part prohibits or restricts the publication, by a person or body prescribed by the regulations, of information if:
(a) the information relates to the dividends or betting odds, or probable dividends or betting odds, payable in respect of a totalizator operation conducted in another country, and
(b) the totalizator operation is conducted by a person or body authorised under the law of that country to conduct totalizator operations and the person or body is specified, or is of a class or description of persons or bodies specified, by the Minister by order published in the Gazette, and
(c) the information relates to an event, or an event of a class or description of events, so specified by the Minister.

(4) For the purposes of subsection (3), **country** *includes part of a country.*

29 Publication of betting information

(1) A person must not publish any betting information.

Maximum penalty: 50 penalty units or imprisonment for 12 months (or both).

(2) Subsection (1) does not operate to prohibit:

(a) the publication in a newspaper of the betting or betting odds on any race to be held at a race meeting, so long as that information:

(i) is contained in an edition of the newspaper that is printed, or in respect of which printing has commenced, not less than 30 minutes before the advertised starting time of the first race to be held at the race meeting, and

(ii) is identical in all copies of that edition of that newspaper, or

(b) the publication, by any other means, of the betting or betting odds on any race to be held at a race meeting, so long as that information is made publicly available not less than 30 minutes before the advertised starting time of the first race to be held at the race meeting, or

(c) the publication of any betting information after the scheduled starting time of the last race intended to be held at a race meeting.

30 Advertising betting information and betting services

(1) A person must not publish an advertisement:

(a) indicating that the person (or any other person) is prepared:

(i) to provide betting information, or

(ii) to bet on any race that is to be held at a race meeting, or

(iii) to bet on any sports betting event, or

(b) that is designed to induce a person to obtain betting information, or

(c) that invites any person to make, or take a share in, a bet on any horse race, harness race, greyhound race or sports betting event, or

(d) that relates to any gambling operations or services carried on by a person who is not a licensed bookmaker.

Maximum penalty: 50 penalty units or imprisonment for 12 months (or both).

(2) Subsection (1) does not operate to prohibit:

(a) a licensed bookmaker from exhibiting, on a licensed racecourse on a day on which a race meeting is being held on the racecourse, any written or printed matter relating to the betting or betting odds on a race that the bookmaker is prepared to accept or offer, or

(b) an advertisement relating to a licensed bookmaker to the effect that the bookmaker is prepared to accept bets electronically or by telephone, so long as:

(i) the bookmaker is authorised by section 16 to engage in telephone or electronic betting, and

(ii) the advertisement complies with the conditions (if any) to which the authority is subject, or

(c) an advertisement relating to a licensed bookmaker to the effect that the bookmaker is prepared to accept bets in an authorised betting auditorium, or

(d) an advertisement relating to an authorised sports betting bookmaker, so long as the advertisement is confined to the following information:

(i) the name and contact details of the bookmaker,

(ii) the location of the licensed racecourse at which the bookmaker is prepared to accept bets on sports betting events,

(iii) the sports betting odds that the bookmaker is prepared to offer, or

(e) a licensed bookmaker from exhibiting, in an authorised betting auditorium, any written or printed matter relating to the betting or betting odds at which the bookmaker is prepared to accept a bet, or

(f) a licensed bookmaker from exhibiting, on a licensed racecourse, any written or printed matter relating to the betting or betting odds on a sports betting event that the bookmaker is prepared to accept or offer, or

(g) the publication of an advertisement or other notice relating to a licensed bookmaker, but only if the contents of the advertisement or notice are confined to the following:

(i) a statement of the name of the bookmaker,

(ii) the racecourse on which the bookmaker will operate,

(iii) the location of the authorised betting auditorium from which the bookmaker is prepared to accept or offer bets, or

(h) a person from organising or promoting a punters' club in accordance with section 14.

(3) A person must not provide by means of the Internet, subscription TV or other on-line communications system any service that enables a person:

(a) to access the gambling operations carried on by any person other than:

(i) a licensed bookmaker, or

(ii) the holder of a licence under the Totalizator Act 1997 *, or*

(b) to access information relating to those gambling operations.

Maximum penalty: 50 penalty units or imprisonment for 12 months (or both).

(4) The regulations may exempt any person, or class of persons, from the operation of subsection (3) in such circumstances, and subject to such conditions, as may be specified in the regulations.

31 Premises used for publishing betting information or betting services

'(1) A person is guilty of an offence if the person:

(a) uses premises for the purpose of publishing:

(i) betting information, or

(ii) any advertisement that relates to any betting services, or

(b) knowingly permits premises to be used for such a purpose, or

(c) has the control or management of premises that are used for such a purpose, or

(d) is involved in conducting a business on premises that are used for such a purpose.

Maximum penalty: 50 penalty units or imprisonment for 12 months (or both).

