HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND GORDON JJ

TABCORP HOLDINGS LIMITED APPELLANT

AND

STATE OF VICTORIA RESPONDENT

Tabcorp Holdings Limited v Victoria
[2016] HCA 4
2 March 2016
M81/2015

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

A C Archibald QC and J C Sheahan QC with P G Liondas and B K Holmes for the appellant (instructed by Herbert Smith Freehills)

W A Harris QC with R G Craig and K A Loxley for the respondent (instructed by Johnson Winter & Slattery)

CATCHWORDS

Tabcorp Holdings Limited v Victoria

Statutes – Interpretation – Where conjoined "wagering licence" and "gaming licence" issued under statutory scheme – Where statute provided for payment on "grant of new licences" – Where statutory scheme amended so no new wagering licence and gaming licence could be issued – Whether "grant of new licences" confined to grant of new wagering licence and gaming licence – Whether payment due.

Statutes – Interpretation – Context – Relevance of legislative history – Relevance of commercial context.

Statutes – Interpretation – Principle of legality – Whether principle engaged where nature of right is contingent and interest to be protected is limited.

Words and phrases – "gaming licence", "gaming machine entitlement", "grant of new licences".

Gambling Regulation Act 2003 (Vic), Pt 4A of Ch 3, Pt 3 of Ch 4, ss 4.3.4A, 4.3.12.

FRENCH CJ, KIEFEL, BELL, KEANE AND GORDON JJ.

Introduction

1 Gambling activity involving the use of gaming machines was legalised in Victoria in 1991[1]. In 1992, the respondent, the State of Victoria ("the State"), issued each of the Totalisator Agency Board of Victoria ("TAB") and the Trustees of the Will and Estate of the late George Adams ("Tatts"[2]) a gaming operator's licence for a term of 20 years[3]. It was a duopoly. Neither TAB nor Tatts paid a fee to the State for the grant of their respective gaming operator's licences.

2 In 1994, TAB was privatised. The *Gaming and Betting Act* 1994 (Vic) ("the 1994 Act") was enacted. Investors subscribed for shares in the appellant, Tabcorp Holdings Limited ("Tabcorp"), through a public float. Under the 1994 Act, Tabcorp was granted conjoined licences – a wagering licence and a gaming licence – for a term of 18 years. The duopoly was retained[4].

3 The proceeds of the privatisation of TAB were paid to the State. The State was advised that, if Tabcorp was to be repaid the initial licence fee upon the granting of new licences after the expiry of Tabcorp's conjoined licences in 18 years, the capital value of the wagering licence and the gaming licence issued to Tabcorp would not need to be amortised in the financial statements set out in the prospectus. This would maximise the return to the State from the privatisation. That advice was accepted and s 21(1), containing what became known as the "terminal payment provision", was included in the 1994 Act.

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1 *Gaming Machine Control Act* 1991 (Vic) ("the 1991 Act").

2 In 1998, that estate was restructured and corporatised and Tatts Group Limited became the holder of the gaming operator's licence previously held by the Trustees. In these reasons, for convenience the Trustees and Tatts Group Limited are referred to as "Tatts".

3 Under s 33 of the 1991 Act.

4 Subject to the geographically and functionally limited exception of the Crown Casino.

4 In 2003, multiple pieces of legislation regulating gambling in Victoria were re-enacted and consolidated into the *Gambling Regulation Act* 2003 (Vic) ("the 2003 Act"). The duopoly was retained. Tabcorp's wagering licence and gaming licence were provided for in Pt 3 of Ch 4 of the 2003 Act. The terminal payment provision was re-enacted in s 4.3.12(1) of the 2003 Act. It provided that, "[o]n the grant of new licences", the holder of the former licences would be "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".

5 In 2008 and 2009, the State Government restructured Victoria's gaming industry. Neither Tabcorp's nor Tatts' licences were to be renewed after they expired in 2012. From that time, Tabcorp and Tatts were to lose their right to conduct gaming operations. The right to conduct gaming operations was to be granted to holders of a new authority called a "gaming machine entitlement" or "GME".

Issue

6 Tabcorp claims to be entitled to the terminal payment provided for in s 4.3.12(1) of the 2003 Act. Tabcorp contended below, and in this Court, that the allocation of the GMEs was the "grant of new licences" within the meaning of s 4.3.12(1) of the 2003 Act because the GMEs were "substantially similar" to the licences held by Tabcorp.

7 Was there a "grant of new licences" within the meaning of s 4.3.12(1) of the 2003 Act which entitled Tabcorp to payment under that sub-section? In particular, does the phrase "grant of new licences" in s 4.3.12(1) mean the grant of a new wagering licence and gaming licence under Pt 3 of Ch 4 of the 2003 Act, as the State contends, or does it extend to the grant of other entitlements, not previously existing, the substantive operation of which was to authorise wagering and gaming activities in Victoria, as Tabcorp contends?

8 For the reasons that follow, the phrase "grant of new licences" in s 4.3.12(1) of the 2003 Act means the grant of a wagering licence and a gaming licence issued under Pt 3 of Ch 4 of the 2003 Act. That construction is supported by reference to the plain and ordinary meaning of the text of s 4.3.12(1) as well as its context, including its legislative history[5].

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5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner*

(Footnote continues on next page)

9 This appeal was heard with an appeal by the State against a decision of the Court of Appeal of the Supreme Court of Victoria in favour of Tatts[6]. The issues in that appeal were related to those in this appeal and are addressed in separate reasons[7].

Structure

10 These reasons will set out the facts and legislative history and then turn to the question of construction of s 4.3.12(1) of the 2003 Act.

Facts and legislative framework

Introduction of gaming in Victoria and the creation of the duopoly

11 In Victoria, gambling activity involving the use of gaming machines was illegal until the introduction of the *Gaming Machine Control Act* 1991 (Vic) ("the 1991 Act"). The 1991 Act legalised such conduct by providing for the grant of a "gaming operator's licence", which authorised the holder to conduct gaming on gaming machines at approved venues in Victoria.

12 On 14 April 1992, the State issued each of TAB and Tatts a gaming operator's licence for a term of 20 years[8]. Neither TAB nor Tatts paid a fee to the State for the grant of its gaming operator's licence.

13 The licences authorised TAB and Tatts to conduct gaming on gaming machines at approved venues in Victoria. Section 14 of the 1991 Act set out the authority conferred by a gaming operator's licence as follows:

> "(1) … a gaming operator's licence authorises the licensee, subject to this Act and any conditions to which the licence is subject—

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of Territory Revenue (2009) 239 CLR 27 at 47-48 [51]; [2009] HCA 41; *Independent Commission Against Corruption v Cunneen* (2015) 89 ALJR 475 at 487-489 [57], [62]; 318 ALR 391 at 405-407; [2015] HCA 14.

