HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY — No. A10 of 2024

BETWEEN: **SKYCITY ADELAIDE PTY LTD**
Appellant

and

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TREASURER OF SOUTH AUSTRALIA
First Respondent

STATE OF SOUTH AUSTRALIA
Second Respondent

APPELLANT'S SUBMISSIONS

I PUBLICATION

1. This submission is suitable for publication on the internet.

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II CONCISE STATEMENT OF ISSUES

2. Does wagering on electronic gaming machines using credits which had their source in loyalty points given to customers by the appellant (**Converted Credits**) result in "gross gambling revenue" (and, in turn, "net gambling revenue" subject to casino duty) within the meaning of the Casino Duty Agreement?

III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3. Notice is not required to be given under s 78B of the *Judiciary Act* 1903 (Cth).

IV CITATION

4. The judgment of the Court of Appeal has not been reported. Its medium neutral citation is *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] SASCA 14.

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V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

The statutory framework and the CDA

5. Under s 7 of the *Casino Act* 1997 (SA) (**Casino Act**)[1] there is not to be more than one casino licence in force at the same time.

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1 The Casino Act repealed and replaced the *Casino Act* 1983 (SA).

6. The appellant has been licensed, pursuant to s 5(2) of the Casino Act, to operate what is now known as the SkyCity Casino on North Terrace in Adelaide (**Casino**) since 25 November 1999[2]. It does so in accordance with an approved licensing agreement as contemplated by s 16 of the Casino Act, first entered into on 27 October 1999, and amended from time to time subsequently (**Approved Licensing Agreement**)[3].

7. Section 17(1) of the Casino Act provides for there to be a further agreement between the casino licensee and the Treasurer, *inter alia*, to fix the amount, or basis of calculation, of "casino duty". A statutory liability to pay the casino duty on the agreed basis is imposed by s 51 of the Casino Act. Those provisions reflect that one aspect of the Casino Act's object of providing for the licensing, supervision and control of the Casino (identified in s 2A(d) of the Act) is "to ensure that the interest of the State in the taxation of gambling revenue arising from the operation of the Adelaide Casino is properly protected".

8. The appellant and the first respondent entered into a casino duty agreement pursuant to s 17(1) on 27 October 1999, which has been subsequently varied by agreement several times (**CDA**)[4].

9. Clause 5 of the CDA {CAB103} provides that the sum payable by the appellant by way of casino duty is the greater of nil and the sum of various amounts. The items listed in cl 5 which are relevant to electronic gambling are those identified in paragraphs (c), (d) and (e) of cl 5, all of which are identified by reference to the critical concept of "net gambling revenue".

10. Clause 1.1 of the CDA is titled "Definitions" {CAB99-101}. With respect to electronic forms of gambling, it materially provides as follows (underlining added):

> "**net gambling revenue**" in respect of gambling for a period means:
>
> …
>
> (b) for net gambling revenue that is attributable to other gambling – the <u>gross gambling revenue</u> for the relevant period that is attributable to the gambling, less the value of monetary prizes that the Licensee was liable to pay during that period that are attributable to the gambling (whether or not awarded in respect of gambling for that period).

[2] Case Stated – Revision 1 Agreed Facts (**Agreed Facts**) {CAB21} at [1] {CAB21}.

[3] Agreed Facts [4], [6] {CAB21-22}. The current operative terms of the Approved Licensing Agreement are at {CAB45-91}.

[4] Agreed Facts [7], [8] {CAB22}. The operative terms of the CDA are those as varied by the 23 June 2020 variation agreement at {CAB99-108}.

11. The same clause provides:

> "**gross gambling revenue**" for a period means:
>
> (a) the gross amount received by the Licensee during the period for or in respect of consideration for gambling in the casino premises; and
>
> (b) any bad debt to the extent recovered by the Licensee during the period.

12. For convenience, these will be referred to as 'definitional provisions' although, as will be contended, that description may be question-begging.

13. The expression "gambling" is not defined in the CDA but by reason of cl 1.1 it is deemed to have the meaning given by the Casino Act, under which it means the playing of a game for monetary or other stakes and includes making or accepting a wager: s 3(1). The expressions "gross" and "revenue" are not individually defined in the CDA or the Casino Act although, as noted, the expression "gambling revenue" is used in s 2A(d).

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Electronic gambling at the Casino

14. Since 14 February 2014, the Casino has offered two electronic forms of gambling, namely electronic gaming machines (**EGMs**) and automated table games (**ATGs**). Customers placing bets on EGMs and ATGs do so by wagering electronic gaming credits which are recognised by the machines[5].

15. On 5 May 2014, an electronic cashless gaming system was introduced at the Casino. Under this system, each customer holds a cashless gaming account, comprising funds deposited by the customer using cash or collected winnings. Each customer has a cashless gaming card which stores information about the funds held in their cashless gaming account[6].

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16. The cashless gaming system is linked to the electronic forms of gambling at the Casino, in that a customer can insert their cashless gaming card into an EGM or ATG and choose to convert funds stored in their account into electronic gaming credits on the machine to enable the customer to place bets[7].

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5 Agreed Facts [18], [25], [48] {CAB24-30}.

6 Agreed Facts [48] {CAB29-30}.

7 Agreed Facts [48] {CAB29-30}.

The Rewards Program and Points

17. The appellant also operates an approved rewards program within the Casino (**Rewards Program**), in which customers (referred to as **Members**) can participate for no charge[8].

