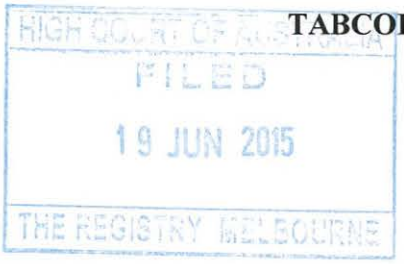
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M81 of 2015

BETWEEN:



TABCORP HOLDINGS LIMITED (ACN 063 780 709)
Appellant

and

STATE OF VICTORIA
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The Court of Appeal in *Tabcorp Holdings Limited v The State of Victoria* [2014] VSCA 312 (**AJ**) construed the undefined expression "new licences" in s 4.3.12(1) of the *Gambling Regulation Act 2003* (Vic) (**Act**) as if followed by the confining words "under this Part". The effect was to deprive the section of any operation, because under the Act no further licences under the Part could be granted. The primary issue in this appeal is whether the words "new licences" in s 4.3.12 referred only to licences granted under Part 3 of Chapter 4 or whether the words also encompassed licences substantially similar to those granted under that Part.

Part III: Section 78B notices

3. The Appellant does not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of reasons for judgment

4. The reasons for judgment of the primary judge Justice Hargrave are not reported. The medium neutral citation is *Tabcorp Holdings Limited v The State of Victoria* [2014] VSC 301 (**J**). The reasons of the Court of Appeal of the Supreme Court of Victoria are not reported. The medium neutral citation is *Tabcorp Holdings Limited v The State of Victoria* [2014] VSCA 312.

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Part V: Material facts

5. In 1994, the Totalizator Agency Board of Victoria was privatised by the transfer of its business and assets to Tabcorp Holdings Limited (**Tabcorp**), and by the offer of shares in Tabcorp to the public via a prospectus.[1] The prospectus identified the State as the promoter of the issue of the shares that was the subject of the prospectus. To provide a regulatory framework for the privatisation and to facilitate the float, the Government enacted the *Gaming and Betting Act 1994* (Vic) (**1994 Act**).[2] As provided for in the 1994 Act, Tabcorp was granted a wagering licence and a gaming licence.[3] They were its major assets. Each licence had an 18-year term, expiring on 15 August 2012.[4] On the grant of these licences, Tabcorp paid to the State the licence fee required by the 1994 Act. The amount of the fee was determined by the proceeds of the float.[5]

6. The State had sought to maximise the amount raised by the float. It had been advised that the amount raised would be substantially reduced if the profit forecasts in the prospectus had to include amortisation of the licences over their 18-year terms.[6] The Treasurer was advised that amortisation could be avoided if Tabcorp was entitled to repayment of the licence consideration at the end of the licences.[7] This was the genesis of s 21(1) of the 1994 Act (the **terminal payment provision**)[8] which provided:

> On the grant of new licences (other than the initial licences), the person who was the holder of the licences last in force (in this section called the "former licences") is entitled to be paid an amount equal to the licence value of the former licences or the premium payment paid by the new licensee, whichever is the lesser.

7. Pursuant to s 7 of the 1994 Act, the gaming licence authorised the conduct of gaming operations and the conduct and promotion of club keno games in accordance with the *Club Keno Act 1993* (Vic).[9] Pursuant to s 6, the wagering licence authorised the conduct of wagering and approved betting competitions.[10] Section 3 defined the term "licence" to mean the wagering licence or the gaming licence granted under Part 2 of the Act.[11] The expression "new licences" was not defined.

8. The float proceeds paid to the State (being, after certain deductions, $597.2 million), were increased by hundreds of millions of dollars by the terminal payment provision.[12]

9. In 2003 the provisions of the 1994 Act were repealed and re-enacted in the Act.[13] Sections 4.3.1 and 4.3.2, which dealt respectively with the rights conferred by the wagering licence and the gaming licence were included in Part 3 of Chapter 4, and were in substantially

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[1] AJ[2]; *State of Victoria v Tatts Group Limited* [2014] VSCA 311 (**Tatts Reasons**) at [1]. The factual background is set out in more detail in the Tatts Reasons.
[2] J[25]; Tatts Reasons at [14].
[3] AJ[2]; 1994 Act, s 12.
[4] 1994 Act, s 12(2); J[28].
[5] AJ[5]; J[28]; Tatts Reasons at [15], [18].
[6] J[4]; AJ[48].
[7] J[5].
[8] J[5]; AJ[48].
[9] Tatts Reasons at [16].
[10] AJ[4]; J[136]; 1994 Act, s 6.
[11] AJ[3]. "Gaming licence" was defined to mean "the gaming licence granted under Part 2", and "wagering licence" was defined to mean "the wagering licence granted under Part 2" (1994 Act, s 3).
[12] J[5(3)], [67]; AJ[53]; Tatts Reasons at [2].
[13] AJ[8].

identical terms to ss 6 and 7 of the 1994 Act.[14] Section 4.3.12(1) of the Act was also in Part 3 of Chapter 4. It re-enacted the terminal payment provision in the following terms:[15]

> On the grant of new licences, the person who was the holder of the licences last in force (the "former licences") is entitled to be paid an amount equal to the licence value of the former licences or the premium payment paid by the new licensee, whichever is the lesser.

The definition of "licence" that had been provided by s 3 of the 1994 Act was omitted.[16]

10. On 10 April 2008, the then Premier announced that the Government had decided to move to a new structure for the gambling industry upon expiry of the gaming licence and the wagering licence in 2012. The new structure was to involve: venues owning, operating and maintaining gaming machines pursuant to gaming machine entitlements (**GMEs**); keno operations being the subject of a single, specific licence; and a single licence for wagering.[17]

11. The new structure was introduced through amendments to the Act passed in 2008 in respect of wagering (**2008 Amendments**)[18] and 2009 in respect of gaming (**2009 Amendments**).[19] The text of s 4.3.12 was not altered by the 2008 Amendments or the 2009 Amendments. Importantly, s 4.3.4A(1) was inserted into Part 3 of Chapter 4 of the Act by the 2008 Amendments. It provided:

> This Part applies only with respect to the wagering licence and gaming licence that were issued on 15 August 1994 and does not authorise the grant of any further wagering licence or gaming licence.

12. The 2008 Amendments created a new "wagering and betting licence" under new Part 3A of Chapter 4 of the Act which authorised the holder to conduct wagering and approved betting competitions.[20] The 2008 Amendments also inserted a new Chapter 6 into the Act. This provided for the grant of a 10-year licence that permitted its holder to conduct keno games.[21]

13. The 2009 Amendments provided for GMEs to be issued to venue operators, which permitted the holder to conduct gaming on an approved gaming machine.[22]

14. Following the 2008 and 2009 Amendments, the new wagering and betting licence was issued and GMEs were allocated to approved venue operators. The licence and GMEs took effect on 16 August 2012. The new keno licence was also issued.[23] The State received total payments of approximately $1.45 billion for these new licences.