(2) This section does not operate to prohibit:

(a) information being provided to persons who are at a licensed racecourse when betting at the racecourse is lawful, or

(b) information being provided by a licensed bookmaker who is at a racecourse, so long as the information:

(i) is provided on a day on which a race meeting is being held on the racecourse and in response to a telephone or electronic request by a person who is not on the racecourse, and

(ii) relates to a bet with the bookmaker in accordance with an authority held by the bookmaker under section 16, or

(c) information being published in the manner referred to in section 29 (2) (c), or

(d) information being provided in any manner referred to in section 30 (2), or

(e) information being provided in accordance with section 32, or

(f) information being provided to persons who are in an authorised betting auditorium, or

(g) information being provided from an authorised betting auditorium, so long as the information:

(i) is provided by a licensed bookmaker in response to a request by a person who is not at the racecourse, and

(ii) relates to a bet that is made with the bookmaker in accordance with an authority held by the bookmaker under section 16.

32 Betting information provided by authorised persons

(1) The Minister may, by order in writing:

(a) appoint a person or body of persons as an authorised person or body for the purposes of this section, and

(b) impose conditions to be complied with by the appointee.

(2) An authorised person, or the representative of an authorised body of persons, who:

(a) is present on a licensed racecourse during a race meeting held

there, and

(b) complies with the conditions of appointment of the authorised person or body,

may publish betting information if the person or representative receiving the information is at a racecourse when it is lawful for betting to take place at the time the information is received.

33 Unauthorised race programs

(1) A person must not publish:

(a) a list of the horses or dogs nominated for any intended race that is to be held at any race meeting on a licensed racecourse, or

(b) a list of the horses or dogs that will or will not take part in any such race,

unless the publication of the list has been approved or authorised by the person, club or association conducting the race meeting.

Maximum penalty:

(a) for a first offence--10 penalty units, and

(b) for a second or subsequent offence--20 penalty units or imprisonment for 6 months (or both).'

22 In summary, s 29 prohibits a person from publishing betting information save in certain circumstances, including those prescribed by s 32(1), which permits a person authorised by the Minister to publish betting information whilst he/she, *inter alia*, is present on a licensed racecourse during a race meeting held there and that person was at the racecourse when it was lawful for betting to take place at a time he/she received the betting information. By its terms, the restriction in s 29 applies regardless of whether a person is licensed as a bookmaker (though note s 16).

23 Further, s 30 in essence prohibits the publication of advertising of the provision of betting information and betting services, again subject to exceptions. All materially relevant exceptions are conditioned upon a person being a licensed bookmaker; others are conditioned, in addition, to activities occurring or to occur at a particular location, namely an authorised betting auditorium (subss 2(c) and 2(e)) or a licensed racecourse (subss 2(a), 2(d) and 2(f)).

24 Further, subs 30(3) prohibits a person from providing by means of the internet or other on-line communications system any service that enables a person to access the gambling operations carried on by any person other than, *inter alia*, a licensed bookmaker.

25 Section 31 prohibits the use of premises for publishing betting information or any advertisement that relates to betting services. That section does not apply in circumstances conditioned upon information being supplied:

(a) by a licensed bookmaker who is at a racecourse, so long as the information is provided at a certain time, in response to a certain type of request, and the bookmaker is authorized to take bets by telephone or electronically (subss 2(b) and 2(g)); and

(b) at a licensed racecourse (subs 2(a)); and

(c) in circumstance otherwise provided for in the Part (subss (2)(c)-(e)).

26 Section 88 of the *Totalizator Act* provides:

> *'A person:*
> *(a) who makes or enters into a bet, or who offers to make or to enter into a bet, on the result of an event or contingency, by which the person agrees to pay to the other party to the bet, if the other party should win the bet, a sum of money the amount of which is dependent on the result of the working of a totalizator on the event or contingency, or*
> *(b) who (not being a person lawfully conducting or employed in the working of a totalizator) sells or offers for sale a ticket, card or thing entitling or purporting to entitle the purchaser or holder of it to an interest in the result of the working of the totalizator on an event or contingency, or*
> *(c) who purchases from a person (not being a person lawfully conducting or employed in the working of a totalizator) a ticket, card, or thing entitling or purporting to entitle the purchaser or holder of it to an interest in the result of the working of the totalizator on an event or contingency, or*
> *(d) makes or offers to make a contract or bargain of any kind to pay or receive money on an event or contingency determined or to be determined by the result of the working of the totalizator on an event or contingency,*
> *is guilty of an offence.*
> *Maximum penalty: 50 penalty units.'*

27 The prohibitions in s 88 apply regardless of whether or not the person is licensed as a bookmaker.

28 'Totalizator' is defined by s 6 of that legislation to mean the following:

> *'For the purposes of this Act,* **totalizator** *means:*
> *(a) a system used to enable persons to invest money on events or contingencies with a view to successfully predicting specified outcomes of those events or contingencies and to enable the money left after the deduction of commission to be divided and distributed among those*

persons who successfully predict those outcomes, and

(b) any instrument, machine or device through or by which the system is operated.