18. Members accumulate loyalty points (**Points)** through various means. Points are earned by reference to a Member's expenditure at the Casino (both gambling and non-gambling). The rate at which Points are earned varies according to the "tier" of the Rewards Program to which a Member belongs. Points earned from gambling activity are earned regardless of whether the Member wins or loses in a particular gambling transaction. Points can also be awarded to Members on a discretionary basis – for example, to mark a Member's birthday or for a trade promotion[9].

19. Not only is participation in the Rewards Program free, there is no additional or higher level of payment required for participation in gambling or product purchases from the appellant in order to earn Points[10].

20. The appellant reserves to itself the right to amend the terms and conditions applicable to the Rewards Program at any time[11]. Points expire after six months of being earned, cannot be redeemed for cash, and are not transferable[12].

21. Members are issued with membership cards. Since the introduction of the cashless gaming system in 2014, those membership cards have been linked to the cashless gaming system. The membership card records both a Member's Points balance and the balance of that Member's cashless gaming account[13].

Cashless gaming by Members

22. As has been noted, by paying cash to the appellant, a Member can transfer funds onto their cashless gaming account which are then accessible by inserting their card into an EGM or ATG. At that point, a Member may transfer a selected amount of their stored

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8 Agreed Facts [20]-[24] {CAB24-25}.

9 Agreed Facts [48] {CAB29-30}.

10 Agreed Facts [24], [28], [35], [42], [43] and [60] {CAB25-33}.

11 Agreed Facts [46], [48](k) {CAB29-31}.

12 Agreed Facts [40], [45], [48](k) {CAB25-31}, Terms & Conditions {CAB119} at [17] {CAB124}.

13 Agreed Facts [30], [48] {CAB26-31}.

funds to the machine for conversion into electronic gaming credits (in the credit meter on the machine) which then are able to be played or wagered on the machine[14].

23. Alternatively, a Member who has accumulated Points, the balance of which are recorded on their account and made available on their membership card, can 'convert' those Points into electronic gaming credits on an EGM or ATG (**Converted Credits**), provided that the Member has first wagered electronic gaming credits to an amount equal in value to the value of the Points they wish to convert on the same trading day.

24. This condition (referred to as the "gate") formed part of the terms of the cashless gaming system as approved[15]. At all material times, the conversion has been permitted on the basis that one Point converts to one cent of electronic gaming credit value, so that 100 Points may be converted to a gaming credit that permits a wager of $1[16].

25. If a Member who is playing an EGM or ATG has gaming credits available to them on the credit meter of the machine which are derived both from the conversion of Points (that is, Converted Credits) and gaming credits the result of transferring or exchanging funds from their cashless gaming account, the Member is treated as first wagering Converted Credits[17].

26. When a Member wins a bet playing at an EGM or ATG, their winnings are awarded as electronic gaming credits on the machine, which the machine's credit meter records along with any unplayed electronic gaming credits. When the Member's card is withdrawn from the machine, the electronic gaming credit balance will automatically transfer back as a credit to the cashless gaming account that is linked to the membership card[18].

27. The balance on a cashless gaming account may then be used by a Member to generate gaming credits in the credit meters of other EGMs or ATGs, or they may take their card

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14 Agreed Facts [48](c)-(d) {CAB30}.

15 Agreed Facts [48](e)-(g) {CAB30}. The requirement for approval by the Commissioner of systems and procedures is located in s 38 of the Casino Act.

16 Agreed Facts [44], [48](h) {CAB29-30}.

17 Terms & Conditions {CAB119} at [18] {CAB124}. It is acknowledged that, so far as gaming on a machine is concerned, the machine treats gaming credits as able to be used for identical purposes, irrespective of their source: Agreed Facts [48](j) {CAB30-31}.

18 Without the resultant balance differentiating between the sources of that balance: [48](i)-(j) {CAB31}.

to a Casino cashier and redeem the value for cash (up to a monetary threshold specified by the appellant[19] and subject to a three year forfeiture period[20]).

The dispute and the case stated

28. A dispute arose between the appellant and the respondents in relation to the interpretation of the CDA and its operation in connection with the electronic forms of gambling operated by the Casino.

29. In particular, they disagreed as to whether the value of electronic gaming credits (Converted Credits) which had been converted from Points and then wagered by a customer were to be reckoned as constituting "gross gambling revenue" and, consequently, "net gambling revenue" subject to duty at specified rates.

30. A case was stated on agreed facts {CAB21} and three questions were posed for the consideration of the Court of Appeal (set out at CA [4]) {CAB164-165}. The appeal concerns the issue that was the subject of the first question reserved and in respect of which there was a grant of special leave {CAB194}.

VI ARGUMENT

Overview

31. The first question reserved was as follows:

> (1) Do Converted Credits, being electronic gaming credits arising from the conversion of loyalty points (howsoever accumulated) by the Applicant's customers, when played by customers, constitute an "amount received by the Licensee during the period for or in respect of consideration for gambling in the Casino premises" within the meaning of "gross gambling revenue" within the definition in clause 1.1 of the operative terms of the Current CDA?

32. The appellant submits that having regard to the text, context and purpose of the provisions of the CDA, and giving them the meaning that a reasonable businessperson would give them, the answer is "No".

33. The context includes the natural meaning in commerce of the word "revenue" itself, which connotes an incoming of money or its equivalent to a business or undertaking

[19] Agreed Facts [30](d) {CAB26}, Terms & Conditions {CAB119} at [17] {CAB124}.