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[14] AJ[9].
[15] AJ[10].
[16] AJ[22(1)]; Tatts Reasons at [34(1)].
[17] Tatts Reasons at [35]; AJ[58].
[18] Tatts Reasons at [36]-[37]; J[36]-[40]; *Gambling Regulation Amendment (Licensing) Act 2008* (Vic).
[19] Tatts Reasons at [38]; J[41]-[42]; *Gambling Regulation Amendment (Licensing) Act 2009* (Vic).
[20] AJ[12]; J[37].
[21] J[40].
[22] AJ[13]; Tatts Reasons at [38]; J[42].
[23] J[43]-[46].

15. The State made no terminal payment to Tabcorp. On 24 August 2012, Tabcorp issued proceedings in the Supreme Court of Victoria seeking payment of approximately $686.8 million, plus interest, pursuant to the terminal payment provision.[24]

16. The trial judge found that the statutory authorities granted under the new regime (the wagering and betting licence, the keno licence, and the GMEs) substantially replicated the authorities granted under the earlier regime.[25] Notwithstanding this, the trial judge dismissed Tabcorp's statutory claim on the basis that "new licences" in s 4.3.12 was confined to new licences issued under Part 3 of Chapter 4 of the Act. The Court of Appeal (Nettle, Osborn and Whelan JJA) dismissed Tabcorp's appeal from that decision.

Part VI: Argument

17. The construction question at trial and on appeal was whether the undefined expression "new licences" in s 4.3.12 was to be construed as "new licences under this Part", or rather was to be accorded a less specific (or, as it was described, "generic") meaning, so that it would encompass a statutory authority to engage in substantially similar gaming and wagering activities. If the former, then s 4.3.12 had no operation at all, and Tabcorp was denied recovery of the licence fee amount, despite the basis on which the float had proceeded. Both the trial judge and the Court of Appeal adopted the former (confined) construction.

18. The Court of Appeal accepted that its construction of ss 4.3.4A and 4.3.12 "emasculat[ed]"[26] the right in s 4.3.12 and deprived it of "operative effect", "practical utility"[27] and "any practical content."[28] This construction therefore raised starkly the principles against legislative redundancy,[29] the destruction of – or interference with – valuable rights (being part of the principle of legality),[30] and avoiding results that are manifestly unfair or unreasonable.[31] It also engaged the principles that an Act is to be construed on the basis that its provisions are intended to give effect to harmonious goals, and that any conflict between provisions should be alleviated by adjusting the meaning of the provisions so as best to give effect to the purpose and language of those provisions.[32]

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[24] Tabcorp had two alternative claims to its statutory claim: (1) that Tabcorp was entitled to the payment pursuant to an indemnity given by the State in favour of Tabcorp in 1994 in respect of any loss suffered by Tabcorp arising from changes to relevant legislation; and (2) that a letter dated 29 June 1994 from the then Treasurer of Victoria to the Chairman of Tabcorp (**Treasurer's Letter**) gave rise to a binding commitment on the part of the State to deal with Tabcorp reasonably and in good faith, which the State breached, resulting in damages payable to Tabcorp in an amount equivalent to the payment entitlement under the terminal payment provision. The trial judge dismissed each of the alternative claims, and the Court of Appeal dismissed Tabcorp's appeal in relation to the Treasurer's Letter claim (Tabcorp did not appeal the dismissal of the indemnity claim).

[25] J[133], [138]-[159].

[26] AJ[35].

[27] AJ[24].

[28] AJ[30].

[29] *The Commonwealth v Baume* (1905) 2 CLR 405, 414; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71]; *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 37-8 [41], 76-7 [172], 168 [450].

[30] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 307-12 [307]-[315]; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30, 49 [43]; *Springhall v Kirner* [1988] VR 159, 165-6.

[31] *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, 397.

[32] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [70].

(i) The principle against redundancy, and the availability of a construction that would avoid redundancy

19. This Court has emphasised that courts should strive to avoid a construction of an Act that results in words or sentences being rendered redundant. This must apply, *a fortiori*, when a whole Division of an Act is rendered redundant by a particular construction of the Act.

20. Sir Owen Dixon said that "*when two apparently inconsistent provisions occur in one Act of Parliament, to reconcile them by interpretation is the only course open*".[33]

21. In *Commonwealth v Baume* (1905) 2 CLR 405 at 414, Griffith CJ referred to the settled canon of construction against "surplusage"[34] as being that:

> [S]uch a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.

22. This passage has been referred to in numerous subsequent decisions of this Court.[35] It was quoted with approval by the plurality in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71], where their Honours said that this principle required that "*a court construing a statutory provision must strive to give meaning to every word of the provision*".

23. In *Plaintiff M47/2012* (2012) 251 CLR 1, 76 [172], Hayne J cited the same passage, emphasising the word "any" in the phrase "*if by <u>any</u> other construction*".

24. In a similar vein, it has been observed that the principle against redundancy "demands that" where one interpretation would render a section ineffectual, while another would offer it a sphere of operation, the latter is to be preferred.[36] And, as Gummow J said in *Minister for Resources v Dover Fishers Pty Ltd* (1993) 43 FCR 565, 574, "*it being improbable that the framers of legislation could have intended to insert*[37] *a provision which has virtually no practical effect, one should look to see whether any other meaning produces a more reasonable result*".[38]

25. This principle must be applied to the legislation in the form it took in 2012 – after the 2008 and 2009 amendments had taken effect. This follows from the rule that an Act that is amended and the amending Act are to be read together as a combined statement of the

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[33] *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603, 626

[34] Referring to *The King v Berchet* (1688) 1 Show KB 106; 89 ER 480.

[35] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12-13 (Mason CJ); *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140, 190 (Kirby J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71]; *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, 665-6 [121] (Kirby J); *Saeed v Minister for Immigration and Citizenship* (2010 241 CLR 252, 266 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 192 [97] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic v R* (2011) 245 CLR 1, 168 [423] (Heydon J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 37-8 [41] (French CJ), 76-7 [172] (Hayne J), 168 [450] (Kiefel J).

[36] *Telstra Corporation Ltd v Australasian Performing Rights Association* (1997) 191 CLR 140, 190 (Kirby J).

[37] And, Tabcorp submits, retain as well.

[38] This passage was cited with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [70].

will of the legislature.[39] Accordingly, one must start with the text of the Act as it stood in 2012 and construe that text, as a single text, without assuming that unamended parts of the text had the same meaning as they had before.[40]

26. The Court of Appeal – in holding that the words "under this Part" are necessarily implicit in s 4.3.12[41] – did not treat the standard of "necessary implication" as requiring it to strive for any available interpretation that would avoid redundancy. Despite AJ[23], nothing in the reasons supports a conclusion that the only available interpretation of "new licences" was the restricted meaning, and that this was the only way of reconciling ss 4.3.4A and 4.3.12.