Note: Under this Act money can be invested on a totalizator for horse and greyhound races, and on other sporting events approved by the Minister. References in this Act to a totalizator can include a reference to an approved betting activity under section 13. See that section.'

Facts

29 The facts which are agreed between the parties are as follows:

1. The applicant is a corporation entitled to sue. It is registered in New South Wales for the purposes of the *Corporations Act 2001* (Cth).
2. The applicant's primary business activity is to accept bets via the internet and telephone on approved sporting or other events.
3. The applicant holds a sports bookmaking licence issued pursuant to the *Race and Sports Bookmaking Act 2001* (ACT).
4. Terms and conditions of the applicant's Sports Bookmaking Licence are recorded in the terms of the licence (being annexure 'B' to the affidavit of Mr Kafataris sworn on 28 August 2003) and in the terms of the letter of the ACT Gambling and Racing Commission addressed to Mr Kafataris and dated 3July 2001, being annexure 'D' to the said affidavit.
5. For the purpose of its business as a licensed sports bookmaker, the applicant:
   (a) trades from premises located at Canberra Racecourse, Flemington Road, Lyneham in the Australian Capital Territory ('the ACT Premises'); and
   (b) hosts, operates and maintains at / from the ACT Premises an internet betting service (being the website identified as www.sportodds.com), which service is capable of being accessed and used by customers of the applicant throughout Australia.
6. The internet betting service hosted at the applicant's ACT Premises is accessed by account customers located in all Australian jurisdictions, including New South Wales.
7. The applicant holds a Bookmakers Licence issued pursuant to the *Betting Control Act 1954* (WA).
8. Terms and conditions of the Bookmakers Licence are recorded in the terms of the document itself, being annexure 'E' to the affidavit of Mr Kafataris sworn on 28 August 2003.

9. For the purpose of its business the applicant:-

   (a) trades from premises at Gloucester Park Racecourse, Nelson Crescent, East Perth, WA (the 'WA Premises'); and

   (b) hosts, operates and maintains at / from the WA Premises an internet gambling service relating to sports events (being the website identified as www.sportodds.net), which service is capable of being accessed and used by customers of the applicant throughout Australia.

10. The internet gambling service hosted at the applicant's WA Premises is accessed by account customers located in all Australian jurisdictions, including New South Wales.

11. By accessing the applicant's websites, the applicant's customers can obtain betting information and place a bet on sporting events via the internet.

12. The computer facilities that enable the applicant's staff to upload betting information on to the applicant's two websites and the telephone equipment for its telephone betting operations are located at the ACT Premises and the WA Premises.

13. For the financial year ended 30 June 2002 the New South Wales government received $136,088,000 in wagering tax on totalizator schemes. Since 31 March 2002 bookmakers have not been liable to pay any betting or wagering tax on racing and sporting events to the New South Wales government. Section 26A of the RAA provides:

> *'(1) A person must not carry on a business as a bookmaker on any racecourse (or part of a racecourse) unless the person:*
> …
> *(b) is the holder of a licence, certificate of registration or permit authorising the person to do so, issued by the racing club that conducts race meetings at that racecourse …'*

   At least some race clubs charge bookmakers a small percentage of their turnover to issue the licence, certificate of registration or permit referred to above.

14. The gambling and racing industries in the Australian Capital Territory are much smaller than the equivalent industries in New South Wales in terms of the number of people involved in those industries.

15. The applicant is not licensed to carry on the business of a Sports Betting Bookmaker in New South Wales.

16. The applicant has not made an application for a licence to carry out Sports Betting Bookmaking in New South Wales as the licence requirements for New South Wales

would in effect prevent the applicant from operating in another Australian State or Territory by prohibiting its directors from being 'a director, … concerned in the management of a corporation, … that is registered or otherwise authorised to carry on, or carries on, any such business in another Australian State or Territory…'.

17. On 11 August 2003 the applicant entered into a contract with, inter alia, RWC 2003 Limited ('the Contract') pursuant to which the applicant became an 'Official Supplier' to the Rugby World Cup in relation to 'Betting Services', as those terms are defined in the Contract, and for that purpose the applicant was sanctioned by RWC 2003 Limited to advertise and promote its relationship with the Rugby World Cup throughout Australia.

18. Pursuant to that contract, the applicant became obliged to host, operate manage and maintain an Internet web site, such site to provide betting information, betting facilities and certain odds as more particularly defined in the Contract.

19. A director of the applicant, Con Peter Kafataris, is authorised by the Greyhound Racing Authority (NSW), Harness Racing New South Wales, and the NSW Thoroughbred Racing Board as a bookmaker.