[20] Terms & Conditions {CAB119} at [34] {CAB127}.

from the conduct of the business or undertaking[21], and thus connotes the receipt of money or its equivalent from an exogenous source. That is also the natural sense of the concept of "revenue" in a context that involves a duty being imposed in respect of a species of revenue.

34. This context informs the meaning of the CDA even though the word "revenue" is not reproduced in the text of paragraph (a) within the definitional provision. Properly analysed, that definitional provision does not purport exhaustively and exclusively to provide the meaning of the expression "gross gambling revenue". Rather, the provision in question identifies that the relevant revenue "in respect of a period" that is to form an integer in "net gambling revenue" is the amount (of revenue) received during that period, and it identifies the requisite connection between that revenue and the "consideration for gambling", making clear, as well, that the gambling must be "in the Casino premises". Additionally, the clause requires the inclusion of a bad debt recovered by the Licensee during that period (irrespective of when the debt was incurred or first treated as 'bad').

35. Such an understanding of "gross gambling revenue" is supported by an analysis of the text of the definitional provision which: (1) speaks of an "amount" (but assumes rather than purports to identify the subject matter which is being quantified); (2) requires that the amount be "received by the Licensee" (language that is consistent with a focus on economic benefits being derived from an exogenous source); and (3) contemplates an inquiry not just into the "consideration" for gambling but rather whether there was an amount received "for or in respect of" that consideration.

36. That language may be seen as reflecting an understanding between the (sophisticated) parties to the CDA that at the point of wagering in a casino, what is staked is not usually currency but a physical token (chip) or electronic symbol (credit). There might be nice questions about the value of a chip or a credit. In expounding the approach to be taken in reckoning the amount of "gross gambling revenue", the CDA therefore directs

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[21] The Macquarie Dictionary includes within the meanings of revenue: "the collective items or amounts of income of a person, a state, etc.; the return or yield from any kind of property; income; an amount of money regularly coming in". In *London, Midland & Scottish Railway Co v Anglo-Scottish Railways Assessment Authority* (1933) 150 LT 361, Lord Tomlin said (at 367) that whilst "revenue" was a word of somewhat indefinite import, in its ordinary sense in relation to a business undertaking it connoted "those incomings of the undertaking which are the products of or are incidental to the normal working of the undertaking". In *Chemeq Ltd v Shepherd Investments International Ltd* (2007) 62 ACSR 359; [2007] WASC 117 at [152], McLure JA (Wheeler and Pullin JJA agreeing) observed that the natural and ordinary meaning of revenue in the context of the agreements being considered corresponded with the description of revenue in AASB 118, namely "income that arises in the course of ordinary activities of an entity including sales, fees, interest, dividends and royalties".

attention to whether there is an amount (in the appellant's submission, meaning an amount of money or its equivalent (and thus revenue) or an amount of revenue) *received* by the appellant *for or in respect of* the consideration deployed in gambling. Thus, if the Casino simply allowed a customer to play at roulette by placing a chip on the colour requested by the customer (but without receiving any money or its equivalent from the customer), there would be no "gross gambling revenue". Similarly, in the appellant's submission, wagering using Converted Credits involves the appellant permitting customers to wager *without it receiving*, from any exogenous source, any increase in or increment to its economic resources (CA [34]).

10 37. The appellant's construction is consistent with the purpose (or commercial object) of the CDA which is to impose a duty on the appellant in recognition of the monopoly rights conferred by the licence and the economic value of those rights, and the need to protect the State's interest in the taxation of "gambling revenue" (s 2A(d)). Whilst undoubtedly the broader regulation of the appellant's activities is undertaken with a view to harm minimisation, it is wrong to construe "gambling revenue" widely on the footing that, in some way, that would be more consonant with harm minimisation (presumably by indirectly discouraging gaming) when the Casino Act itself authorises the conduct of gaming on the Casino's premises.

38. The Court of Appeal rejected the appellant's contentions. Finding that there was a
20 critical distinction between Points and Converted Credits (CA [41]), and treating the Converted Credits as a *chose in action*[22] having value *to the customers*, it answered the question "Yes" (CA [61]).

39. In respect of its textual and contextual analysis, the Court of Appeal rejected the appellant's reliance on the word "revenue" as forming part of the context from which the meaning of "gross gambling revenue" should be drawn; the Court considered it would "risk circularity" (CA [35]) to attempt to distinguish between Converted Credits and credits for which a Member had paid money by reference to the natural meaning of "revenue".

40. It focused exclusively on the words in the definitional provision and, in particular, upon
30 the words "amount received" and "consideration for gambling" (see, eg, CA [47]-[49]).

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[22] The characterisation of Converted Credits as a *chose in action* was not an agreed fact. It was raised by way of submission in the Court of Appeal and would ultimately entail a detailed consideration of the terms and conditions of the Rewards Program that was not undertaken by the Court of Appeal. The appellant submitted (and submits) that even if it they can be so characterised, that is not determinative.

It considered that all that was required was the receipt of something that had monetary value by way of the consideration for gambling (CA [38], [45]), and since a gaming credit could, whatever its origin, be used to play at an EGM or ATM (or could alternatively be returned to a Member's card and later 'cashed out'), the giving up of a Converted Credit amounted to "gross gambling revenue".