6 *Victoria v Tatts Group Ltd* [2014] VSCA 311.

7 *Victoria v Tatts Group Ltd* [2016] HCA 5.

8 Under s 33 of the 1991 Act.

(a) to obtain from manufacturers and suppliers listed on the Roll [of Recognised Manufacturers and Suppliers of Gaming Machines and Restricted Components] approved gaming machines and restricted components; and

(b) to manufacture approved gaming machines and restricted components; and

(c) to supply approved gaming machines and restricted components to venue operators; and

(d) to conduct gaming at an approved venue; and

(e) to sell or dispose of gaming equipment with the approval of the Commission; and

(f) to service, repair or maintain gaming equipment through the services of licensed technicians; and

(g) to do all things necessarily incidental to carrying on the activities authorised by this section.

(2) In this section '**approved gaming machines**' means gaming machines of a type approved by the Commission under section 69."

14 The 1991 Act also provided for the grant of a venue operator's licence[9]. Section 13 of the 1991 Act set out the authority conferred by a venue operator's licence as follows:

"… a venue operator's licence authorises the licensee, subject to this Act and any conditions to which the licence is subject—

(a) to obtain from a gaming operator, gaming machines of a type approved by the Commission under section 69; and

(b) to possess gaming equipment; and

(c) to do all things necessarily incidental to carrying on the activities authorised by this section."

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9 s 13 and Div 2 of Pt 3 of the 1991 Act.

15 TAB's gaming division began operating gaming machines in licensed clubs and hotels in Victoria on 16 July 1992. Tatts commenced gaming operations in Victoria on 6 August 1992. Neither TAB nor Tatts ever held a venue operator's licence. Instead, TAB and Tatts had contractual arrangements with the holders of venue operator's licences.

16 From 1992, TAB and Tatts each held half of Victoria's gaming industry (outside of the Crown Casino) whilst they each held one of the two gaming operator's licences issued by the State under the 1991 Act. That duopoly remained until 2012, when their licences expired.

17 In 1993, the *Club Keno Act* 1993 (Vic) was enacted. Under that Act, TAB and Tatts were authorised to conduct a lottery-style game known as "keno" or "club keno".

Privatisation of TAB and the enactment of the 1994 Act

18 In 1994, a number of steps were taken to privatise TAB. On 13 April 1994, Tabcorp, then called TAB Corp Limited, was incorporated and registered. It changed its name to Tabcorp on about 27 April 1994.

19 On 25 May 1994, the State enacted the 1994 Act to provide a regulatory framework for the privatisation of TAB and to facilitate the public float of Tabcorp.

20 By a letter dated 29 June 1994, the Treasurer of Victoria wrote to the Chairman of Tabcorp and the Chairman of VicRacing Pty Ltd confirming the principles on which the Government of Victoria was privatising TAB. The letter relevantly stated:

> "I must … make it clear that *the statement of principles in this letter does* ***not*** *bind this Government or future Governments* and, of course, that the Victorian Parliament has the power at any time to amend existing legislation or pass new legislation affecting the operations of the TABCORP group of companies, the Victorian Racing Industry or the terms on which those operations are conducted.
>
> [The principles] are as follows:
>
> 1. TABCORP … has the sole licence for 18 years under [the 1994 Act] to conduct off-course wagering on horse, harness and greyhound racing and a concurrent right (with [Tatts] and Crown Casino) to conduct gaming, for a fixed period.

…

3. In order to maintain and improve the competitiveness of the Victorian Gambling Industry, amounts payable to the Government in relation to wagering operations under the new TABCORP licences will be reduced from an average across bet types of approximately 42% of net wagering revenue under the Racing Act to approximately 28.2% of net wagering revenue for the period of the licences. Amounts which may be retained by TABCORP by way of commission on gaming will be maintained at 33.33% for the period of the licences.

…

5. Consistent with all of these objectives, the maximum commercial value for the licences should be recouped by the [State].

6. Accordingly:

> TABCORP has now been granted a wagering licence and a gaming licence which will come into effect on the successful conclusion of this float.
>
> The licences will be for terms of 18 years and will be concurrent and not separable.
>
> The Government does not currently intend to grant further gaming or wagering licences to persons who are not now authorised to conduct gaming or wagering during that 18 year period.
>
> TABCORP may apply for new licences after the initial licences terminate and on the same terms as other applicants. It is expected that the process of award of new licences will involve a public tender. It is also expected but not guaranteed that the new licences would be awarded to the highest qualifying bidder. If the new licensee is not TABCORP, TABCORP will be entitled to receive from bid proceeds received by the State an agreed capital compensation amount of approximately the net amount TABCORP will pay the Government for the initial licences calculated in accordance with [the 1994 Act] (subject to the bid proceeds being sufficient).

...

7. It is intended that any new licences will be granted on conditions which include conditions substantially to the same effect as those to which the TABCORP licences are subject." (emphasis added)

21 Clause 6 of the letter reflected some critical aspects of the 1994 Act. The 1994 Act provided for the grant to Tabcorp of two conjoined licences – a wagering licence and a gaming licence[10]. Each had an 18-year term, expiring on 15 August 2012[11]. The 1994 Act did not authorise the operation at the same time of more than one wagering licence or more than one gaming licence under that Act[12].

22 Tabcorp's gaming licence conferred upon it the same authority granted to TAB and Tatts by the gaming operator's licences under the 1991 Act and gave it authority to conduct and promote club keno games in accordance with the *Club Keno Act*[13]. Tabcorp's wagering licence authorised the conduct of wagering and approved betting competitions[14].

23 On the day Tabcorp's wagering licence and gaming licence commenced (15 August 1994), TAB ceased to be the holder of the gaming operator's licence under the 1991 Act[15] and trading of shares in Tabcorp commenced on the ASX.

24 On 29 August 1994, Tabcorp paid to the State the net float proceeds of $597.2 million as consideration for the grant of its wagering licence and gaming licence[16]. These licences were defined in the 1994 Act as the "initial licences"[17].

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10 s 12(1) of the 1994 Act.

11 s 12(2)(a) of the 1994 Act.

12 s 8 of the 1994 Act.

13 s 7 of the 1994 Act.

14 s 6 of the 1994 Act.

15 s 222 of the 1994 Act.

16 Pursuant to s 13 of the 1994 Act.

17 s 3(1) of the 1994 Act.