27. The Court of Appeal's reason for concluding that the text of the Act drove it "*to the conclusion that 'new licences' in s 4.3.12 must mean a new wagering licence and a new gaming licence granted under s 4.3.8*" is set out at AJ[23]-[24]. Critically, the Court concluded:[42]

> Read in conjunction with s 4.3.4A, the only way of reconciling s 4.3.4A and s 4.3.12 is to read s 4.3.12 as providing in effect that, if new licences could still be and were granted under s 4.3.8, the person holding the former licences would be entitled to [the terminal payment].

28. However, nothing in AJ[23] explains why the text of the Act led to that conclusion, which was dependent on the anterior finding that new licences were confined to licences issued under s 4.3.8 (that is under Part 3 of Chapter 4). The Court of Appeal, at AJ[25][43], states that "*the words 'under this Part' are necessarily implicit in s 4.3.12 for the reasons already stated*". In the reasons already stated, the sole justification advanced by the Court of Appeal for reaching the conclusion that such words were "necessarily implicit" was set out at AJ[24] as follows:

> [W]e agree with the [trial] judge that the precise definition of 'gaming licence' in s 1.3 when read in the context of the clear terms of the other sections to which we have referred leaves no room for an alternative broader interpretation of 'new licences' in that context.

29. That proposition was misconceived. The trial judge did not say this in relation to Tabcorp's claim. Rather, the Court of Appeal at AJ[24] appears to have transposed its reasoning in relation to the different phraseology of the section concerning Tatts' statutory claim (s 3.4.33), to Tabcorp's claim under s 4.3.12. The provenance of the quoted passage in AJ[24] is the Tatts Reasons at [53]: "*Like the judge, however, it appears to us that the precise definition of 'gaming operator's licence' in s 1.3 when read in the context of the clear terms of the other sections to which we have referred leaves no room for an alternative broader interpretation of 'gaming operator's licence' in that context.*" The trial judge's conclusion on this point in the Tatts proceeding was at *Tatts*

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[39] *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453, 463; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209, 214 [25] (Crennan, Bell, Gageler and Keane JJ); *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 735 (Isaacs J); *R v Seller* (2013) 273 FLR 155, 183 [100] (Bathurst CJ).

[40] *Commissioner of Stamps v Telegraph Investment Company Pty Ltd* (1995) 184 CLR 453, 463.

[41] AJ[25].

[42] AJ[23(8)].

[43] Emphasis added.

Group Limited v The State of Victoria [2014] VSC 302, [204]: "*The definition of 'gaming operator's licence' in s 1.3 set out above is simply too strict to allow the Court to ignore the text of the Act and conclude that the identical defined phrase had different meanings within s 3.4.33.*"

30. Even if this reasoning was appropriate to Tatts' statutory claim, it depended upon the existence of the defined expression "gaming operator's licence". This reasoning had no application to s 4.3.12 or to Tabcorp's licences, as there was no equivalent defined expression: neither the phrase "gaming licence" nor the phrase "gaming operator's licence" appeared in s 4.3.12 and neither "licences" nor the composite expression "new licences" was defined. The fact that the phrase "gaming licence" was defined in s 1.3 could not render the phrase "new licences" in s 4.3.12 incapable of bearing any construction other than new licences under Part 3 of Chapter 4.

31. Contrary to the Court of Appeal's conclusion, an alternative construction of "new licences" was available, namely the less specific meaning which included licences substantially similar to Part 3 licences. The ascription to "new licences" of that meaning did allow s 4.3.4A to be reconciled with s 4.3.12, did allow both provisions to operate in accordance with their terms, and left the Act with a sensible and coherent operation, thereby producing "a more reasonable result".

32. The Court of Appeal failed to have regard to the following matters of text, context and purpose that supported – or made sufficiently available – that alternative, useful and pertinent construction of s 4.3.12.

33. *First*, the expression "new licences" is not defined. The natural meaning of the phrase is not confined to a specific form of licence.[44] In its plain meaning, a "licence" is a permit to do something that would otherwise be unlawful.[45] The legislation did not require any narrower answer to the question, "New licences to do what?", than "New licences to do substantially what was authorised by the gaming licence and the wagering licence".

34. In addition, the word "licence" itself was not defined. It had been defined in the 1994 Act as meaning "*the wagering licence or the gaming licence granted under Part 2*". That definition was not applicable to the construction of the composite expression "new licences" in s 21 of the 1994 Act (the predecessor to s 4.3.12 of the Act). But in any event the re-enactment and consolidation in 2003 in the Act removed the definition of "licence", with the result that its meaning in that Act was unaffected by a definition.

35. Further, if it matters, the omission of the defined term "licence" in the Act cannot be explained away by the analysis of the trial judge at J[63(1)]. It is true that the Act refers to 12 forms of licences in addition to the wagering licence and the gaming licence.[46] But each of these licences is expressly defined in s 1.3. Had the definition of "licence" for the

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[44] As recognised by the Court of Appeal's discussion in the Tatts Reasons at [148] in relation to the natural meaning of the words "a new gaming operator's licence".

[45] *Federal Commissioner of Taxation v United Aircraft Corp* (1943) 68 CLR 525, 533 (Latham CJ); *Sinclair v Judge* [1930] Qd R 220.

[46] The other categories of licence are as follows: bingo centre employee's licence, bingo centre operator's licence, casino licence, club licence, interactive gaming licence, gaming operator's licence, pub licence, public lottery licence, racing club licence, technician's licence, special employee's licence and venue operator's licence.

purposes of Chapter 4 been retained, no confusion would have attended the meaning of these other licences.

36. Further still, not only was the definition of licence removed from the Act in 2003, but at the same time the Act introduced a definition of "gaming operator's licence" (which phrase was not defined in the *Gaming Machine Control Act 1991*, as in force prior to the 2003 re-enactment and consolidation). Hence, for the purposes of s 3.4.33 of the Act, a specific definition of the type of licence that would trigger the repayment right was inserted into Act, at the same time as the definition in relation to the analogous Tabcorp provision was removed. On the Court of Appeal's reasoning in the Tatts' case, the introduction of that definition was critical. Yet, at the same time, the Court of Appeal ignored the removal of the definition of "licence" insofar as it concerned Tabcorp's right.

37. *Secondly*, not only was s 4.3.12 retained in the Act, but s 4.3.4A(1) expressly preserved the operation of Part 3 of Chapter 4 as regards Tabcorp's licences, while removing the authority to grant further licences under Part 3. Section 4.3.12 could be reconciled with s 4.3.4A(1) by according to it a continuing operation confined to a single iteration in respect of Tabcorp's initial licences, conformably with the fundamental purpose of the section.

38. The operation of s 4.3.4A was not adequately addressed by either the Court of Appeal or the trial judge. Section 4.3.4A(1) has two limbs. The first limb of s 4.3.4A(1) is a positive provision: "*This Part applies only with respect to the wagering licence and gaming licence*". It preserves the operation of the Part in relation to the initial wagering licence and gaming licence, and recognises the continuing operation of the sections applying to those initial licences, of which s 4.3.12 is an instance. The second is a negative or limiting limb: the Part "*does not authorise the grant of any further wagering licence or gaming licence.*" Section 4.3.4A therefore precluded the grant of further licences under Part 3, and limited the operation of the Part to a single iteration.