41. In respect of the purpose of the provision, the Court rejected any contention that the purpose was to charge the appellant an amount by way of duty that was related to the revenue sourced externally from customers for gambling (cf. CA [55]). Instead, it emphasised that the objects of the Casino Act and the Approved Licensing Agreement extended to "harm minimisation" and "revenue protection" (CA [57] and see also [87]), effectively concluding that the duty was a tax on wagering, not a tax on the transfer of economic resources attributable to wagering. It also rejected as "superficial at best" (CA [56]) the appellant's characterisation that a construction which resulted in the appellant paying duty in respect of the extent of the 'free' gambling permitted by it was uncommercial.

Definitional provisions and 'context'

42. The CDA was entered into in a statutory context[23], but is nevertheless a commercial contract[24]. As such, its meaning is to be determined objectively[25] and by a process that entails consideration of what a reasonable businessperson would understand its terms to mean, preferring a commercial construction where two constructions are open[26].

43. The guiding interpretive principle is well established. It requires consideration of the language used, the circumstances addressed by the contract and the commercial purpose

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23 The making of an agreement with respect to casino duty was anticipated by s 17 of the Casino Act, and the duty once fixed by the agreement is required to be paid by the licensee under s 51(1), and in the absence of an agreement, the obligation is to pay casino duty on a basis fixed under the regulations: s 51(2). The duty received is to be paid by the Treasurer into the Consolidated Account: s 51(3). Casino duty may be recovered as a debt due to the State: s 51(4). The Casino Act confers investigatory powers relating to casino duty (s 52AA), and imposes penalties for evasion of payment of casino duty and the making of knowingly false or misleading statements relevant to the amount of duty payable (s 52).

24 The CDA is deemed to operate as a deed despite the absence of formalities of execution and delivery, but does not attract stamp duty: s 17(3) and s 17(4).

25 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350-351, *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 (***Electricity Generation Corporation***) at [35] (French CJ, Hayne, Crennan and Kiefel JJ).

26 *Australian Broadcasting Commission v Australian Performing Rights Association Ltd* (1973) 129 CLR 99 (***ABC v APRA***) at 109.

or objects to be secured[27]. Identifying the commercial purpose or objects of the contract may be facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating[28].

44. A definitional provision is to be construed in accordance with the guiding principle like any other provision. In the appellant's submission, there is and can be no absolute rule to the effect that the ordinary or natural meaning of a word, term or phrase which is further explicated by a definitional provision cannot colour or otherwise affect the meaning to be given to the word as defined or explicated by the definitional provision.

45. Accepting that there are recognised[29] parallels between the processes of contractual construction and statutory interpretation[30], it is submitted that even in the context of statutory interpretation, and notwithstanding that a true definition may be described as "the most basic building block of a statutory structure"[31], care is required in the application of what was recently described as the "orthodox view" (associated with *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc*[32]) that one should not attempt to construe the words of a definition by reference to the term defined[33].

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46. It is respectfully submitted, first, that the relevance of the principle associated with *Shin Kobe Maru* will require a consideration of the nature of the definitional provision and that, secondly, even when applicable, it is not an inflexible principle that in all cases denies the contextual relevance of the natural meaning of the term defined; rather it is

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27 *Electricity Generation Corporation* at [35] (French CJ, Hayne, Crennan and Kiefel JJ), *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 (***Mount Bruce***) at [47] (French CJ, Nettle and Gordon JJ), [109] (Kiefel and Keane JJ).

28 *Mount Bruce* at [49] (French CJ, Nettle and Gordon JJ), [108] (Kiefel and Keane JJ).

29 See, eg, *Byrnes v Kendle* (2011) 243 CLR 253 at [98] (Heydon and Crennan JJ),

30 In both exercises, text, context and purpose provide the basis for attributing meaning to language, and the search for intent (whether the 'objective' intent of the parties to the contract or the 'legislative intent' in the case of an enactment) involves a metaphor rather than a quest for any actual collective mental state: eg, *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) and *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, referring, *inter alia* to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) at [78] (McHugh, Gummow, Kirby and Hayne JJ).

31 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 (***Cunneen***) at [77] (Gageler J).

32 *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 (***Shin Kobe Maru***) at 419 ("The use of the word 'proprietary' in the term to be defined does not colour the meaning to be given to the definition which follows it. It would be quite circular to construe the words of a definition by reference to the term defined".)

33 *Australian Securities and Investments Commission v King* (2020) 270 CLR 1 at [18] (Kiefel CJ, Gageler and Keane JJ). See also *Cunneen* at [33] (French CJ, Hayne, Kiefel and Nettle JJ), *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [48] (French CJ, Kiefel, Bell and Keane JJ).

an interpretive principle which, like others, may yield in appropriate cases to other considerations.

47. Language is a complex means of conveying meaning. Expression may be by a single word but is more usually by a phrase or sentence or an entire document or speech. It is difficult to divorce the meaning of a critical word or phrase or sentence from the context in which it appears. As Edelman J has observed, the intended meaning of words can never be acontextual[34]. Context means not only the immediate verbal context but also the wider context which explains the occasion for the use of the critical word or words. Intuitively, context and purpose are brought to bear in attributing meaning to language
10 as a method of communication.

48. Consistently with these propositions, in attributing legal meaning to words, just as a statute should be read as a whole[35], so too should a contract be construed as a whole[36]. The entire text of a legal instrument comprises the "local" or "documentary context" that must be considered in its construction[37]. "Words, like people, may be judged according to the company they keep"[38].