The possibility of the grant of a subsequent wagering licence and gaming licence, after the grant of the initial licences, was addressed in Div 3 of Pt 2 of the 1994 Act, entitled "Grant of licences after initial licences". Section 14 of the 1994 Act relevantly provided:

> "(1) A company incorporated under the Corporations Law of Victoria may, within such period as the Authority[18] determines *before the expiry of the initial licences or later licences* or, *if the initial licences or later licences are cancelled*, within such period after the cancellation as the Authority determines, apply to the Authority for the grant of—
>
> (a) a wagering licence; and
>
> (b) a gaming licence.
>
> (2) A person who has been a licensee is not entitled to apply under sub-section (1) if a wagering licence or gaming licence held by the person has been cancelled." (emphasis added)

25 Also in Div 3 of Pt 2 of the 1994 Act, s 20(1) provided for the grant of a subsequent wagering licence and gaming licence "on payment by the applicant of the premium payment". Section 20(2) went on to provide that:

> "The Governor in Council must not grant the licences unless the Minister, after consultation with the Authority—
>
> (a) is satisfied—
>
> (i) that the arrangements between the current licensee and VicRacing or Racing Products have been or, before the licences commence, will be, concluded to the reasonable satisfaction of the parties; or
>
> (ii) that a reasonable opportunity has been given for such a conclusion of those arrangements; and

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18 The "Authority" was defined in s 3(1) of the 1994 Act to mean the Victorian Casino and Gaming Authority established under that Act. The Authority succeeded the Victorian Casino Control Authority and the Victorian Gaming Commission under s 166 of the 1994 Act.

(b) is satisfied that the applicant has entered into, or made a binding offer to enter into, arrangements with VicRacing and arrangements with Racing Products that, in the opinion of the Minister, after consultation with the Authority, are no less favourable to VicRacing and Racing Products than those last in force between a licensee (other than a licensee appointed under section 34) and VicRacing or Racing Products, as the case requires."

26 Section 20(3) then provided that if, because of s 20(2), the Governor in Council was "unlikely to grant the licences before the expiration of the term of 18 years of the licences held by the current licensee", the Governor in Council was able to "approve the extension of the term of the current licences until the commencement of the new licences or for such shorter period as is specified".

27 Section 21(1) of the 1994 Act, in Div 4 of Pt 2, contained what became known as the "terminal payment provision". Section 21 provided:

"(1) 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.

(2) The person who was the holder of the former licences is entitled to the payment under sub-section (1) whether or not the person was, or was entitled to be, an applicant for the *new licences*.

(3) Sub-section (1) does not apply if the holder of the former licences has been wound up.

(4) The payment under sub-section (1) must be made not later than 7 days after the commencement of the new licences and the Consolidated Fund is hereby to the necessary extent appropriated accordingly.

(5) In this section, '**licence value**' in relation to the former licences means the amount calculated in accordance with the formula [specified]." (emphasis in italics added)

28 The expression "new licences" was not defined in the 1994 Act. However, "licence" was defined to mean "the wagering licence or the gaming licence granted under Part 2" of the 1994 Act; "gaming licence" was defined to mean "the gaming licence granted under Part 2" of the 1994 Act; and "wagering

licence" was defined to mean "the wagering licence granted under Part 2" of the 1994 Act[19].

29 Why was s 21 included in the 1994 Act? The State sought to maximise the amount raised by the privatisation of TAB. As noted earlier, the State had been advised that the amount raised would be substantially reduced if the profit forecasts in the Tabcorp prospectus included amortisation of the licences over their 18-year terms. The State was advised that amortisation could be avoided if Tabcorp was entitled to repayment of the licence consideration at the end of Tabcorp's licences in 18 years' time. It was for that reason that s 21(1) of the 1994 Act contained the terminal payment provision.

2003 Act

30 The 1991 Act and the 1994 Act were repealed and materially re-enacted in the 2003 Act.

31 The general prohibition on gambling (including gaming, wagering and betting) was retained[20]. The duopoly created in 1992 was retained. Tatts and Tabcorp were dealt with in different Chapters of the 2003 Act. That was unsurprising. Tatts held a gaming operator's licence under the 1991 Act. Division 3 of Pt 4 of Ch 3 of the 2003 Act materially re-enacted the provisions of the 1991 Act which were applicable to Tatts and its gaming operator's licence.

32 Tabcorp, however, held its conjoined wagering licence and gaming licence under the 1994 Act. Those licences were addressed in Pt 3 of Ch 4 of the 2003 Act[21]. The purposes of Ch 4 included to make provision for the carrying on of licensed wagering and betting by the issue of a wagering licence[22] and, no less importantly, "to provide for the issue of a gaming licence in conjunction with the issue of a wagering licence, allowing the licensee [namely, Tabcorp] to conduct gaming in accordance with Chapter 3"[23]. In other words, an object of Ch 4 was

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19 s 3(1) of the 1994 Act.

20 Ch 2 of the 2003 Act.

21 See also cl 4.2(1) and (2) of Sched 7 to the 2003 Act.

22 s 4.1.1(a)(i) of the 2003 Act.

23 s 4.1.1(b) of the 2003 Act.

to ensure that Tabcorp conducted gaming in Victoria on substantially the same terms as Tatts did under Ch 3.

33 Part 3 of Ch 4 of the 2003 Act, headed "Wagering Licence and Gaming Licence", materially re-enacted the provisions of the 1994 Act which were applicable to Tabcorp and its wagering licence and gaming licence. Part 3 of Ch 4 comprised a number of Divisions. Division 1, headed "Authority of Licences", identified the activities authorised to be conducted on the grant of a wagering licence[24] and a gaming licence[25]. "[W]agering licence" was defined in the 2003 Act to mean "the wagering licence granted under Part 3 of Chapter 4"[26]. Similarly, "gaming licence" was defined in the 2003 Act to mean "the gaming licence granted under Part 3 of Chapter 4"[27].

34 Sections 4.3.1 and 4.3.2, which dealt with the rights conferred by the wagering licence and the gaming licence respectively, were included in Div 1, and were in substantially identical terms to ss 6 and 7 of the 1994 Act. Significantly, s 4.3.2 provided that the gaming licence conferred on the licensee (namely, Tabcorp) "the same authority as is conferred on the holder of a gaming operator's licence under Chapter 3" (namely, Tatts) as well as the authority to conduct and promote club keno games in Victoria. Again, the duopoly was maintained.

35 Section 4.3.3 reinforced the duopoly by providing that the Chapter did not authorise the operation at the same time of more than one wagering licence or more than one gaming licence. Moreover, those licences were not transferable[28].

36 Division 2 of Pt 3 of Ch 4, headed "Grant of Licences", addressed, amongst other things, the process of applying for a wagering licence and a gaming licence[29], the matters to be considered in determining an application for

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24 s 4.3.1 of the 2003 Act.

25 s 4.3.2 of the 2003 Act.

26 s 1.3(1) of the 2003 Act.

27 s 1.3(1) of the 2003 Act.