39. There were two alternative ways that s 4.3.4A and s 4.3.12 could interact, which depended on the construction given to the words "new licences" in s 4.3.12:

    (a) if "new licences" was construed to be limited to new licences under Part 3, then s 4.3.4A operated so that s 4.3.12 was made redundant and Tabcorp was deprived of its valuable right to the terminal payment. This results in redundancy, expropriation and unfairness. Moreover, if "new licences" was limited in this way, s 4.3.4A would also contradict itself: on the one hand it would confirm the continuing operation of s 4.3.12 (as one of the provisions in Part 3); on the other hand it would deprive s 4.3.12 of any operation;

    (b) in contrast, if "new licences" referred to substantially similar licences and was not narrowed by the implication of the additional words "under Part 3", s 4.3.4A would not internally contradict itself, and s 4.3.4A and s 4.3.12 would operate in harmony and consistently, and would avoid redundancy, expropriation and unfairness.

40. *Thirdly*, if it were intended that s 4.3.12 be rendered inoperative, it could and should have been repealed in 2008 and 2009. In fact, it was neither repealed nor amended, but was expressly preserved by s 4.3.4A. The same may be said of the entirety of Division 3 of Part 3 of Chapter 4. Division 3 is a separate and self-contained division addressing only

one subject-matter: the terminal payment. The repeal of Division 3 in its entirety could have been achieved without any consequential amendment or "filleting". There is no rationale that withstands scrutiny for leaving ss 4.3.12, 4.3.13 and 4.3.14 in the legislation, other than that those provisions continued to operate. It is particularly incongruous that an appropriation of the consolidated fund was left in place if s 4.3.12 was to be inoperative: see s 4.3.14(2).

41. The State's assertion that it was neither practical nor appropriate for the State to undertake the repeal of relevant provisions of Part 3 of Chapter 4 was rejected at trial and in the Court of Appeal. The argument fails to rise above speculation as to why Division 3 was not repealed. And it cannot easily be reconciled with: the Act as enacted in 2003 omitting Division 2 of the 1994 Act (ss 10-13), on the evident ground that it was now without work to do; and the repeal in 2010 of the entirety of Division 5 of Part 3 of Chapter 4 of the Act,[47] along with four of six of the provisions in Division 6 of Part 3.[48] Division 3 of Part 3 of Chapter 4 is self-contained, addressing only one subject matter and none of its provisions would have a continuing function if the State's construction is accepted. The repeal of Division 3 in its entirety could have been achieved without any consequential amendment or "filleting", as the State conceded at trial.[49]

42. *Fourthly*, the Court of Appeal's approach was to ascribe to the expression "new licences" in s 4.3.12(1) a meaning identical to the meaning of the different phrase "any further wagering licence or gaming licence" in s 4.3.4A(1). Yet the use of the different phrase in s 4.3.4A(1) indicated that the meaning of the phrase "new licences" was different to the meaning of "any further wagering licence or gaming licence". The latter invoked the defined expressions which connoted only licences granted under Part 3 of Chapter 4. The former had a different, broader connotation.

43. *Fifthly*, the first operation of s 4.3.12 was not to occur until 18 years after enactment, and 9 years after its re-enactment in 2003.[50] During that period, legislative change affecting the licencing regime was likely, and its exact content could not be predicted. Hence the use of a phrase – "new licences" – that was apt to include licences that were not identical to Part 3 licences. Such a phrase advanced the object of securing the terminal payment by preserving it from incidental changes in the regulatory scheme. The object of s 4.3.12 was to maximise the return to the State from the float of Tabcorp by avoiding the requirement for Tabcorp to amortise the original licence fee in its accounts.[51] Achievement of this object required that the occurrence of repayment be made

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[47] Section 61(3) of the *Gambling Regulation Amendment (Licensing) Act 2010* (Vic) repealed ss 4.3.18 to 4.3.27 of the Act ("*Division 5 of Part 3 of Chapter 4 of the **Gambling Regulation Act 2003** is repealed*").

[48] Section 61(6) of the *Gambling Regulation Amendment (Licensing) Act 2010* (Vic) provided: "*Sections 4.3.30, 4.3.30A, 4.3.30B, 4.3.30C ... of the **Gambling Regulation Act 2003** are repealed*". Provisions introduced by the 2008 and 2009 amendments expressly stated that the effect of certain amendments would not give rise to an obligation on the part of the State to pay compensation: J[124]. A similar provision could have been, but was not, introduced in relation to s 4.3.12(1).

[49] During argument at trial, Hargrave J said: "Division 3 of Part 3, so 4.3.12, 13 and 14 are self-contained and wouldn't require any other piecemeal amendment, would they, if they were removed?" Senior Counsel for the State said: "That is probably correct" (T114:8-31).

[50] Cf Tatts Reasons at [132] and [151], where the Court concluded that the fact the phrase "a new gaming operator's licence" fell to be applied in 17 years' time supported a construction that did not confine the expression to a new iteration of the "gaming operator's licence" that had been granted in 1991.

[51] J[67]. This finding was not challenged on appeal.

dependable. That was effectuated by giving the phrase "new licences" the less specific meaning, so that the right to repayment was preserved against loss or impairment as a result of an incidental, even unintended effect of reforms to the licensing regime. No material suggested that it was an objective of the 2008 and 2009 reforms to bring an end to Tabcorp's repayment right. Nor did the bringing of that right to an end advance or promote any of the legislative objects which those reforms did have.

44. *Sixthly*, the terms of Part 3 of Chapter 4, and in particular s 4.3.4A(1), are to be contrasted with other provisions in the Act, such as s 3.4.1A.[52] Section 3.4.1A expressly provides that a venue operator's licence will not be considered to be a gaming operator's licence for the purposes of Part 4 of Chapter 3 (including s 3.4.33).[53] In contrast, there is no corresponding provision in Chapter 4 providing that (for example) the wagering and betting licence is not to be taken to be a new licence for the purpose of s 4.3.12(1).

45. *Seventhly*, rights to payment are expressly denied in many other provisions of the Act by providing that no compensation is payable in the event of the operation of certain sections or parts of the Act.[54] By contrast, there is no such provision in relation to s 4.3.12. The words used in s 4.3.4A are "This Part applies" with respect to Tabcorp's licences, where "this Part" includes the right to a terminal payment.

46. *Eighthly*, the composite expression "new licences" in s 4.3.12 differs from references to "the licences" in other sections, where the context shows that the expression refers only to the wagering licence and the gaming licence. The latter instances involve a dependent reference, in which the use of the definite article indicates a reference back to an earlier express mention of the wagering licence and the gaming licence (usually in the same section).[55]

47. *Ninthly*, elsewhere in the Act, where a specific meaning is intended, express narrowing words are used (such as "under this Part").[56]

48. These eighth and ninth points indicate that, when the Act intends to confine a word like "licence", it does so by express language or the plain effect of context. Neither applies to "new licences" in s 4.3.12. That section appears at the commencement of a separate Division in Part 3 of Chapter 4. Nothing about its context dictates that "new licences" should be confined to licences "under Part 3".