49. Because a word in a statute (or contract) which is the subject of a definitional provision forms part of the context available to inform the meaning of the relevant statutory concept[39], it is difficult to see that there could be a strict rule of preclusion forbidding resort to the natural meaning of the word or term defined, particularly if there is
20 ambiguity in the meaning of the definition[40]. Some intermediate appellate authorities have treated the observations in *Shin Kobe Maru* as precluding resort to the ordinary or

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34 *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [83] (Edelman J), *R v A2* (2019) 269 CLR 507 at [163] (Edelman J).

35 *Project Blue Sky* at [69] (McHugh, Gummow, Kirby and Hayne JJ), *Ross v The Queen* (1979) 141 CLR 432 at 440 (Gibbs J; Barwick CJ, Stephen, Mason and Aickin JJ agreeing).

36 *ABC v APRA* at 109, *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411.

37 See Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at [22.20], referring, *inter alia*, to Carter, *The Construction of Commercial Contracts* (2013) (at [4-19], [6-04]-[6-07]); also see [22.30].

38 The Hon A M Gleeson AC, "Statutory Interpretation" – Justice Hill Memorial Lecture, Taxation Institute of Australia, 24th National Convention – Sydney, delivered 11 March 2009, at p 19.

39 *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* (2019) 272 FCR 170 (***ASIC v Westpac***) at [22] (Allsop CJ).

40 *Esso Australia Resources v Federal Commissioner of Taxation* (2011) 199 FCR 226 (***Esso***) at [101] (Keane CJ, Edmonds and Perram JJ). See also the analysis at Thawley J (McKerracher and Davies JJ agreeing) in *Commissioner v Auctus Resources Pty Ltd* (2021) 284 FCR 294 at [59] ff.

natural meaning of the defined term (or a component of it), as a matter of authority[41]. A10/2024
Other decisions appear to have adopted a more permissive approach, without expressly confronting *Shin Kobe Maru*[42].

50. The authors of one Australian text have contended that the principle associated with *Shin Kobe Maru* is wrong[43], and the English courts have more readily embraced permitting a statutorily defined term to inform the construction of the associated definition where the terms of the definition are ambiguous[44], in effect recognising what Lord Scott of Foscote, adopting the terminology of *Bennion on Statutory Interpretation*[45], described as "the potency of the term defined"[46]. A recent and careful consideration of the issue
10 and the authorities may be found in the decision of Leeming JA in *Singh v Lynch*[47], who observed that since statutes are multifarious, there are different forms of statutory definitions, and because language is very complicated, there is "much to be said against a one-size-fits-all rule"[48].

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41 See, eg, *Esso* at [103]-[104], [107] (Keane CJ, Edmonds and Perram JJ), *ASIC v Westpac* at [22] (Allsop CJ) and *BWP Management Ltd v Ipswich City Council* (2020) 4 QR 353 at [51] (McMurdo JA, Morrison JA and Boddice J agreeing), *Programmed Industrial Maintenance Pty Ltd v Construction Industry Long Service Leave Payments Board* [2021] WASCA 208 at [153]-[156] (Kenneth Martin J).

42 See, eg, *Minister for Immigration and Multicultural Affairs v Hu* (1997) 79 FCR 309 at 324 (von Doussa, Moore and Sackville JJ), *Manly Council v Malouf* (2004) 61 NSWLR 394 at [8] (Handley JA, Mason P agreeing), *Streller v Albury City Council* [2013] NSWCA 348 at [43] (Meagher JA, Ward JA agreeing) (and the authorities cited by him), *Beqiri v R* (2013) 37 VR 219 at [29] (Priest JA, Warren CJ and Vickery AJA agreeing), *Heffernan v Comcare* (2014) 218 FCR 1 at [46] (Allsop CJ, Jacobson and Katzmann JJ agreeing), *Greater Shepparton City Council v Clarke* (2017) 56 VR 229 at [74] (Santamaria, Beach and Kaye JJA).

43 Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at [3.50] ("As a matter of principle, the view in *The Shin Kobe Maru* is incorrect. The term chosen as the defined term is usually chosen as a meaningful label, because ordinary meaning approximates the idea to be conveyed by the definition".) In Pearce (ed), *Statutory Interpretation in Australia* (2023, 10th ed) it is said (at [6.8]) that while the dictionary meaning of a defined term is notionally displaced by the act of defining the term, it is likely to have "some impact on a court's view of the meaning of the term", although the tension with *Shin Kobe Maru* is noted.

44 See, in particular, *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd* [2005] 4 All ER 107; [2005] UKHL 47 at [18] (Lord Hoffmann). See also *British Amusement Catering Trades Association v Westminster City Council* [1989] 1 AC 147 at 157 (Lord Griffiths), *Delaney v Staples* [1992] 1 AC 687 at 692 (Lord Browne-Wilkinson), *Birmingham City Council v Walker* [2007] 2 AC 262 at [11] (Lord Hoffmann), *Her Majesty's Revenue and Customs v Stringer* [2009] 4 All ER 1205; [2009] UKHL 31 at [24] (Lord Rodger of Earlsferry) and *Phillips v News Group Newspapers Ltd* [2013] 1 AC 1 at [18]-[19] (Lord Walker, with whom Lords Hope, Kerr, Clarke and Dyson agreed).

45 In the passage from *Bennion on Statutory Interpretation* (2002, 4th ed) endorsed by Lord Scott of Foscote the author observed that "[i]t is impossible to cancel the ingrained emotion of a word merely by announcement" citing R G F Robinson, *Definition* (1950) at p 77.

46 *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 at [82]-[83] (Lord Scott of Foscote).