28 s 4.3.4 of the 2003 Act.

29 s 4.3.5 of the 2003 Act.

those licences[30], the grant of a wagering licence and a gaming licence[31], and the duration of those licences and licence conditions[32]. An application for the grant of a wagering licence and a gaming licence had to be accompanied by, amongst other things, a statement of the premium payment offered by the applicant[33].

37 Section 4.3.9(2) was significant. It provided that if the Governor in Council was unlikely to grant new licences before the expiration of the term of 18 years of the licences held by the current licensee, the Governor in Council could approve the extension of the term of the current licences until the commencement of the new licences or for any such shorter period as specified.

38 Division 3 of Pt 3 of Ch 4, headed "Entitlement of Former Licensee", re-enacted in substantially identical terms the terminal payment provision previously contained in s 21(1) of the 1994 Act. Section 4.3.12 of the 2003 Act provided:

> "(1) 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.
>
> (2) The person who was the holder of the former licences is entitled to the payment under sub-section (1) whether or not the person was, or was entitled to be, an applicant for the new licences.
>
> (3) Sub-section (1) does not apply if the holder of the former licences has been wound up." (emphasis in italics added)

39 The formula for calculating the "licence value" of the former licences was set out in s 4.3.13 and when payment was to be made was addressed in s 4.3.14. It will be necessary to return to consider these provisions later in these reasons.

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30 s 4.3.6 of the 2003 Act.

31 s 4.3.8 of the 2003 Act.

32 s 4.3.9 of the 2003 Act.

33 s 4.3.5(3)(c) of the 2003 Act.

40 A number of other aspects of Ch 4 should be noted. The definition of "licence" that had been in s 3(1) of the 1994 Act was omitted. That was not surprising. As noted earlier, multiple pieces of legislation in Victoria regulating gambling in its various forms (by the grant of various kinds of statute-specific licences) were re-enacted and consolidated in the 2003 Act. A single definition of the word "licence" would have been inapt. However, for the purposes of Ch 4 only, "licensee" was defined to mean the holder of the wagering licence and the gaming licence[34].

The Premier's announcement, the 2008 Amendments and the 2009 Amendments

41 On 10 April 2008, the Premier of Victoria announced that the State would introduce a new structure for Victoria's gaming industry, which would fundamentally reshape that industry, as part of a broader reform of all gaming and wagering in Victoria. The consequence was that Tabcorp's and Tatts' gaming licences would not be renewed. The Premier's announcement stated that:

> "The Government's decision represents an entirely new regulatory model for the operation of wagering, gaming and keno in Victoria after the expiration of the current licences in 2012, and the Government has formed the view that neither [Tatts] nor Tabcorp are entitled to compensation."

42 The reference to "current licences" was, of course, a reference to the licences held by Tabcorp and Tatts. The new structure was relevantly introduced through amendments to the 2003 Act passed in 2008 in respect of wagering[35] ("the 2008 Amendments") and in 2009 in respect of gaming[36] ("the 2009 Amendments").

43 The text of s 4.3.12 was not altered by the 2008 Amendments or the 2009 Amendments. However, s 4.3.4A was inserted into Pt 3 of Ch 4 of the 2003 Act by the 2008 Amendments. Section 4.3.4A(1) provided:

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34 s 4.1.2 of the 2003 Act.

35 *Gambling Regulation Amendment (Licensing) Act* 2008 (Vic).

36 *Gambling Regulation Amendment (Licensing) Act* 2009 (Vic); *Gambling Regulation Amendment Act* 2009 (Vic).

> "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."

44 Put simply, at the expiration of the wagering licence and the gaming licence then held by Tabcorp, no further or new wagering or gaming licence would be issued. There was to be a new regime. A similar provision was inserted into Ch 3 of the 2003 Act in relation to the licence held by Tatts[37]. It limited the application of Pt 4 of Ch 3 to the gaming operator's licence issued to Tatts on 14 April 1992 and then provided that the Part "does not authorise the grant of any further gaming operator's licence".

45 As part of that new regime, the 2008 Amendments created a new "wagering and betting licence" under a new Pt 3A of Ch 4 of the 2003 Act which authorised the holder of such a licence to conduct wagering and approved betting competitions[38]. The amendments expressly provided that a wagering and betting licence could not be issued "that has effect" at any time while the wagering licence and the gaming licence were in effect under Pt 3 of Ch 4[39]. In other words, the new regime came into operation once the licences under the existing duopoly expired. The 2008 Amendments also inserted a new Ch 6A into the 2003 Act which provided for the grant of a 10-year licence that permitted its holder to conduct keno games[40].

46 The 2009 Amendments inserted Pt 4A, which provided for GMEs to be allocated to venue operators, into Ch 3 of the 2003 Act[41]. A GME permitted the holder to conduct gaming on an approved gaming machine[42].

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37 s 3.4.3 of the 2003 Act.

38 s 4.3A.1 of the 2003 Act.

39 s 4.3A.8(2) of the 2003 Act.

40 ss 6A.3.1, 6A.3.7 and 6A.3.11 of the 2003 Act.

41 s 25 of the *Gambling Regulation Amendment (Licensing) Act* 2009 (Vic).

42 s 3.4A.2 of the 2003 Act.

Subsequent events

47 On 7 June 2010, the Minister for Gaming created 27,500 GMEs with an effective date of 16 August 2012, being the day after Tabcorp's wagering licence and gaming licence expired. GMEs were allocated to holders of venue operator's licences. The result was that the gaming operations which Tabcorp conducted under its gaming licence ceased and were then carried on by the holders of GMEs. On about 19 December 2011, a subsidiary of Tabcorp obtained the new wagering and betting licence, which also took effect from 16 August 2012, upon the payment of a substantial premium. The new keno licence was also issued, to a different subsidiary of Tabcorp. The State received total payments of approximately $1.45 billion for these new licences.

48 The State made no payment to Tabcorp under s 4.3.12(1) of the 2003 Act. On 24 August 2012, Tabcorp issued proceedings in the Supreme Court of Victoria seeking payment of $686.83 million, plus interest, pursuant to the terminal payment provision.

Previous decisions

49 The primary judge found that the aggregate authorities granted under the new regime (the keno licence and the GMEs) authorised substantially the same kind of activities as those authorised by Tabcorp's gaming licence under the 2003 Act prior to the 2008 Amendments and the 2009 Amendments[43]. But the primary judge dismissed Tabcorp's statutory case on the basis that "the grant of new licences" in s 4.3.12 of the 2003 Act was confined to new licences granted under Pt 3 of Ch 4 of the 2003 Act[44]. The Court of Appeal (Nettle, Osborn and Whelan JJA) dismissed Tabcorp's appeal from that decision[45].