49. *Tenthly*, the use of the word "on" in s 4.3.12 – "on the grant of new licences" – identifies the time at which the repayment right was to be discharged.[57] Thus, it reflects a legislative

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[52] See also s 3.4.4A.

[53] Thereby avoiding the triggering of the repayment right under s 3.4.33.

[54] Eg. s 3.4.28F (referred to at AJ[29]); and, ss 2.5A.14, 3.2.5, 3.4.48B, 3.4.59LB, 3.4.59Q, 3.4A.6B, 3.4A.11B, 3.4A.20J, 3.4A.29, 3.4A.31, 3.5.33N, 3.7.6C, 3.8.12, 4.2.11(6), 4.3.34(4), 4.3A.10AB, 4.3A.34AB, 4.3A.39A(4), 6.6.1(4), 6A.2.4A(6), 6A.3.10B, 6A.3.34B, 6A.3.39A (none of which were referred to in the Court's reasons). It can be noted that all of these provisions relate to rights altered by the 2008 and 2009 Amendments. If Parliament intended to make changes to the Act that would prevent the terminal payment arising, it could easily have said so in terms similar to many of these provisions (i.e. "*No compensation is payable by the State to any person because of the operation of this Subdivision*" – being the wording used in s 3.5.33N; or, "*No compensation is payable by the State to any person because of the operation of this Division*" – the wording in s 3.4.38F).

[55] Eg, ss 4.3.2, 4.3.4A(2), 4.3.5(3)(d), 4.3.7(1) and (2), 4.3.8(2), 4.3.9(2), 4.3.32(2), 4.3.33(1).

[56] Eg. ss 4.2.1(1), 4.3.33.(3) (as it stood prior to 2008). See also J[70(6)].

assumption that some form of new licences will be granted. This legislative assumption coheres better with the less specific reading of "new licences".

50. *Eleventhly*, the contrasting text of s 3.4.33(1), provides textual support for that meaning of "new licences" in s 4.3.12. Section 3.4.33 provides for a terminal payment. However: (a) as noted above, it is expressly conditioned on the grant of a new "gaming operator's licence", where that expression is defined to have a specific meaning, rather than on the grant of undefined "new licences"; (b) while s 4.3.12 commences with "on the grant of new licences", s 3.4.33 employs the conditional "if".

51. The most that could be said for the Court of Appeal's construction was that there were a number of textual or contextual matters that could tend against the points noted above. However, none of those matters, and nothing in the text or structure of the Act, compelled a reading of "new licences" in s 4.3.12 that confined its operation to "new licences under Part 3".

52. The conclusion that the expression "new licences" means licences substantially similar to Part 3 licences is underscored by the Court's reasoning in relation to Tatts' contractual claim. In the Tatts case, the Court held that honest and reasonable business people *"would undoubtedly have answered, yes"* if asked whether *"a new gaming operator's licence"* included any form of authority which conferred rights to carry on gaming operations in substance the same as the rights conferred under the Gaming Operator's Licence.[58] The Court deployed principles equally applicable to Tabcorp's statutory claim to reach that conclusion. In Tabcorp's case, the legislative object, like the object of Tatts' contract, was plainly better served by a construction that did not confine the natural meaning of the expression.

53. There are especially powerful reasons for reading "new licences" in s 4.3.12 in the way honest and reasonable business people would read the expression, since the section effectuates and underpins an essentially commercial transaction by the State.

54. The result that should have been arrived at having regard to a proper consideration of the text, context and purpose of the Act, and to the principle of redundancy, is that the phrase "new licences" should not be read down so as to refer uniquely to Part 3 licences. This conclusion draws further support from consideration of the principle of legality, and the other matters addressed below.

(ii) The principle of legality

55. This Court has formulated in various ways the clarity of the language required to overcome the presumption of legality: "*irresistible clearness*";[59] "*a clear expression of an unmistakable and unambiguous intention*";[60] "*with a clearness which admits of no doubt*";[61] and provisions that "*necessarily imply*" alteration of a right, even though the Act

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[57] In contrast to the express terms of s 4.3.12, the Court of Appeal referred to Tabcorp's right to payment under s 4.3.12 as arising "*when and if* the State issued a new wagering and gaming licence under Part 3 of Chapter 4": AJ[32] (emphasis added).
[58] Tatts Reasons at [146].
[59] *Potter v Minahan* (1908) 7 CLR 277, 304.
[60] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 309 [309]-[310].
[61] *Magrath v Goldsborough, Mort & Co Ltd* (1932) 47 CLR 121, 128.

does not provide expressly for that effect.[62] That clarity can consist of express words or arise by necessary intendment.[63] All this reinforces the approaches required here by the need to avoid redundancy.

56. The Court of Appeal addressed the principle of legality but discounted its relevance on two bases: *first*, that the rights granted to Tabcorp by s 4.3.12 were contingent; *secondly*, that being statutory, they were always subject to revision by legislation.

57. These considerations do not diminish the force of the principle of legality, in particular in a case such as this. As to the *first*, at trial, Hargrave J correctly found that the principle of legality applied (as Tabcorp's right under the terminal payment provision was a "valuable right"),[64] and the principle was not limited to vested interests or rights. The State did not challenge this on appeal. Nevertheless, the Court of Appeal, at AJ[31] – [34], appears to have taken the view that the principle applied only to vested rights, or would have little effect in relation to rights other than vested rights, and that Tabcorp had only a "contingent right" or an "expectation" which could readily be emasculated.

58. Tabcorp's right to the terminal payment is not properly characterised as a "mere contingent" right or "expectation". Section 21 of the 1994 Act conferred on Tabcorp a present right to receive a payment in the future.[65] Parliament used the word "on" the grant of new licences, not "if" new licences are granted. This reflected a legislative assumption that the occasion for the terminal payment – the grant of new gambling licences –would occur.[66] The true import of the provision concerning the grant of new licences was to address timing, not contingency.

59. This had to be so to achieve the legislative objective of maximising the proceeds of the float: the right to the re-payment had to be dependable so that the licences did not need to be amortised. As the trial judge found, the object of the provision for a terminal payment in s 4.3.12 was to enable "*the State to receive hundreds of millions of dollars more than it would have received if amortisation had been required. The achievement of this object was at the price of the promise contained in the terminal payment provision; albeit a promise which was always subject to the sovereign risk of repeal or alteration by Parliament*" (J[67]). The reference to a "price" was apt. The terminal payment right was essentially bought and paid for by members of the public who subscribed to the float. It was a valuable right, secured at very great cost.