47 *Singh v Lynch* (2020) 103 NSWLR 568 (***Singh v Lynch***) at [97]-[131] (Leeming JA). See also Wray-Jones, "Defined Terms in Legislation: Mere Placeholders or Meaningful Labels? Revisiting the Principle from Shin Kobe Maru" (2023) 97 *Australian Law Journal* 196.

48 *Singh v Lynch* at [130] (Leeming JA).

51. In the field of statutory interpretation, it is submitted that whilst there is no reason to doubt the correctness of the decision of *Shin Kobe Maru* on its facts, the approach stated in it must be understood in the context of a definition which otherwise widened the natural and ordinary meaning of the defined term, or at least that ordinary meaning having regard to existing custom or practice[49].

52. In the appellant's submission it would be a mistake to treat all definitional provisions in the same way; they may take different forms and serve different purposes.

53. In some cases, the definitional provision may not purport wholly and exhaustively to state the meaning of the term being defined. A provision which takes the form A *includes* B and C or A *excludes* B and C may not purport to inform the meaning of A in considering whether D, E or F fall within its scope[50], although the provision may in some cases have that effect[51].

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54. In other cases, the definitional provision may employ the word "means", but may nevertheless take the meaning of the term as given or assumed and may use it as the basis to create or identify a limited subset of examples within the broader denotation of that term. The example given by Prince and Herzfeld is a definition in an Act which states that "*pets* means dogs and cats"[52]. In such a case, the ordinary meaning of "pets" forms part of the context relevant to deciding whether dogs extends to wild coyotes and

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49 At issue was the definition of "proprietary maritime claim" which was stated in wide and specific terms, such that the definition could not reasonably or sensibly be read down to a particular kind of proprietary claim. The decision does not support the elevation of the critical sentence (at 419) that "It would be quite circular to construe the words of the definition by reference to the term defined" to the status of a strict and all-encompassing rule of interpretation. Authority cited for the proposition was *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503. This was undoubtedly intended to be a reference to the reasons of Gibbs J at 507 (the reference given by counsel in argument), but, as has been pointed out "[i]t is difficult to discern from *Wacal* a *ratio decidendi* that requires abstention from the reference to the term defined as a device for resolving ambiguity in a definition for the case did not present that issue": *Esso* at [102] (Keane CJ, Edmonds and Perram JJ).

50 In the case of "includes", see, eg, *Robinson v Local Board of Barton-Eccles* (1883) 8 App Cas 798 at 801 (Lord Selborne LC), *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 589 (Barwick CJ).

51 In the case of "includes", there may be cases in which it will be understood as being used exhaustively: see *Dilworth v Stamps Commissioner* [1899] AC 99 at 106, but cf. *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379 at [89] (Basten JA). In the case of "excludes", conceivably, applying another principle of construction (the presumption against surplusage or redundancy), it might be concluded that for the exclusion of B and C to be treated as necessary, A must be understood as otherwise having had a meaning broad enough to have embraced B and C. Alternatively, the exclusion may be treated as being for the avoidance of doubt, and the exclusion of B and C might confirm a narrower general conception of A.

52 Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at [3.50].

cats extends to untamed tigers. In other cases, the defined term may re-appear, in whole or in part, in the definition[53].

55. In yet other cases, the definitional provision may appear to be designed to state exhaustively the content of the word, term or expression being defined, but that statement may nevertheless be ambiguous or open to a constructional choice, in which case, potentially, the natural meaning of the word, term or expression being defined may provide a legitimate contextual indicator of the true meaning. It is in such cases that the issue of 'circularity' may arise for consideration.

56. Even in that context, it is submitted that Leeming JA was right to observe that a definition in a statute is not like a definition in a subroutine or a formula in a spreadsheet, which has to be executed unintelligently by a machine (no ambiguity, no interpretive issues); the process of giving legal meaning to legislative language is "utterly different". As his Honour observed, the iterative approach to contractual construction is familiar, and the iterative approach in contract, as in statutory interpretation, has been seen as a particular application of the concept of a hermeneutic circle[54]. That concept[55]:

> is that understanding of the parts is dependent upon understanding the larger whole, but the larger whole can only be understood on the basis of the parts, so that arriving at an understanding of any particular part involves movement to and fro between the parts and the whole.

57. Accordingly, paying regard to the ordinary or natural meaning of a defined term in construing the words of the definition will not necessarily be circular. But the broader point, which, respectfully, is well made by Leeming JA, is that the charge of circularity, even when available as a matter of strict logic, may not necessarily be cogent[56], having regard to the complexity of language and the attribution of meaning to words in context.

58. That is to recognise, as Lord Hoffmann said in the context of contractual construction in *Chartbrook Ltd v Persimmon Homes Ltd*[57], that:

> [t]he words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the

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53 See, eg, the definition of "income from personal exertion" in s 6, *Income Tax Assessment Act* 1936 (Cth).

54 *Singh v Lynch* at [128], referring, *inter alia*, to Lord Grabiner, "The iterative process of contractual interpretation" (2012) 128 *Law Quarterly Review* 41.

55 *Thomas v State of New South Wales* (2008) 74 NSWLR 34 at [22] (Campbell JA), referred to in *Nau v Kemp & Associates Pty Ltd* (2010) 77 NSWLR 687 at [31] (McColl JA) and *Singh v Lynch* at [128] (Leeming JA).

56 See also Bailey and Norbury (eds), *Bennion on Statutory Interpretation* (2020, 8th ed) at [18.5].

57 [2009] 1 AC 110 at [17].

definition. In such cases the language of the defined expression may help to elucidate ambiguities in the definition ….