Construction of s 4.3.12 of the 2003 Act

50 As at 16 August 2012, after Tabcorp's licences expired and the new regime came into effect, s 4.3.12, found in Div 3 of Pt 3 of Ch 4 of the 2003 Act, relevantly provided:

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43 *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301 at [159].

44 *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301 at [75], [130].

45 *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [23]-[25].

> "(1) 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.
>
> (2) The person who was the holder of the former licences is entitled to the payment under subsection (1) whether or not the person was, or was entitled to be, an applicant for the new licences." (unbolded emphasis in italics added)

51 The phrase "new licences" in s 4.3.12(1) was not defined. The word "licence" was not defined. However, for the purposes of Ch 4 of the 2003 Act only, "licensee" was defined to mean "the holder of the wagering licence and the gaming licence"[46]. As noted earlier, the phrases "wagering licence" and "gaming licence" were defined in s 1.3(1) for the purposes of the 2003 Act. "[W]agering licence" meant "the wagering licence granted" under Pt 3 of Ch 4 of the 2003 Act. "[G]aming licence" meant "the gaming licence granted" under Pt 3 of Ch 4 of the 2003 Act.

52 Accordingly, having regard to those defined terms in the 2003 Act and, in particular, the defined meaning of "licensee" for Ch 4 of the 2003 Act, s 4.3.12(1) should be read:

> "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 [holder of the wagering licence granted under Pt 3 of Ch 4 of the 2003 Act and the gaming licence granted under Pt 3 of Ch 4 of the 2003 Act], whichever is the lesser."

53 The phrase "grant of new licences" in the first line of s 4.3.12(1) was a reference to, and could only be a reference to, the grant of a new wagering licence and a new gaming licence under Pt 3 of Ch 4 of the 2003 Act. That construction is compelled by the text of s 4.3.12(1).

54 First, Pt 3 of Ch 4, which contained s 4.3.12, was headed "Wagering Licence and Gaming Licence". The heading to Ch 4 of the 2003 Act, and the headings to its Parts and its Divisions, formed part of the 2003 Act[47]. The subject

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46 s 4.1.2 of the 2003 Act.

47 s 36(1) of the *Interpretation of Legislation Act* 1984 (Vic).

matter of the Part was the wagering licence and the gaming licence. Division 1 of Pt 3, headed "Authority of licences", identified the activities authorised to be conducted on the grant of a wagering licence and a gaming licence. It comprised five sections. Each reinforced the conclusion that the Part was dealing with a sole subject matter – the conjoined wagering licence and gaming licence.

55 Sections 4.3.1 and 4.3.2 dealt respectively with the rights conferred by the wagering licence and the gaming licence. Significantly, s 4.3.2 provided that the gaming licence conferred on the licensee (namely, Tabcorp) "the same authority as is conferred on the holder of a gaming operator's licence under Chapter 3" (namely, Tatts) as well as the authority to conduct and promote club keno games in Victoria. That section maintained the duopoly. Section 4.3.3 reinforced the duopoly by providing that Ch 4 of the 2003 Act did not authorise the operation at the same time of more than one wagering licence or more than one gaming licence. Section 4.3.4 provided that the wagering licence and the gaming licence were not transferable.

56 Section 4.3.4A was also in Div 1 of Pt 3 of Ch 4 of the 2003 Act. It was not inserted into the 2003 Act until 2008. It will be necessary to return to address this section later in these reasons.

57 Division 2 of Pt 3 of Ch 4, headed "Grant of licences", addressed the process of applying for a wagering licence and a gaming licence, the matters to be considered in determining an application for those licences, the grant of a wagering licence and a gaming licence, and the duration of those licences and licence conditions. An application for the grant of a wagering licence and a gaming licence had to be accompanied, amongst other things, by a statement of the premium payment offered by the applicant. Each licence was for a term of 18 years (or such longer term determined by the Governor in Council) and was subject to the conditions set out in the licence and any conditions imposed by the 2003 Act.

58 That brings us to Div 3 of Pt 3 of Ch 4, headed "Entitlement of former *licensee*" (emphasis added), which contained s 4.3.12. As noted earlier, "licensee" was a defined term and s 4.3.12(1) must be read as incorporating that definition. Next, the heading to s 4.3.12, "Entitlement of former licensee on grant of new licences", again referred to the former holder of the wagering licence and the gaming licence and supports the conclusion that the reference to "licences" throughout s 4.3.12 is a reference to the wagering licence and the gaming licence.

59 That conclusion is inevitable given the text of s 4.3.12 and Pt 3 of Ch 4 of the 2003 Act. There is nothing in s 4.3.12 to suggest that the word "licences" in that section can or should be distinguished from any of the other sections in Pt 3 of Ch 4 where the word "licences" appeared. Indeed, a careful reader will notice that the headings and provisions in Pt 3 of Ch 4 referred interchangeably to "licences" and "the wagering licence and the gaming licence". Why? Because the wagering licence and the gaming licence were the sole subject matter of the Part. Indeed, none of the provisions in Pt 3 of Ch 4 were directed to, or concerned, any subject matter other than the wagering licence and the gaming licence held by Tabcorp. Each of the remaining Divisions in Pt 3 of Ch 4 had as its exclusive subject matter the wagering licence and the gaming licence[48].

60 Next, s 4.3.12(1) provided that the holder of the former wagering licence and gaming licence "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" (emphasis added). The two methods of calculation reinforced the conclusion that the reference to "the grant of new licences" in the first line of s 4.3.12(1) is a reference to the grant of a new wagering licence and a new gaming licence.

61 A method for calculating the payment provided for in s 4.3.12(1) was by reference to "the premium payment paid by the new licensee". As noted earlier, by reason of the definition of "licensee" for the purposes of Ch 4, that was to be read as "the premium payment paid by the new [holder of the wagering licence and the gaming licence]". The event which triggered that limb of the calculation was, of course, the grant of the "new licences" referred to in the opening words of s 4.3.12(1).

62 And it is important to recall that under Pt 3 of Ch 4, an applicant for a wagering licence and a gaming licence was obliged to offer a premium payment at the time of application[49] and an applicant was only granted a wagering licence and a gaming licence on the payment of the premium payment[50]. No premium

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48 Div 4 (Operators), Div 5 (Regulation of shareholding interests) (repealed in 2010), Div 6 (Further licensing restrictions and requirements), Div 7 (Disciplinary action and cancellation), Div 8 (Further obligation to provide information) (inserted in 2009).

49 s 4.3.5(3)(c) of the 2003 Act.