60. As the Court of Appeal recognised,[67] the principle of legality is not confined to the expropriation of rights – it applies to other manifest unfairness. As Gageler and Keane JJ have observed, the principle "*is not confined to the protection of rights, freedoms or immunities that are hard-edged. ... The principle extends to the protection of fundamental*

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[62] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 149 [142].
[63] See: Hon JJ Spigelman AC, "Principle of legality and the clear statement principle" (2005) 79 *ALJ* 769, 781.
[64] J[98]-[99]; relying on statements in *Potter v Minahan* (1908) 7 CLR 277, 304; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30, 49 [43]; *Springhall v Kirner* [1988] VR 159, 165-6.
[65] Cf s 3.4.33 of the Act. Section 21 of the 1994 Act conferred on Tabcorp an immediate right to a payment, but to a payment in the future. The Act recognised the immediacy of the right by providing for an immediate appropriation from the consolidated fund from the outset - see sub-s 21(4) of the 1994 Act, and now sub-s 4.3.14(2).
[66] The form of right granted to Tabcorp can be distinguished from the potential or contingent right in issue in a case such as *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30.
[67] AJ[31].

principles and systemic values."[68] Uncompensated deprivation of the valuable terminal payment (even if contingent) is palpably unfair.

61. As for the *second* matter, while the right conferred by s 4.3.12 was subject to repeal and therefore to sovereign risk, the point of the principle of legality is that Parliament is presumed not to wish to impair the State's credit by violating the legitimate expectations of those who deal with it, or at least not to do so except in plain and direct terms. To deny a role for the principle of legality in relation to statutory rights would significantly limit its relevance in the modern age of statutes.[69]

(iii) Presumed legislative intention to eschew the perception that Tabcorp had a right that had been taken away

62. The Court of Appeal acknowledged the anomaly produced by its construction: that s 4.3.4A preserved s 4.3.12 by expressly providing that it continues to apply with respect to Tabcorp's licences, while at the same time depriving s 4.3.12 of useful operation.[70] The Court attempted to explain this anomaly by assuming a legislative intention "*to eschew the perception that Tabcorp had a right to a payment which has been taken away*".[71] This was said to explain the circuitous manner in which, on the Court's construction, the Act rendered nugatory Tabcorp's right to a termination payment, and why (in contrast to the method adopted elsewhere in the Act) no provision expressly stated that there was to be no terminal payment.[72]

63. To construe legislation by reference to an assumed intention, essentially, to employ a disguise is remarkable – especially where the outcome produces manifest unfairness, legislative redundancy and expropriation of valuable rights. Those who set out to abolish or neuter valuable rights are required to do so directly and clearly. As Lord Hoffman remarked in *R v Secretary of State for the Home Department; Ex parte Simms*: "*Parliament must squarely confront what it is doing and accept the political cost*".[73] Or, as Lord Simon of Glaisdale has noted, the canons of construction are "*constitutionally salutary in helping to ensure that legislators are not left in doubt what they are taking responsibility for.*"[74]

64. If Parliament intended to repeal, or render inoperative, the payment right, it had to do so by clear and unambiguous words. It did not. It is not only speculative but contrary to principle to attribute to the legislature in these circumstances an intention of doing away with the right by means of a disguise. Indeed, given that what is involved in ascertaining

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[68] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] (emphasis added). In *Potter v Minahan* the Court spoke of the principle applying not only to the overthrow of fundamental principles and the infringement of rights, but also to a "depart[ure] from the general system of law": (1908) 7 CLR 277, 304, quoted with approval in *Bropho v State of Western Australia* (1990) 171 CLR 1, 18.

[69] See, eg, *Buck v Comcare* (1996) 66 FCR 359, 364, quoted with approval in *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449, 458. See also *Grenville v Williams* (1906) 4 CLR 694; *Young v Owners Strata Plan No 3529* (2001) 54 NSWLR 60; *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603.

[70] AJ[29]; cf Tatts Reasons at [58].

[71] AJ[30].

[72] See footnote [54] above.

[73] [2000] 2 AC 115 at 131. This observation has been quoted and referred to numerous times by this Court: *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 309 [311].

[74] *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 361.

legislative intention "*is not the attribution of a collective mental state to legislators*",[75] it is difficult to see how, consistent with established principles, it is possible to conclude that the intention of legislation is to act surreptitiously and obliquely to remove rights and render an extant legislative provision redundant. The Court of Appeal's reasoning fell into error by approaching the question of legislative purpose anthropomorphically.[76] The repeated use of the words "*determination*" and "*determined*" (AJ[30]) reveals that the Court of Appeal strayed into a consideration of what it perceived as the subjective purpose (or mental state) of the legislators (or, more likely, those promoting the legislation). An intention to "*eschew a perception*" might, upon evidentiary proof, be capable of being the mental state possessed by a person, or even the collective mental state of legislators. But, it cannot be a legislative intention attributed to Parliament consistent with established principles. In any event, there was no evidentiary proof of such an intention.

65. The Court of Appeal held that the restrictive meaning it attributed to "new licences" was the only way of reconciling s 4.3.4A and s 4.3.12,[77] and that to construe the words to have a broader meaning would "*run counter to what we perceive to be the statutory purpose*",[78] namely, to deploy the disguise referred to above. This amounts to a finding that, although Parliament's purpose was to disguise the effect of its amendments, the purpose of the provisions was so clear that they could only reasonably have one particular meaning. This is unsound.

66. The Court of Appeal advanced no other explanation of the anomaly that s 4.3.4A preserved s 4.3.12, yet deprived it of useful operation. This is significant. Absent this finding as to legislative intention, the anomaly in the Court's construction of the provisions would not have been overcome. The Court would have been driven the conclusion that "new licences" encompassed licences substantially similar to those granted under Part 3, enabling the provisions to operate in harmony.

(iv) Purpose (of s 4.3.4A) and circularity

67. The Court of Appeal adopted the specific meaning of "new licences" in s 4.3.12 by reference to "*what we perceive to be the statutory purpose of precluding the occurrence of the circumstance which would give rise to Tabcorp's entitlement to the specified payment*" (AJ[25], [30]). This finding was unjustified for several reasons.

68. *First*, it was circular. In order to find the existence of the purpose, the Court reasoned as follows:

(a) Parliament determined not to alter the right to payment in s 4.3.12, and indeed expressly preserved it;

(b) at the same time, Parliament determined to deprive that right of any practical content by providing that the pre-condition to the payment could not occur.

69. However, in order for this second point in the Court's reasoning to be available to support the purpose that it found, it had to first assume that s 4.3.12 was limited to new licences

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[75] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591-2 [43].
[76] Cf *Momcilovic v The Queen* (2011) 245 CLR 1, 175 [441] (Heydon J).
[77] AJ[23(8)].
[78] AJ[25].

under Part 3 of Chapter 4. But, that was the very question under consideration. The Court assumed the result that s 4.3.12 was limited to new licences under that Part, then used this to find a statutory purpose. This statutory purpose was in turn used to justify the conclusion that s 4.3.12 was limited to licences under the Part. In this way, the reasoning of the Court was circular.[79]

70. *Secondly*, no extrinsic evidence supported such a perception. None was referred to by the Court of Appeal. As the trial judge held (at J[119]), any evidence as to the purpose of s 4.3.4A and the amendments made in 2008 and 2009 was equivocal.