20. Con Peter Kafataris is the holder of a State bookmakers authority issued pursuant to the RAA.

21. Con Peter Kafataris is authorised to conduct sports betting in New South Wales pursuant to the RAA.

22. Con Peter Kafataris is the holder of licences, certificates of registration or permits authorising him to carry on business as a bookmaker at various racecourses in New South Wales, issued by the racing club or the relevant controlling body that conducts race meetings at the racecourse.

23. Con Peter Kafataris holds a Race Bookmakers License issued pursuant to the *Race and Sports Bookmaking Act 2001(ACT)*.

24. Con Peter Kafataris holds a Bookmakers License issued pursuant to the *Authorised Betting Operations Act 2000* (SA).

25. Another director of the applicant, Arthur Pappageorge, is licensed as a Bookmaker's Clerk in New South Wales.

26. By letter dated 28 March 2003, the respondent, through the Department of Gaming and Racing ('the Department'), formally alerted the applicant to the Department's concerns regarding legal issues which may arise from certain aspects of wagering operations conducted over the applicant's official website, www.sportodds.com, and

asserted that it was arguable that the betting information and the New South Wales race meeting fields appearing on the applicant's websites were being 'published' in New South Wales, possibly in breach of sections 29 and 33 of the RAA.

27. By letter dated 4 August 2003 from the Department to the General Manager of the Rugby World Cup, the respondent drew the Rugby World Cup's attention to the provisions of the RAA relating to advertising of betting services and communication of betting information and sought the Rugby World Cup's assistance in ensuring that the legislation was drawn to the attention of the relevant persons within its organisation, as failure to comply with the legislation could lead to the initiation of legal action by the Department.

30 There is no agreement between the parties about the costs that would (as the applicant contends) or might (as the State contends) be incurred in the event that a company separate from the applicant had to set up its own bookmaking business in New South Wales. It is sufficient that I find (as I do) that costs and expenses would be incurred in that event which would be unnecessary if the business could be conducted without a separate entity being established, even if the current establishment needed to be increased to cope with new business. Establishing and maintaining a separate entity would involve cost and expense over and above that involved in increasing the current establishment.

Arguments

31 The applicant's principal argument was that the impugned provisions are contrary to s 92 of the Commonwealth Constitution (which it has standing to raise because of its Western Australian operations) and contrary to s 69 of the *Self Government Act* (which is identical in effect to s 92 of the Commonwealth Constitution), leading to the conclusion that s 109 of the Commonwealth Constitution would invalidate the New South Wales provisions (which it has standing to raise because of its operations in the Australian Capital Territory). There is no distinction between the two branches of the argument. An alternative argument is put that the impugned provisions of the RAA are inconsistent with the licence which the applicant holds granted pursuant to the *Race and Sports Bookmaking Act* which was enacted pursuant to s 22 of the *Self Government Act*, which in turn was enacted pursuant to the Commonwealth's power to make laws for the government of a Territory pursuant to s 122 of the Commonwealth Constitution, thus bringing into play s 109 of the Commonwealth Constitution to invalidate the New South Wales provisions to the extent that they impinge

upon the exercise of territory legislative power.

32 The starting point for what I shall call the s 92 argument is that the RAA regulates betting and gaming by reference to whether or not a person is a 'licensed bookmaker', meaning a person who is authorised by a controlling body to carry on bookmaking (s 4). A 'controlling body' means any of the NSW Thoroughbred Racing Board, Harness Racing New South Wales, or Greyhound Racing New South Wales, each constituted by specific legislation. That legislation has a common set of provisions in relation to the issuing of licences to bookmakers, as appears above. The net effect of those provisions is that a corporation cannot do business as a bookmaker in the State of New South Wales unless:

(a) it is taken to be registered under the *Corporations Act* in that state; and

(b) no-one concerned in its operation trades as a bookmaker in another state or territory, either individually or through a corporate structure.

Further, the effect of s 119A of the *Corporations Act* is that a corporation can be registered in only one state or territory. It is submitted that the licensing legislation uses the criteria of ownership (through shares), the holding of office (through appointment as a director) and control (through power of management) to prohibit persons involved in out-of-state corporations from having any such role within a New South Wales licensed corporation. The practical effect is that no corporation can organise its affairs to trade across the New South Wales border. As a consequence, if the applicant wishes to apply for a sports bookmaker's licence in New South Wales it would have to surrender its licence in other jurisdictions, including the Australian Capital Territory. It is submitted that a practical consequence of this is that it could not offer bets on events in the Australian Capital Territory at a rate better than that being offered by the New South Wales Totalizator Administration Board by reason of s 88 of the *Totalizator Act.* At the moment, it is not so inhibited. It is submitted that this is, in substance and effect, an equalisation measure similar in effect to that involved in *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411. This is a somewhat convoluted argument which, in my view, even if correct, would not lead to any relevant invalidity. Regardless of that point, it is submitted that the effect of the legislation is plainly discriminatory and protectionist in the sense explained by the High Court in *Cole v Whitfield* (1988) 165 CLR 360 and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