59. In the present context, it is submitted that the correct approach is that signalled by Bell and Gageler JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*, where the "strictures of logic" that preclude construing a definition by reference to the defined term were described only as "presumptively applicable" in connection with a complex statutory scheme, and where it was recognised that in the field of the construction of commercial contracts, the Court's "overriding concern" is with how reasonable businesspersons would be taken to understand the term[58]. That is to say, while the "strictures of logic" may not be decisive in attributing meaning to a statute, they have a weaker claim in the construction of a commercial contract, where the parties may have chosen a label for a defined term not arbitrarily but as a meaningful label[59]. Intermediate appellate courts have denied the inflexible operation of the *Shin Kobe Maru* principle in the context of the construction of commercial contracts[60].

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60. Returning to the present case, the nature of the definitional provision should be appreciated. In terms, it is concerned with an identification of the "gross gambling revenue" *for a period*. That necessity arises due to the need for the periodic reckoning of the amount of duty payable. Next, it is to be borne in mind that the function of "gross gambling revenue" (for a period) is to supply an integer or base in the reckoning of "net gambling revenue" for a period. That the ultimate statutory concept involves an assessment of a "net" amount itself tends to support the notion that what is being measured concerns the receipt of actual value by the appellant, and that the word "revenue" is also used in "net gambling revenue" counts against a suggestion that the deployment of the word "revenue" in the contractual expressions was arbitrary or a meaningless label, having no "potency".

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61. Further, it is not apparent from the grammatical structure that paragraph (a) of the definitional provision is intended to state exhaustively the subject matter addressed by it, in that it refers to "the gross amount received" without in terms identifying the amount *of what* that must be received. On one view, it is silent, but the answer is "revenue". On

58 *Mount Bruce* at [121] (Bell and Gageler JJ).

59 See Lewison and Hughes, *The Interpretation of Contracts in Australia* (2012, 4th ed) at [15.11] ("Where construction of a defined term is at issue, the label used will itself be a highly relevant contextual factor".)

60 See, eg, *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279 at [10]-[12] (Leeming JA, Beazley P and Tobias AJA agreeing). In *Hardy Wine Co Ltd v Janevruss Pty Ltd Hardy Wine Co Ltd* [2006] VSCA 28, Callaway JA said that he did not think the proposition in *Shin Kobe Maru* was "universally true" (at footnote 4).

another view, the provision is ambiguous, and the answer is informed (if not supplied) by "revenue"[61]. In either case, the word "revenue" and its ordinary meaning in this context, which connotes an incoming or receipt of money or its equivalent from an exogenous source, has interpretive potency subject, of course, to its consistency with the text, the broader context, and the purpose or commercial objects of the CDA.

62. It may be that when context is sought to be brought to bear, the greater the work to be done (in altering or qualifying the literal effect of a provision), the greater may need to be the potency of the meaning conveyed by the label[62]. In the context of a regime for the imposition of a duty, bringing to bear the natural meaning of "revenue" in understanding the contractual expression "gross gambling revenue" does not involve any significant variance. On the contrary, to do so is consistent with the meaning of the text of paragraph (a) of the definitional provision.

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63. Respectfully, the Court of Appeal was wrong to deprecate[63] the reliance on the meaning of "revenue" as risking circularity (CA [35]).

Further considerations of text, context and purpose

64. The Court of Appeal considered that the text, and the immediate context of the phrase "amount received" (and its juxtaposition with "in respect of consideration for gambling"), spoke against the appellant's construction (CA [36]-[38]). Respectfully, however, the opposite was true.

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65. The Court of Appeal rightly considered that the parties should be taken to have understood that in the nature of cashless gaming, the consideration passing at the point of placing a stake may be represented by the giving up of a credit (CA [36]-[37]), being a gaming credit recognised by the machine's meter.

66. The Court's next step was seemingly to conclude that because "amount received" is linked with the surrender of credits (the consideration for gambling), this counted against

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[61] Interpreting "amount" as "amount of revenue" is consistent with the fact that one ordinary meaning of "amount" is not simply a quantity but an amount *of money*.

[62] Compare, by analogy, *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 276 CLR 170 (***H Lundbeck***) at [97] (Edelman J) (referring to what Dixon CJ described as the "force as to carry conviction to the mind" that may be needed before an implication can be recognised: *Butt v Long* (1953) 88 CLR 476 at 488) and also at [113].

[63] The Court did not explain what it meant by "circularity", but plainly considered the observation pejorative. In the discourse of logic, a circular argument is one which adopts a premise that explicitly or implicitly assumes the conclusion. However, as has been submitted, resort to a defined term to inform the defined meaning does not always or necessarily justify that criticism or imply illogicality.

any requirement that, for there to be "gross gambling revenue", there had to be an amount of money (or its equivalent) received by the appellant (CA [38]).

67. That, however, was to ignore that the focus of paragraph (a) of the definitional provision was not upon the "amount" of or by way of "consideration" but rather the "amount received by [the appellant] … for or in respect of consideration for gambling". In other words, the draftsperson recognised that the consideration for gambling might be (or be understood to be) a chip or a credit, the intrinsic value of which might be contestable, and instead mandated an inquiry into whether there was an amount received *for or in respect of* that consideration. In this way, the definitional provision supported, rather than spoke against, a consideration of the "origin" of Converted Credits. The Court of Appeal erred in concluding that origin was "irrelevant" (CA [47]).