50 s 4.3.8(1) of the 2003 Act.

payment was payable for the allotment of GMEs[51]. In fact, under s 3.4A.5(9)(b) of the 2003 Act, the Minister could determine "whether an amount or amounts must be paid by a person to whom a gaming machine entitlement is allocated". That provision expressly contemplated that the Minister could exercise a discretion as to whether a person allocated a GME must make a payment for it and as to the amount of that payment (if any) for the allotment of a GME. There was no indication in the terms of the 2003 Act that GMEs might be allocated so as to continue the duopoly. Given that GMEs were to be allocated only to venue operators, the financial considerations at play in fixing the licence value and premium payment under s 4.3.12 have no place in fixing the amount payable for a GME. And there was no indication in the 2003 Act that some or all of the receipts for allocations of GMEs were to be appropriated to the terminal payment entitlement under s 4.3.12, unlike the premium payment for a new wagering licence and a new gaming licence.

63 The alternative method of calculation in s 4.3.12 was the payment of an amount equal to the licence value of the "former licences". In its terms, "former licences" was not limited to the initial licences held by Tabcorp but would apply on the expiry of both the initial licences held by Tabcorp and any later wagering licences and gaming licences. The formula for calculating the "licence value of the former licences" was contained in s 4.3.13. Integers in that calculation were amounts referable to wagering and gaming activities conducted by the former holder of the licences. As the State submitted, there was a logic in the terminal payment entitlement in s 4.3.12(1). The former licensee was to receive the lesser of the value of *its* licence (calculated in accordance with the formula in s 4.3.13) or the premium payment paid by the new licensee under s 4.3.8.

64 Both methods of calculating the payment under s 4.3.12 were ascertainable. Both methods were expressly provided for in Pt 3 of Ch 4. The Part was internally consistent and coherent. Contrary to Tabcorp's contentions, there was nothing to suggest that, in s 4.3.12(1), the phrase "new licences" was intended to include the grant of licences other than a wagering licence and a gaming licence or that the phrase "new licensee" was intended to include the holder of authorities other than a wagering licence and a gaming licence.

65 The matter may be tested this way. Tabcorp's contention that the phrase "grant of new licences" in s 4.3.12 was generic (and was capable of extending to

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51 s 3.4A.5(9)(b) and (c) of the 2003 Act.

and intended to extend to the allotment of GMEs) would require the Court to accept that, in a single section, and for the first and only time in Pt 3 of Ch 4 of the 2003 Act, Parliament adopted a generic and ambulatory meaning of the term "licences" in circumstances where the term had been, and continued to be, consistently used in a confined and defined way throughout the Part. In fact, Tabcorp's construction of "new licences" would impermissibly involve giving the term "licences" a different meaning within a single section (s 4.3.12) and, indeed, within a single sub-section (s 4.3.12(1)). There is nothing in the text or context of s 4.3.12 that supports Tabcorp's construction. A consistent meaning should ordinarily be given to a particular term wherever it appears in a suite of statutory provisions[52].

66 The result is that the phrase "grant of new licences" in the first line of s 4.3.12(1) referred to the grant of a new wagering licence and a new gaming licence under Pt 3 of Ch 4 of the 2003 Act. This meant that the trigger or pre-condition to Tabcorp receiving payment under s 4.3.12 – the grant of a new wagering licence and a new gaming licence under Pt 3 of Ch 4 – did not occur. Tabcorp had no entitlement to payment unless a new wagering licence and a new gaming licence were issued to a new licensee. They were not issued.

67 In fact, Tabcorp's entitlement to such a payment was not guaranteed because there was no guarantee that any new wagering and gaming licences would be issued to anyone at any time. Tabcorp's entitlement to payment was contingent upon the issue of a new wagering licence and a new gaming licence to a new licensee. That did not occur.

Legality

68 It is for that reason that Tabcorp's submissions that s 4.3.12 of the 2003 Act somehow engaged the principle of legality[53] should be rejected. The principle of legality, as a principle of statutory construction, requires that clear language be used in legislation if a person is to be deprived of a valuable right.

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52 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; [1975] HCA 41; *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32]; [2013] HCA 52; *Selig v Wealthsure Pty Ltd* (2015) 89 ALJR 572 at 578 [29]; 320 ALR 47 at 55; [2015] HCA 18.

53 See, for example, *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *Coco v The Queen* (1994) 179 CLR 427 at 436-438; [1994] HCA 15; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131.

Tabcorp's submission that the principle was engaged failed to address the contingent – as distinct from vested – nature of the right to the terminal payment[54] and the limited interest to be protected by that right. Tabcorp's interest was limited in a number of ways. The right did not arise simply upon the expiration of the former licences. It arose on the issue of new licences. That the Government might decide not to continue the duopoly by issuing new licences was a commercial risk that the duopolists knew existed from 1992. For those reasons, Tabcorp's interest could not be described as the value of its gaming business undiminished by the amortisation of the value of its wagering licence and its gaming licence. The terminal payment entitlement did not protect Tabcorp against the amortisation of the value of its now expired licences. The State did not guarantee the continuation of the duopoly. And, in any event, the "entitlement to payment" was not taken away. The event that was the trigger for it simply did not happen.

Construction of s 4.3.4A(1)

69 It is then necessary to address s 4.3.4A in Div 1 of Pt 3 of Ch 4. Section 4.3.4A was inserted into the 2003 Act by the 2008 Amendments. It is worth restating sub-s (1):

> "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."

70 That sub-section comprises two elements. It provides that Pt 3 of Ch 4 applies only to Tabcorp's wagering licence and gaming licence. It then provides that Pt 3 of Ch 4 does not authorise the grant of any further wagering licence or gaming licence.

71 Section 4.3.4A was part of the broader reform of gaming and wagering in Victoria announced in 2008 which was to take effect on the expiration of Tabcorp's and Tatts' gaming licences. A consequence was that Tabcorp's and Tatts' gaming licences would not be renewed. And a further consequence followed if "new licences" in s 4.3.12 was construed as limited to new wagering or gaming licences: the trigger or pre-condition to Tabcorp's entitlement to payment under s 4.3.12 – the issue of a new wagering licence and a new gaming licence – had been removed by the State. No licences of those kinds could be

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54 cf *Clissold v Perry* (1904) 1 CLR 363 at 373; [1904] HCA 12.

issued. Section 4.3.4A(1) expressly provided that such licences would not – indeed, could not – be issued.

72 Tabcorp submitted that if "grant of new licences" in s 4.3.12 were limited to the grant of a new wagering licence and a new gaming licence, then, by reason of the operation of s 4.3.4A, s 4.3.12 would be deprived of "operative effect"[55], "practical utility"[56] and "any practical content"[57]. That submission hides more than it reveals.