33 It was submitted that any doubt as to the effect of the legislation would be set at rest by consideration of the Second Reading Speech by the Minister for Gaming and Racing in

introducing the Racing Legislation Amendment (Bookmakers) Bill, which became the *Racing Legislation Amendment (Bookmakers) Act 2002*, which introduced the availability of a corporate structure for licensed bookmaking in New South Wales. A number of passages from that speech were stressed by counsel, including the following:

> *'There are safeguards inherent in the proposal to prevent any overseas gambling interests capitalising on this legislative initiative to infiltrate the New South Wales bookmaker ranks. That is one of the major centrepieces of this legislation in light of overseas interests intruding into Australia, particularly in the Territories, in recent times.'*
>
> …
>
> *'As I said earlier, that involves the threat posed by the Northern Territory and Australian Capital Territory corporate bookmakers who have established there with the sole purpose of plundering the wagering markets of the larger states.'*
>
> …
>
> *'The financial reality is that the racing industry in New South Wales is heavily dependent on tapping into a revenue stream from wagering turnover on its product. That revenue stream will diminish if there is a significant transfer of wagering turnover to corporate bookmakers in the Northern Territory and the Australian Capital Territory.'*
>
> …
>
> *'…I have been bringing home to my counterparts in each of the other State and Territory jurisdictions the seriousness of intrusion of major corporate bookmaking companies of the likes of the Hills and Ladbrokes into our system of racing and what will happen as a result of the transfer of the operations of the former Vanuatu corporate bookmaking entity to the Northern Territory.'*
>
> …
>
> *'The smaller States and especially the Northern Territory, if they act like mavericks and establish themselves as areas of convenience, as is done in the Caribbean and the Bahamas, will destroy the great racing industry in New South Wales for their own short-term gain. That would be crazy. I will continue, while I am Minister, to oppose the intrusion of such operations into this State. I have done everything I can by way of legislation.'*
>
> …
>
> *'The industry's revenue stream will diminish if there is transfer of wagering turnover to corporate bookmakers in the Northern Territory and the Australian Capital Territory.'*
>
> …
>
> *'Needless to say, the New South Wales corporate bookmaker regime proposed here does not pose the same threats to the racing industry. On the contrary, it will assist the State's bookmakers to compete against the corporate bookmakers who are setting up in the Territories and targeting the New South Wales punters.'*
>
> …
>
> *'Whilst it may not seem so at first sight, this measure is very important to improve the viability of New South Wales bookmakers.'*

34 Counsel for the applicant then submitted that the legislative scheme is so interwoven that it is not possible to unpick one critical portion of it and leave the rest standing. He submitted that, so far as is relevant to his client, invalidity of the particular discriminatory provisions would change the nature of the scheme and that to continue to give the residue force and effect would be tantamount to a legislative choice. Thus, Pt 4 of the RAA is said to be invalid in its application to the applicant.

35 Counsel referred to freedom of intercourse as precluding interference with communications (*Cunliffe v Commonwealth* (1994) 182 CLR 272) and submitted that the manifest purpose of the legislation was to impede, if not prevent, out-of-state bookmakers from crossing the state border, either corporeally or by the use of electronic forms of communication, and that the interference with freedom of intercourse was deliberate rather than incidental. This was said particularly in relation to the impugned provisions of Pt 4 of the RAA. This aspect of the written submissions was not elaborated upon in oral argument, and, as I understand it, was not pressed as a separate ground of invalidity. Even if it were, it would plainly fail, as the prohibitions in Pt 4 are general in operation and are directed to intrastate persons and transactions in the same way as they are directed to persons and transactions outside the state. They are thus not discriminatory or protectionist in the requisite sense.

36 In this connection, reference to the decision of the High Court in *Mansell v Beck* (1956) 95 CLR 550 (and the related case of *Consolidated Press v Lewis*) is instructive. The cases are closely in point on the facts as they concerned the regulation of lotteries in New South Wales. Neither counsel relied upon them, as they predated the re-interpretation of s 92 in *Cole v Whitfield*. However, they give a useful history of gaming regulation, and the analysis remains revealing. For example, in referring to provisions which expressly related to foreign lotteries, Dixon and Webb JJ said (at 567-568):

> *'But does it really mean that the legislation takes, as a ground for penalising the issue of a ticket, the fact that it comes from another State or from aborad, or, as a ground for penalising the acceptance of a payment, the fact that the payment is made for such a ticket and therefore presumptively is made for transmission to that other State or to the place abroad? If it was intended to pick out, as the basis of the prohibition, the fact that it was a transaction over the boundary of New South Wales, it would give support for the view that it involved a direct restriction upon inter-State commerce or intercourse. But that conclusion could be justified only upon a consideration of the legislation*