71. *Thirdly*, the purpose found by the Court of Appeal was nowhere expressed or implicit in the text of the legislation.

(v) Failure to have regard to the purpose of s 4.3.12

72. As regards the duty to prefer a construction which advances the object of the legislation, the State submitted that the object of s 4.3.12 was exhausted when the State reaped the benefits of the float in 1994: AJ[35]. That is, the State submitted that where the object of a legislative promise is to secure immediate financial reward for the State, a purposive construction of the legislation may proceed on the basis that it was not an object of the law for the State to perform the legislative promise, but only to make it. The submission assumes that it is no object of the section to vindicate the legislative premise on which hundreds of millions of dollars had been obtained from the public. The assumption has no basis. The object of the section is not merely to make the legislative promise but to require and enable the State to perform it, by both providing for what the State must do and securing the necessary appropriation of funds to do so. The State's submission was rightly rejected by the Court of Appeal as being "remarkable": AJ[35].

73. The legislative object in 1994[80] was to maximise its returns by making Tabcorp's repayment right dependable. That object was advanced if the phrase "new licences" encompassed licences substantially similar to Part 3 licences, since it would enable investors in 1994 to be confident that the repayment right would not be swept away, perhaps unintentionally, by changes to the licensing regime that were not concerned with the terminal payment. For this reason, even as the legislation stood in 1994, that construction of the composite expression "new licences" was preferable.

(vi) Reasoning by reference to the perceived meaning of s 21 of the 1994 Act

74. The Court of Appeal started from the position that it was necessary for Tabcorp to demonstrate that the expression "new licences" did not "retain" the "meaning it has had from the inception of the legislation in 1994" (AJ[28]). It set Tabcorp the task of demonstrating that the meaning of "new licences" "somehow transformed" from "*'wagering licence and gaming licence issued under Part 3 of Chapter 4' to 'gaming*

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[79] Cf *Independent Commission Against Corruption (NSW) v Cunneen* (2015) 89 ALJR 475, 484 [33], 488 [60] (French CJ, Hayne, Kiefel and Nettle JJ) and *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389-90 [25]-[26], 394-5 [40]-[41] (French CJ and Hayne J), where the comments as to circularity of reasoning and the unsoundness of proceeding from *a priori* assumptions as to the purpose of legislation are equally applicable to the Court of Appeal's reasoning in the present case.

[80] The genesis of s 21 of the 1994 Act was advice to the Treasurer "*that amortisation could be avoided if the State agreed to repay the licence consideration at the end of the licences*": J[5] (emphasis added).

machine entitlements issued under Part 4A of Chapter 3'" (AJ[26]).[81] There are several points to be noted in relation to this approach.

75. *First*, it paid insufficient regard to the principle mentioned earlier,[82] that an Act that is amended and the amending Act are to be read together as a combined statement of the will of the legislature, and that, accordingly, one must start with the text of the Act as it stood in 2012 and construe that text, as a single text, without assuming that unamended parts of the text had the same meaning as they had before.

76. *Secondly*, the focus on whether the legislation retained some earlier meaning was a distraction. The central enquiry is whether the expression "new licences" in the Act, as it stood in 2012, encompassed licences substantially similar to Part 3 licences or rather was subject to an implicit qualification. Prior to the 2008 and 2009 Amendments, the Act relevantly provided for only one licensing regime. The expression "new licences" had only one possible denotation. An interpretive choice between the specific and the less specific meanings could not sensibly arise.

77. By contrast, following the 2008 and 2009 Amendments, the legislation provided for two distinct universes, one concerning Tabcorp's initial licences and one concerning the new licences that might now be issued: J[123]. The expression "new licences" was then placed in a different context.[83] In the Act as it stood in 2012, whether the expression had a specific or a somewhat wider meaning became a pertinent question, and for this case, a vital one. Established principles required adoption of that wider meaning, where the text did not plainly exclude the possibility.[84]

78. *Thirdly*, the expression "new licences" in s 21 of the 1994 Act included licences substantially similar to Part 3 licences. The approach of the Court of Appeal paid insufficient regard to the principle that statutes are to be read as "always speaking". The condition under which legislation should be construed as always speaking was described by Spigelman CJ, in *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 145 as follows: "*the Parliament has chosen a formulation which is of indeterminate scope and of a high level of generality*." The expression "new licences" is of that kind, with the result that the principle of construction is engaged. That principle operates such that, while the connotation of the phrase "new licences" in the 1994 Act was fixed, its denotation was always susceptible of augmentation.[85] "New licences" might have denoted only the wagering licence and the gaming licence under the 1994 Act, and even under the Act as it stood in 2003, as they were the only relevant licences that could be granted under the then legislation. But following the amendments introduced in 2008 and 2009, the phrase had come to be able also to denote those licences which were to stand in the

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[81] This form of reasoning received substantial attention also from the Trial Judge, who focused primarily on the text of the legislation as it stood before the 2008 and 2009 Amendments: J[59]-[91].

[82] See paragraph 25 and footnotes 39-40 above.

[83] Cf *Ex parte Jasaitis* [1970] 2 NSWR 521, 523, where Else-Mitchell J noted the importance of construing the relevant phrase there under consideration in the context of the legislation as it then appeared, and not on the basis of meanings the same phrase may have borne in predecessor Acts.

[84] Namely, the principles against legislative redundancy, the destruction of valuable rights (being part of the principle of legality), and avoiding results that are manifestly unfair or unreasonable, as well as the principle that an Act is to be construed on the basis that its provisions are intended to give effect to harmonious goals.

[85] Cf *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 at 331 (Barwick CJ) and *Imperial Chemical Industries of Australia and New Zealand v FCT* (1972) 46 ALJR 35 (Walsh J).

place of the initial licences and which were to authorise substantially the same activities. The general language used in 1994 (and 2003) had at that time only one obvious reference. But when provision was made in 2008 and 2009 for other licences, the denotation extended to them as well since they were within the connotation.

79. Whatever may have been the position before 2008, the introduction of s 4.3.4A while leaving the whole of Division 3 of Part 3 in place, and with the phrase "new licences" (and the word "licence") undefined, made it necessary to read "new licences" in s 4.3.12 as not confined to licences under Part 3.

80. That construction does not involve altering the unamended provisions of the Act so that they operate inconsistently with their operation before the amendments. The point is that only after the 2008 amendments can it be seen that s 4.3.12 operates in relation to things which did not previously exist. Expressed in terms of connotation and denotation in light of the changes made in 2008 and 2009, the connotation of "new licences" can be seen to extend beyond Part 3 licences. Prior to these amendments there could have been no occasion to consider that issue. It is typically the case that the question whether the connotation of words in legislation might extend beyond their original denotation can only meaningfully be asked after there has been a relevant change of circumstances.[86]

81. *Fourthly*, and in any case, s 21 of the 1994 Act did not call for a limited construction. The expression "new licences" was always undefined and apt to encompass licences substantially in the nature of the initial licences. Had a narrower meaning been intended, it could easily have been made plain, for example by the insertion of the words "under this Part" after "new licences". Or even more plainly, by providing for the terminal payment "*on the grant of the new wagering licence and new gaming licence*". However, no such confining language was used.