73 As the State submitted, the insertion of s 4.3.4A into the 2003 Act achieved a number of objectives. First, it brought about a "staged sunset" of the old gaming regime. After s 4.3.4A was inserted, some provisions of Pt 3 of Ch 4 ceased to have a continuing operation[58] while other provisions of Pt 3 continued to operate until Tabcorp's licences expired[59]. Second, s 4.3.4A limited the operation of some sections in Pt 3 of Ch 4 so that they were only applicable to temporary licences[60] in the event that Tabcorp's licences were cancelled prior to their expiration[61]. Third, s 4.3.4A imposed an end date on the whole of the Part by reference to the date that Tabcorp's licences expired. On that date, the whole of Pt 3 of Ch 4 could no longer operate.

74 Those outcomes were consistent with the Government's stated objectives – "an entirely new regulatory model for the operation of wagering, gaming and keno in Victoria after the expiration of the current licences in 2012"[62]. The duopoly was to end. It was to end at the expiration of Tabcorp's licences,

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55 See *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [24].

56 See *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [24].

57 See *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [30].

58 ss 4.3.5(3)(d), 4.3.6-4.3.8, 4.3.9(2), 4.3.13 and 4.3.14 of the 2003 Act.

59 ss 4.3.1-4.3.4, 4.3.5(1)-(3)(c), 4.3.5(4)-(5), 4.3.9(1), 4.3.10-4.3.11 and 4.3.15-4.3.34 of the 2003 Act.

60 Under s 4.3.33 of the 2003 Act.

61 s 4.3.4A(2) read with ss 4.3.5(1)-(3)(c) and 4.3.5(4)-(5) of the 2003 Act.

62 See [41] above.

and not before. Section 4.3.4A achieved these objectives. Therefore, contrary to Tabcorp's submissions, if "grant of new licences" in s 4.3.12 was limited to the grant of a new wagering licence and a new gaming licence, s 4.3.12 was not deprived of "any practical content"[63] by s 4.3.4A. The principle of redundancy was not engaged[64]. That construction of ss 4.3.4A and 4.3.12 did not result in any provision, clause, sentence or word of Pt 3 of Ch 4 of the 2003 Act being superfluous, void or insignificant[65].

75 Tabcorp contended that s 4.3.4A was inserted into the 2003 Act for different purposes from those put forward by the State. The first purpose was said to be to ensure that there was no overlap between the old and new regimes. That contention should be rejected. Section 4.3.4A was not directed to ensuring that there was no overlap between the old and new regimes. That objective was instead achieved by s 4.3A.8(2)[66], which expressly provided that a licence that "has effect" could not be issued under the new regime "at any time while the wagering licence and the gaming licence are in effect under Part 3 of this Chapter".

76 The second purpose for s 4.3.4A identified by Tabcorp was to "cut back to a single iteration the operation of [s] 4.3.12 to allow it to apply in respect of [Tabcorp's] licences but not other licences"[67]. That contention should also be rejected. If the "grant of new licences" in s 4.3.12(1) referred to licences other than the wagering licence and the gaming licence, such as GMEs, *and* the holder of the licences last in force is Tabcorp (as contended for by Tabcorp), it is readily apparent that the operation of s 4.3.12 cannot be "cut back to a single iteration". 27,300 GMEs were allocated to multiple licensed venue operators. On Tabcorp's own construction, s 4.3.12 would not operate once but rather would operate each and every time a GME was allocated because, on each occasion, Tabcorp would

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63 See *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [30].

64 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414; [1905] HCA 11; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

65 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414.

66 Inserted into the 2003 Act by the 2008 Amendments at the same time as s 4.3.4A. See also s 3.4A.1(1)(c) of the 2003 Act.

67 [2015] HCATrans 288 at 546-548.

be the holder of the licences last in force. And questions about the calculation of the payment under the balance of s 4.3.12(1) would also remain[68].

Conclusion on proper construction of s 4.3.12(1) of the 2003 Act

77 The Court of Appeal was right to conclude that "new licences" in s 4.3.12(1) of the 2003 Act must mean a new wagering licence and a new gaming licence granted under Pt 3 of Ch 4 of the 2003 Act[69]. The Court of Appeal was also right to say that the conclusion followed from textual considerations in the 2003 Act[70]. Both the relevant legislative history and the commercial context revealed by the legislation also support that conclusion. Those matters will now be addressed.

Legislative history

78 The legislative history of s 4.3.12, the regulation of the gaming industry in Victoria and the commercial context of the 2003 Act support and are consistent with the phrase "new licences" in s 4.3.12(1) meaning a new wagering licence and a new gaming licence granted under Pt 3 of Ch 4 of the 2003 Act.

79 As noted earlier, gambling activity involving the use of gaming machines was legalised in Victoria in 1991. From 1992 until the expiration of Tabcorp's and Tatts' licences in 2012, the gaming machine industry was a duopoly. Whilst that duopoly remained in place, the statutory framework addressed the specific licences held by Tabcorp and Tatts. Tatts held its licence under the 1991 Act. Tabcorp, because of TAB's privatisation, held its conjoined licences under the 1994 Act.

1994 Act

80 As seen earlier, the predecessor to s 4.3.12 in the 2003 Act was s 21 of the 1994 Act. Section 21 of the 1994 Act appeared in "Part 2—Wagering Licence and Gaming Licence", as the first section in Div 4 ("Entitlement of former licensee"), immediately following Div 3 ("Grant of licences after initial licences"). Section 21(1) provided:

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68 See [60]-[64] above.

69 *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [23].

70 *Tabcorp Holdings Ltd v Victoria* [2014] VSCA 312 at [23(1)-(8)].

> "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."

81 Unlike in the 2003 Act, "licence" was defined in the 1994 Act in s 3(1) to mean "the wagering licence or the gaming licence granted under Part 2" of the 1994 Act. The term "licensee" was also defined in s 3(1) of the 1994 Act to mean "the holder of the wagering licence and the gaming licence".

82 The addition of the adjective "new" did not alter the meaning of "licence" in s 21(1). It simply referred to new (further) licences of the same character. As enacted, the word "licence" bore the specific meaning contended for by the State, unambiguously referring to the grant of a wagering licence and a gaming licence pursuant to s 20 of the 1994 Act. Contrary to Tabcorp's submissions, there was nothing in the text and context of s 21 of the 1994 Act to permit the phrase "new licences" to be assigned a different, generic meaning untied to the defined meaning of "licence". That conclusion is reinforced by the fact that the phrase "new licences" also appeared in s 20(3) (part of the immediately preceding provision) where that phrase could only refer to the wagering licence and the gaming licence. The subject matter of s 20 was the grant of a wagering licence and a gaming licence. Section 20(3) dealt with the Governor in Council's power to extend licences. It provided:

> "If … the Governor in Council is unlikely to grant the licences before the expiration of the term of 18 years of the licences held by the current licensee, the Governor in Council may … approve the extension of the term of the current licences until the commencement of the new licences or for such shorter period as is specified …"

83 Consistently with the defined terms, the "current licences" were the wagering licence and the gaming licence held by Tabcorp and the "new licences" were the new wagering licence and the new gaming licence to be granted under s 20(1) of the 1994 Act. The 1994 Act did not make provision for any other kinds of licences which could conceivably have fitted the description of "new licences" as used in s 20 or s 21.