> *as a whole. When the legislation is regarded as a whole, it is seen that the provisions directed against foreign lotteries are simply the counterpart of the provisions directed against lotteries in general, provisions presumed to operate only upon lotteries conducted in New South Wales. The provisions are complementary one to another. The history of the legislation against lotteries shows that from an early time foreign and domestic lotteries were dealt with by separate provisions. In the beginning this may be accounted for by what appears to have been the interpretation placed upon the reference in 10* Will.III, *c 23 to grants, patents and licences. It seems that the words were read as referring only to grants, patents and licences from the British Crown. According to a recital made by s 4 of 9* Geo.I, *c 19 "in order to elude the many good laws made for suppressing unlawful lotteries several evil disposed persons have of late presumed to erect and carry on several lotteries upon pretence and colour of some grant or authority given by foreign prices or States". The section, which then went on to prohibit foreign lotteries, was the first of many enactments.*
>
> *The question whether legislation infringes upon s 92 is in one sense a question of the exercise of constitutional power, the power which s 92 leaves unrestricted. The true content of the State law must be ascertained to see whether the law that results from the whole impairs the freedom which s 92 protects and so goes beyond the legislative power. If s 3(4) and s 21 are read together they amount to a prohibition of the sale of tickets in lotteries or the acceptance of money in respect of the purchase of any such ticket covering lotteries conducted within and lotteries conducted outside the State. This is the content of the law. Viewed in this way the law does not select any element or attribute of inter-State trade, commerce or intercourse as the basis of its operation and is concerned only with penalising certain incidents of lotteries because of their aleatory nature. The fact that differing penalties are affixed for breach of the provisions cannot alter the character of the substantive provisions and that is the matter in question here, not the penalties.'*

It is of historical interest that *Mansell v Beck* was a reconsideration of issues decided (in the same way) in the earlier cases of *R v Connare; Ex parte Wawn* (1939) 61 CLR 596 and *R v Martin; Ex parte Wawn* (1939) 62 CLR 457 because of the re-interpretation of s 92 by the Privy Council and the High Court between 1939 and 1956.

37 Reference is also made in the written submissions to a possible construction of the legislation which would have it reach in to the activities of persons outside New South Wales in relation to events outside New South Wales. This was not pursued in oral argument as a separate point, and has only tangential relevance to the s 92 argument.

38 Counsel for the State objected to the use made by counsel for the applicant of the Second Reading Speech to which I have referred. It was submitted that the justification advanced by counsel for the applicant had only been the traditional use of such a speech to

identify the mischief to be redressed in order to assist in construing the meaning of the provisions. Counsel submitted that the meaning of these provisions is clear, and needs no elucidation. In particular, it was submitted that the principle relied upon by counsel for the applicant did not permit use of the Second Reading Speech to prove collateral improper legislative purpose. Even if recourse were to be had to s 34(1) of the *Interpretation Act 1987* (NSW), use would be limited to ascertaining the meaning of the provision.

39 It was then submitted that the burden of proof is on the applicant, at least in relation to showing that the provisions are discriminatory and impose a protectionist burden. Legislation should be presumed to be valid until the contrary is shown. It was pointed out that the applicant had brought no economic evidence and little evidence as to the nature and shape of relevant markets or market participants, apart from some evidence about its own business.

40 Counsel for the State accepted that the impugned provisions require bookmakers, or associated persons, to operate in one jurisdiction at a time. It was submitted that that has always been the practical requirement for individual bookmakers, because it is the particular individual who is licensed and that person cannot be in more than one place at a time. The provision for someone standing in the stead of the individual is very limited. It is submitted that bookmakers have a potential interest to interfere in the events which are being bet upon, and the size of that interest depends upon the amount of money at stake. Once interstate activities are permitted, New South Wales authorities can only see part of the picture and there might be a large incentive for interference which is not visible to any one set of regulators. It was submitted that the impugned provisions are thus reasonably appropriate and adapted to the protection of the integrity of the gaming and racing industries.

41 It was submitted that insofar as there is any difficulty about the requirement that an eligible company be taken to be registered in New South Wales, that requirement is easily severed, and the same thing can be said if s 14A(4)(d) of the *TRB* and its cohorts are held invalid. It was further submitted that, in any event, the invalidity of all or part of any of the individual statutes relating to licensing by controlling bodies would not affect the validity of Pt 4 of the RAA or any of its provisions, these being the provisions with the greatest practical impact for immediate purposes. Those, or like, provisions have been part of the scheme for many years, and pre-dated the introduction of corporate bookmaking. They stand alone, and

do not depend upon the other statutes. Standing alone, there could be no question of invalidity by reason of the s 92 argument as the provisions apply to all persons (including corporations) with no relevant discrimination between those in and out of the state.