68. The Court of Appeal regarded the difference between Points and credits as decisive (see, eg, CA [41], [44]). It considered that Converted Credits, unlike Points, constituted a *chose in action* against the appellant (CA [44]). Even assuming that the *chose in action* was created gratuitously, the Court of Appeal considered that it was an enforceable debt with pecuniary value, such that its surrender benefited the appellant financially (CA [52]).

69. Respectfully, it was artificial and wrong to place significant emphasis on the difference between Points and Converted Credits, so as to conclude that whilst Points may simply reflect the extent of gratuitous benefit available to a Member, once converted to gaming credits in the credit meter of an EGM or ATG (as they had to be in order to be useable), the credits constitute a *chose in action* which, when the wagering occurs, results in the receipt by the appellant of some monetary value (viz, the reduction in a liability) which satisfies the meaning of "gross gaming revenue".

70. Viewed as a matter of substance, the conversion of Points in this way, and the wagering of credits derived from those Points, involved the appellant conferring a benefit on a customer, not the receipt by the appellant of something of monetary value from the customer that answers the meaning of "gross gambling revenue".

71. When Points are converted into credits, to be useable in an EGM or ATG, this is in substance no more than the appellant permitting a customer a turn at gambling that is provided gratuitously by it. The conversion of Points to credits and their subsequent wagering does not produce any revenue in any ordinary accepted sense for the appellant. It is the equivalent of the provision of a free travel ticket or coffee voucher or rewards

scheme credit to loyal customers. The business cannot sensibly be said to receive any "amount" – any "revenue" – on redemption, even though, on redemption, the customer receives something of monetary value. The process between award and redemption of the gratuitous benefit cannot make a difference to the nature of the "receipt" by the operator when the benefit is redeemed. For example, in the case of the Casino, it might award a benefit in the form of gifted gaming chips to be played at a gambling table, without any intermediate allocation of Points. It might be said (although it may also be contentious to say) that the gifted chip embodies a "chose in action", but that is the form which the gift might have to take to be effective. That, however, would not allow the
10 source or provenance of the gifted benefit to be ignored in an assessment of "revenue".

72. The fact that the Points, once converted into gaming credits in an EGM or ATG, may then, at the conclusion of play, result in a crediting of the customer's cashless gaming account and, in turn, the withdrawal of cash, simply illustrates an additional way in which the customer may be conferred a benefit[64]. It does not alter the conclusion that if the Converted Credits are used to play a game, the appellant has not received an amount (of money or its equivalent, or revenue) for or in respect of the consideration for that gambling.

73. In rejecting the appellant's argument that it must have been intended that duty be exacted and be payable only on amounts actually received by way of revenue sourced externally
20 from customers (CA [55]), the Court also rejected as "superficial at best" a submission that the rival interpretation was uncommercial (CA [56]). The Court repeated that the conversion of Points to credits created a chose in action of value to the appellant and that the creation of Points convertible to credits, along with the "gate", was an encouragement to gambling. With respect, this part of the Court's reasoning confused the question of whether it was commercially beneficial to the appellant to provide customers with internally-generated credits with whether it was commercially sensible for the parties to have agreed to impose a *tax* calculated by reference to the nominal value of internally-generated credits which represented no actual money being received by the appellant. The Court thereby failed to address the actual contention: that the

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64 It may be accepted that, should the customer choose to return to gaming at the Casino with the cash withdrawn from their account, the nexus between the conferral of Points and the later participation in gaming would be broken. Put another way, the deploying of cash towards gaming on the later occasion would appropriately be treated as involving incoming or exogenous revenue.

parties could not have intended that the appellant be taxed by reference to its own internally-generated, and not exogenous, value creation.

74. The Court held that the CDA was entered into pursuant to the regime created by the Casino Act and the Approved Licensing Agreement, and that the object of those regimes was not purely commercial, but extended to harm minimisation and revenue protection: CA [57]. With respect, the concept of the levying of a tax based on a notion of "revenue" that included internally-generated credits is not self-evidently likely to result in harm minimisation. Insofar as a purpose of "revenue protection" is concerned, if that simply meant maximisation of the amount of tax to be collected, it was both wrong in principle[65]
10 and question-begging to rely on it.

75. Consistent with the statutory recognition of the State's interest in the taxation of gambling revenue arising from the operation of the Adelaide Casino (s 2A), the evident purpose of the CDA was, relevantly, to impose a duty upon the appellant, calculated as a proportion of the net revenue derived by the appellant from gambling. Fundamentally, the CDA imposes (and casino duty is) a tax based on "revenue", in its ordinary conception.

VII ORDERS SOUGHT

76. That the appeal be allowed with costs.

77. That the orders of the Court of Appeal made on 22 February 2024 be set aside and that
20 in lieu thereof it be ordered that:

(1) The answers to the questions of law reserved are:

Question 1 – No

Question 2 – No

Question 3 – Yes

(2) The respondents are to pay 75% of the appellant's costs of the case stated.

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65 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [6] (Gleeson CJ).

VIII ESTIMATE OF ORAL ARGUMENT

78. The appellant will require approximately 1.5 hours to present its oral argument.

Date: 18 July 2024

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10 Counsel for the appellant

IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **No. A10 of 2024**

BETWEEN: **SKYCITY ADELAIDE PTY LTD**

Appellant

and

10 **TREASURER OF SOUTH AUSTRALIA**

First Respondent

STATE OF SOUTH AUSTRALIA

Second Respondent

ANNEXURE

LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANT'S SUBMISSIONS

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1. *Casino Act 1997* (SA)