2003 Act

84 The 2003 Act has been addressed. There is nothing to suggest that the legislature determined in the course of an exercise intended to "re-enact and

consolidate"[71] the previous legislation to alter the meaning of the term "licences", or the phrase "new licences", when it re-enacted s 21 of the 1994 Act as ss 4.3.12 to 4.3.14 of the 2003 Act.

2008 Amendments and 2009 Amendments

85 Only two changes were made to Pt 3 of Ch 4 of the 2003 Act by the 2008 Amendments. Section 4.3.4A, which has been addressed, was inserted[72]. The second change was to the provisions dealing with the appointment of a temporary licensee. In s 4.3.33(3), the words "a wagering and betting licence under Part 3A" replaced the words "another licence under this Part". This change was significant. It shows that where Parliament intended there to be a change in meaning where licences were referred to, it expressly provided for it. Each amendment confirmed that "new licences" in s 4.3.12 had a specific meaning, namely, a wagering licence and a gaming licence under Pt 3 of Ch 4. The 2009 Amendments did not bear on the meaning of "new licences" in s 4.3.12.

Conclusion

86 This legislative history supports the conclusion that the words "new licences" in s 4.3.12 of the 2003 Act mean a wagering licence and a gaming licence issued under Pt 3 of Ch 4 of the 2003 Act.

87 Indeed, the legislative history identifies two significant deficiencies in Tabcorp's argument. Tabcorp failed to identify at which point in this legislative history the expression "new licences" ceased to refer to licences of the kind issued to Tabcorp under Pt 2 of the 1994 Act (materially re-enacted in Pt 3 of Ch 4 of the 2003 Act). And Tabcorp failed to provide any explanation of what might have brought about such a change of legislative purpose or the reasons for such a change.

88 Put another way, one would expect a cogent explanation as to why the certainty of the legislative identification of the licences in the earlier legislation was abandoned for the uncertainty of licences which need only be "substantially similar" to the initial licences held by Tabcorp. At no point does the legislative history invite such a comparison or provide any guide as to what might be

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71 s 1.1(1) of the 2003 Act.

72 See [43], [69]-[76] above.

sufficiently "substantially similar". Indeed, in asserting substantial similarity, Tabcorp identified no similarity other than the right to operate a gaming machine, a GME. Section 4.3.12 does not – as Tabcorp's submission requires – provide for the making of a terminal payment to Tabcorp "upon the expiration of its licences and the issue to any person of any licence to operate a gaming machine in any venue for which a venue operator's licence is held".

Commercial context

89 Tabcorp's contention that it was entitled to the payment provided for in s 4.3.12(1) of the 2003 Act because the allocation of the GMEs was the "grant of new licences" within the meaning of that provision also ignored, and was inconsistent with, the commercial context in which the 2003 Act is to be construed.

90 Tabcorp's wagering licence and gaming licence were, together, an instrument of commerce, not merely an abstract legal concept. The legislative framework, from the enactment of the 1994 Act and the consolidation effected by the 2003 Act until the 2008 Amendments, supported the duopoly in legal gaming activities enjoyed by Tabcorp and Tatts.

91 Tabcorp's wagering licence and gaming licence, together, constituted the legal element essential to the operation of a semi-exclusive gaming business in Victoria – namely, the duopoly. At the time of the 2008 Amendments, the relationship between Tabcorp's licences and the duopoly would have been readily apparent to anyone who turned his or her mind to the issue. In the commercial context in which s 4.3.12 operated, a reference to "new licences" in s 4.3.12 as being to new licences of the character of those formerly held by Tabcorp was unmistakable.

92 The terminal payment provision in s 21 of the 1994 Act and s 4.3.12 of the 2003 Act was expressly predicated upon new licences issuing in a context which would mean that they would operate, as instruments of commerce, to authorise the continuation of the duopoly. Once it is appreciated that this is the context in which s 4.3.12 speaks of "new licences", that expression cannot sensibly be understood as speaking of any licence other than that of the character "formerly" held by Tabcorp. If the duopoly were to be discontinued, the machinery for the funding of the payment could not work, because there would be no incoming duopolist (or in Tabcorp's case an ongoing duopolist) to pay either the licence fee or the premium payment which represented the value of the commercial advantage which attached to Tabcorp's gaming licence. Whether the duopoly would continue was a matter ultimately to be determined by the legislature; and

the risk that the legislature might decide not to continue the duopoly was left squarely with the duopolists. Tabcorp seeks to claim compensation for a commercial risk that was always borne by it.

93 To the extent that the terminal payment for which s 4.3.12 provides is said to be "compensation" for that portion of the consideration initially paid to the State by Tabcorp as a result of the non-amortisation of Tabcorp's licences, it was never the case that any "compensation" was to be paid to Tabcorp otherwise than as the value of a share in an ongoing duopoly. The obligation of the State to make a payment to Tabcorp was to be funded by a payment by the new licensee, and that payment would be for Tabcorp's share in the ongoing duopoly.

94 That this was so is apparent from the provisions of the 1994 Act and the 2003 Act concerned with the obtaining of, and payment for, the new licences[73]. Those provisions direct not only the continuation of the licensed duopoly, but also that the funding of the terminal payment was to come from a payment to the State by the new licensee, who would be acquiring, and paying for, the same advantages enjoyed by Tabcorp as a duopolist. That direction was inconsistent with a notion that any moneys raised upon the grant of a licence of any kind to conduct gaming activities, however limited either geographically or functionally, would be aggregated and paid to Tabcorp if the licence which supported the duopoly was no longer in place.

95 Section 4.3.12 operates on the basis that the "new licences" and the "former licences" are not different for the purposes of the determination of licence value or premium payment. As seen earlier, the terminal payment in s 4.3.12(1) was measured by "an amount equal to the licence value of the former licences or the premium payment paid by the new licensee, whichever is the lesser"[74]. Section 4.3.12 contemplates that the terminal payment will represent the value of a half-share in the duopoly which the acquirer of that share agrees to pay. This may be contrasted with the position in relation to the allocation of GMEs to venue operators who neither obtain, nor pay for, any such commercial interest.

Conclusion

96 For those reasons, the appeal should be dismissed with costs.

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73 s 21 of the 1994 Act; ss 4.3.12-4.3.14 of the 2003 Act.

74 See [50] above.