42 The alternative argument for the applicant starts from the fact that the applicant holds a current sports bookmaking licence, issued pursuant to the *Race and Sports Bookmaking Act 2001* (ACT). That Act provides for the Gambling and Racing Commission to determine rules for sports bookmaking (s 23). Pursuant to that provision, the Gambling and Racing Commission has issued rules which permit sports bookmakers to accept bets via the internet. The *Race and Sports Bookmaking Act* was passed by the Australian Capital Territory Legislative Assembly pursuant to s 22 of the *Self Government Act*. Section 22 of that Act conferred upon the Assembly 'power to make laws for the peace, order and good government of the Territory'. In turn, the Self Government Act was enacted pursuant to the Commonwealth's power to make laws for the government of a territory (s 122 of the Commonwealth Constitution). It was submitted that if the effect of the decision in *Dow Jones & Company Inc v Gutnick* (2003) 77 ALJR 255; 194 ALR 433 is that publication of material on the internet occurs wherever that material is downloaded from the web server (see *Dow Jones* [44]), then the RAA in the case of a corporation operates either to prohibit such downloading to occur in New South Wales or to compel the corporation (at least in theory) to obtain a licence as a bookmaker in New South Wales with all the restrictions involved in that. It is at this point of the argument that assistance is sought to be gained from the potential application of the RAA to events occurring outside New South Wales. It was submitted that the RAA purports to prohibit or regulate actions authorised by the *Race and Sports Bookmaking Act* and that s 109 of the Commonwealth Constitution invalidates the RAA to the extent that it does so.

43 Counsel for the State submitted that s 109 of the Commonwealth Constitution had no application in relation to the operation and effect of a local Australian Capital Territory statute, which was not a law of the Commonwealth for that purpose. It was further submitted that there was not the kind of direct conflict between statutes of differing jurisdictions which would give rise to the necessity to resolve the conflict. The provisions of the *Race and Sports Bookmaking Act* and the authority granted pursuant to it were purely permissive and not mandatory. Furthermore, the Australian Capital Territory licence permitted accepting certain bets, which would be conduct within the boundaries of the Australian Capital Territory. All

that the licence does is lift the prohibition by the Australian Capital Territory on engaging in sports bookmaking which, again, is directed to conduct within the Australian Capital Territory. This is not a case in which the Australian Capital Territory legislation had purported to override state laws. If there had been a direct collision, it was submitted that the conflict would be resolved in the manner suggested by Deane J in *Breavington v Godleman* (1988) 169 CLR 41 at 137-8, and the law with the stronger nexus (or closer connection) to the issue should apply (cf *Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340 at 374). In this case, the New South Wales law is more closely tied to the regulation of conduct in New South Wales.

Decision

44 I do not propose to rule upon the alternative argument presented by the applicant based upon the primacy of Territory legislation pursuant to s 109 of the Commonwealth Constitution. In my opinion, that issue is not sufficiently concrete in this case to permit the making of a declaration concerning validity. Indeed, the issue is hypothetical, as the applicant does not accept that, for the purposes of these statutes, any breach of the RAA occurs where downloading material from a web server takes place. In my opinion, issues such as this should be considered in relation to particular conduct in a particular setting, certainly where (as here) the underlying constitutional principles have not been settled by authority.

45 I am satisfied that the applicant succeeds in its attack upon subs 14A(4)(d) of the TRB and its counterpart sections in the other legislation. There was little disagreement as to the principles to be applied following the trilogy of *Cole v Whitfield* (1988) 165 CLR 360, *Bath v Alston Holdings Pty Ltd* (1998) 165 CLR 411 and *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, in which the High Court re-interpreted s 92. There is no dispute but that s 69 of the *Self Government Act* should be interpreted consistently with those authorities (*AMS v AIR* (1999) 199 CLR 160 at [36] and [221]). The sections in issue are, plainly and expressly, discriminatory – they are aimed at out-of-state parties. They are also plainly protectionist. They protect corporations with local directors, shareholders and managers from competition from corporations with out-of-state directors, shareholders and managers. The only real question is whether the provisions might be justified as being necessary or appropriate to the attainment of a legitimate legislative objective. It will be rare that this will

be established in the face of clear and direct protective discrimination. That issue is usually to be considered as part of the inquiry as to whether there is protectionist discrimination.