82. The fact that the word "licence" was defined in the 1994 Act to mean the gaming licence and the wagering licence makes no difference. It was not the word "licence" which had to be construed but the phrase "new licences". That expression was not defined and was to be construed in its own context. This is to be contrasted with the composite expression "initial licences", which was defined.[87] Further, a definition section, even if it does not expressly state that its application is "unless the context otherwise requires", will not be given effect so as to defeat a meaning required by the context.[88]

(vii) The State's Notice of Contention

83. The trial judge correctly concluded that if he had accepted Tabcorp's contentions that s 4.3.12 was not impliedly repealed, and that "new licences" were not confined to

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[86] See, eg, *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327; *Victor Chandler International v Customs and Excise Commissioners* [2002] 2 All ER 315.

[87] Further, the term "licence" was defined to mean "*the wagering licence or the gaming licence granted under Part 2*". The syntax of the defined term did not fit into the text of s 21, since it would be inapposite to speak of a "*new the wagering licence or the gaming licence*".

[88] *Transport Accident Commission v Treloar* [1992] 1 VR 447, 449 (McGarvie and Gobbo JJ); *Betella v O'Leary* [2001] WASCA 266, [13] (Burchett AJ, Wallwork J and Wheeler J agreeing); *Anti-Doping Violation Panel v XZTT* (2013) 214 FCR 40, 62-3 [89] – [90] (North, Cowdroy and McKerracher JJ). See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) at [6.68].

licences under Part 3 of Chapter 4 of the Act, then the grant of the GMEs, the wagering and betting licences and the keno licence constituted the grant of "new licences".[89]

84. The Court of Appeal did not disturb that finding.[90]

The new authorities were not materially different in substance from Tabcorp's existing licences

85. The State's contention that the new authorities were materially different in substance from Tabcorp's existing licences was dealt with comprehensively by the trial judge.[91] The State's contention in substance requires that the "new licences" be exactly the same as the 1994 licences. But that is, in effect, to seek to reinstate the construction of new licences that limits such licences to those issued under Part 3 of Chapter 4. Further, the new authorities were not materially different in substance from Tabcorp's existing licences. The following more specific points are made.

86. *First*, the activities authorised under the wagering and betting licence were almost identical to those authorised under the wagering licence. The (minor) expansion in the range of activities authorised under the new regime did not fundamentally or materially alter the character of the licence.[92]

87. *Secondly*, the State's submission that the content and effect of the gaming licence held by Tabcorp was materially different in substance to the GMEs issued to licensed venue operators was rightly rejected.[93] Among other things:

(a) the State's position focused upon the form, and not the substance, of the statutory authorisations;[94]

(b) there is no difference between the extent of the authorities granted under each regime for the "conduct of gaming".[95] The trial judge correctly noted that it is the activity constituted by the "conduct of gaming" that comprises the principal value of the authorities under each regime;[96]

(c) the only activity that was authorised under the gaming licence which is not authorised to be conducted by the holder of GMEs (having regard to the fact that they must also hold a venue operator's licence) is the authority to manufacture approved gaming machines.[97] The authority to manufacture approved gaming machines was always separate from the "conduct of gaming" and was always the subject of an authorisation regime separate to the authorities granted under the gaming licence.[98]

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[89] J[132]-[164].
[90] AJ[37], addressing the issue of whether GMEs were "new licences", by reference to its reasoning in the Tatts decision (the relevant reasoning in the Tatts Reasons is at [165]-[211]).
[91] J[136]–[159].
[92] J[138].
[93] J[141]-[159]; Tatts Reasons [165]-[211].
[94] J[141].
[95] J[150]-[151].
[96] J[150].
[97] J[152].
[98] J[153]-[154].

88. *Thirdly*, there is no substantive difference between the authorisations granted in respect of club keno under the two regimes.[99]

"New licences" did not have to be granted to the same licensee

89. The State submitted at trial and on appeal that licences could only be "new licences" if they were all granted to the same licensee. This proposition is, in substance, no more than another way of putting the State's substantive submission as to the proper construction of the phrase "new licences". If it is accepted that the phrase "new licences" is not confined to licences issued under Part 3 of Chapter 4, then the phrase "new licensee" should be construed to have a non-specific meaning, such that it is not necessary for new licences to be issued to the same licensee.[100]

90. The State's contention is not supported by the words of s 4.3.12(1):

(a) the phrase to be construed is "new licensee", and not the defined term "licensee". Other provisions in Part 3 demonstrate that the term "licensee", when used as part of a larger undefined phrase, may not bear its defined meaning;[101]

(b) the reference to a "new licensee" occurs only in the context of identifying one possible lower bound of the amount to be refunded and does not identify the necessary recipient of the licence(s) before the terminal payment provision is engaged; and

(c) s 37(c) of the *Interpretation of Legislation Act 1984* (Vic) provides that words in the singular include the plural. The term "new licensee" includes the plural, and in the context of s 4.3.12 coherently is so read.

Tabcorp or a related entity could be the new licensee

91. The trial judge was correct to conclude that the State's contention that neither Tabcorp nor a related entity could be the new licensee is "*unsustainable on a plain reading of s 4.3.12*".[102] Section 4.3.12 does not state that Tabcorp's entitlement to the terminal payment is dependent on it not being the new licensee. There is no textual foundation for the State's contention. Further, the contrasting context of s 3.4.33 of the Act is a powerful indicator against the State's construction. And the State's construction runs counter to the legislative object of ensuring that Tabcorp did not have to amortise the value of the licences in the profit forecasts contained in the float prospectus.[103]

Part VII: Applicable legislation

92. As directed by the Court on the grant of special leave, the statutory provisions relevant to the appeal and relied on by the parties will be provided in an agreed book at the time of filing the Appellant's Submissions in Reply.

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[99] J[158].
[100] J[161].
[101] Eg. s 4.3.34 ("wagering licensee").
[102] J[162].
[103] J[67].

Part VIII: Orders sought

93. The Appellant seeks the following orders:

(a) The appeal be allowed.

(b) The orders of the Court of Appeal of the Supreme Court of Victoria dated 4 December 2014 be set aside.

(c) The orders of his Honour Justice Hargrave made on 26 June 2014 be set aside.

(d) In lieu of the order of his Honour Justice Hargrave, the following orders be made:

(i) there is judgment for the Appellant in the sum of $686,825,713.20 plus interest in an amount to be calculated;

10 (ii) the Respondent pay the costs of this appeal (including the application for special leave to the High Court), the appeal to the Court of Appeal, and the trial before Justice Hargrave.

Part IX: Estimated length of oral argument

94. The Appellant estimates that it will require 2½ hours for its oral argument.

Dated: 19 June 2015

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