46 In the present case, a justification which is put forward is that the provision is designed to assimilate the position of corporate bookmaking with individual bookmaking so far as is possible. The impugned provisions were introduced as part of a package which permitted corporate bookmaking in New South Wales for the first time. Given that, traditionally, gambling has been closely supervised by the licensing of individuals, it was legitimate to endeavour to preserve the essentials of that system when corporate bookmaking was permitted. As individual bookmakers cannot operate in two places at once, it is appropriate that corporate bookmakers should not be able to operate in two places at once. Whilst that argument has some initial attraction, it does not survive analysis. The inability of an individual bookmaker to operate in more than one place at the one time is simply a practical reality which does not serve any particular purpose in the regulatory scheme. Once a decision is made to permit corporate bookmaking, corporations with interstate principals cannot be discriminated against unless for good reason associated with the regulatory scheme. Here, it is impossible to detect such a reason. A corporation with interstate principals which chooses to seek a licence is bound by all of the same requirements, including probity, and its conduct is subject to the same regulation, as corporations with New South Wales principals. The justification which counsel for the State presented, based upon inability to scrutinise overall exposure on the part of interstate bookmaking corporations, is unsupported by evidence, is not referred to in the Second Reading Speech, and is far from being self-evident.

47 My conclusion has been arrived at without depending upon the statements in the Second Reading Speech relied upon by counsel for the applicant. My decision is based upon the proper construction of the provisions themselves. It is a moot point as to whether a Second Reading Speech can be used to prove what amounts to improper collateral legislative purpose, which I need not resolve.

48 The issue arising as to the validity of s 14A(3) of the TRB and its counterparts insofar as it requires that an eligible company 'is taken to be registered in New South Wales for the purposes of the *Corporations Act* of the Commonwealth' is different. It follows from Pt 2A.2 of the *Corporations Act* that a company is taken to be registered in one state or territory and

that may only be changed if the conditions laid down by s 119A(3) are satisfied. These include (at the moment) approval of the change by the relevant minister of the state or territory in which the company is taken to be registered before the change. It is to be noted that, although a company comes into existence as a body corporate at the beginning of the day on which it is registered (s 119 of the *Corporations Act*), it is incorporated in 'this jurisdiction' (s 119A(1)), which is, in effect, Commonwealth jurisdiction (s 5, s 9). It is also to be noted that the company's legal capacity and powers do not depend in any way on the particular state or territory in which it is taken to be registered (s 124 *Corporations Act*). The choice of the particular state or territory does not depend upon any geographical connection with that state or territory, but is a matter of election on the part of the applicant for registration. In my opinion, this requirement is both discriminatory and protectionist in the relevant sense. Counsel for the State did not suggest any real basis for concluding that this was the result of any appropriate regulatory requirement. It is thus invalid.

49 There is no issue on the pleadings as to the effect of the invalidity which I have found upon the balance of the particular statutes in which the invalid provisions are found save for s 14A(3) of the TRB and its counterparts. In my opinion, the words which create the problem, namely 'that is taken to be registered in New South Wales for the purposes of the *Corporations Act 2001* of the Commonwealth' can be severed from the balance of the subsection. A question which does arise is whether there is any consequential effect upon Pt 4 of the RAA. In my opinion, there is not. In one sense, of course, there is a legislative scheme in existence here, with statutes referring one to the other, establishing different areas and levels of regulation. The question as to whether invalidity of part of such a scheme brings down another part in a separate statute does not directly give rise to the issue of severance of invalid portions of a statute, at least in circumstances where the statutes are not expressly and in every respect interdependent and incorporated one in the other. However, there may be cases where the practical interdependence of statutes is such that the whole or part of the statute may become devoid of content if that which it depends upon in another statute is declared invalid. In my opinion, none of the impugned provisions of Pt 4 of the RAA are in this category. Each has a live field of operation, whether or not corporate interstate licensed bookmakers are eligible for licensing or not and, indeed, whether or not there are any provisions at all for the licensing of corporate bookmakers. As I have said in [35], the prohibition in each section is quite general. To adapt an analogy, the provisions are not so interwoven that the woof and the warp cannot be separated (*Australian Railways*

Union v Victorian Railways Commissioners (1930) 44 CLR 319 at 386).

50 Orders will be made as to invalidity of the identified provisions of the TRB, the HRA and the GRA. No other relief will be granted. The State should pay the costs of the applicant, save for costs of and incidental to expedition of the hearing. The State should not be forced to pay any costs in relation to the application for expedition, which was to suit the commercial purposes of the applicant. It has been argued for the State that the principal practical relief, and that which gave the proceeding its claim to expedition, has been refused and that that result ought to be reflected in the costs order. However, the applicant has succeeded in obtaining substantive relief, which was resisted, and the nature of the issues for argument do not make any apportionment of costs by way of issue sensible or appropriate.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 19 September 2003

Counsel for the Applicant:	BW Walker SC, MK Condon
Solicitor for the Applicant:	Coudert Brothers
Counsel for the Respondent:	J Kirk
Solicitor for the Respondent:	Crown Solicitor
Date of Hearing:	10,11 September 2003
Date of Judgment:	19 September 2003