

HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND GORDON JJ

STATE OF VICTORIA

APPELLANT

AND

TATTS GROUP LIMITED

RESPONDENT

Victoria v Tatts Group Limited
[2016] HCA 5
2 March 2016
M83/2015

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 4 December 2014 and in their place order that:*
 - (a) *the appeal be allowed with costs;*
 - (b) *orders 1 and 2 of the orders of Hargrave J made on 27 June 2014 be set aside, and in their place order that the proceeding be dismissed with costs;*
 - (c) *the respondent pay the appellant \$540,467,887.92 with interest, calculated from 27 June 2014.*

On appeal from the Supreme Court of Victoria

Representation

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

N J Young QC with P D Crutchfield QC and N P De Young for the respondent (instructed by Clayton Utz Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Victoria v Tatts Group Limited

Contract – Construction of terms – Where contract used statutory term "gaming operator's licence" – Where contract provided for payment to respondent if "new gaming operator's licence" issued to person other than respondent – Where statutory scheme amended so gaming operator's licence could no longer be issued – Meaning of "new gaming operator's licence" – Whether payment due.

Contract – Construction of terms – Context and purpose – Where commercial context regulated by statutory regime – Where letter from member of Executive annexed to contract – View of reasonable business people.

Contract – Construction of terms – Whether pre-existing contractual right operated independently of statutory right on same subject matter – Whether pre-existing contractual right discharged or abrogated by subsequent legislative enactment.

Words and phrases – "gaming machine entitlement", "gaming operator's licence", "new gaming operator's licence".

Gaming Machine Control Act 1991 (Vic), Pt 3.

Gambling Regulation Act 2003 (Vic), Pts 4 and 4A of Ch 3.

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

Introduction

1 The legalisation of gaming in Victoria in 1991 by the *Gaming Machine Control Act* 1991 (Vic) ("the 1991 Act"), the creation in 1992 of a duopoly in the gaming industry in Victoria by the issue of a gaming operator's licence to each of the Totalisator Agency Board of Victoria ("TAB") and the Trustees of the Will and Estate of the late George Adams ("Tatts"¹) for a term of 20 years², the subsequent privatisation of TAB (resulting in the creation of Tabcorp Holdings Limited ("Tabcorp")) in 1994 and the enactment of the *Gaming and Betting Act* 1994 (Vic) ("the 1994 Act"), as well as the inclusion in the 1994 Act of a "terminal payment provision"³ in favour of Tabcorp, are explained in the reasons published in the related appeal in *Tabcorp Holdings Ltd v Victoria*⁴. That factual and legislative history is also relevant to the resolution of this appeal by the State of Victoria ("the State").

2 This appeal concerns steps taken by the State and Tatts after the privatisation of TAB in 1994. One of those steps was the entry into an agreement between the State and Tatts dated 17 November 1995 ("the 1995 Agreement").

3 Clause 7.1 of the 1995 Agreement provided for a terminal payment to be made to Tatts "[i]f the Gaming Operator's Licence expires without a new gaming operator's licence having issued to [Tatts]". Clause 7.2 then went on to provide that no amount would be payable if a new gaming operator's licence was not issued at all, or was issued to Tatts or a related entity of Tatts.

1 In 1998, that estate was restructured and corporatised and the respondent, Tatts Group Limited, became the holder of the gaming operator's licence previously held by the Trustees. In these reasons, for convenience both the Trustees and Tatts Group Limited are referred to as "Tatts" unless it is necessary to refer to them specifically.

2 Under s 33 of the 1991 Act.

3 s 21(1) of the 1994 Act.

4 [2016] HCA 4 at [11]-[29].

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4 The principal question in this appeal is whether Tatts is entitled to payment under cl 7.1 because the State allocated gaming machine entitlements ("GMEs") to licensed venue operators under s 3.4A.5 of the *Gambling Regulation Act* 2003 (Vic) ("the 2003 Act").

5 The answer to that question turns on whether the primary judge and the Court of Appeal of the Supreme Court of Victoria were correct in concluding that the phrase "new gaming operator's licence" in cl 7.1 was not restricted to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time) but had a broader generic meaning which covered any statutory authority whose effect was to confer on the holder substantially the same rights as were conferred on Tatts by its gaming operator's licence at the time of its expiration.

6 For the reasons that follow, the phrase "new gaming operator's licence" in cl 7 referred to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time). The phrase did not have a generic meaning which covered any statutory authority whose effect was to confer on the holder substantially the same rights as were conferred on Tatts by its gaming operator's licence at the time of its expiration. A "new gaming operator's licence" never issued and Tatts is not entitled to payment under cl 7 of the 1995 Agreement.

Structure

7 These reasons will set out the facts, including the relevant provisions of the 1995 Agreement, the legislative history and events subsequent to the 1995 Agreement. The reasons will then turn to the question of the proper construction of cl 7 of the 1995 Agreement.

Facts

Negotiations with Tatts following the privatisation of TAB

8 Following the privatisation of TAB in 1994, Tabcorp held its conjoined wagering licence and gaming licence under the 1994 Act. Tatts still held its gaming operator's licence under the 1991 Act.

9 The duopoly that had been created in 1992 was retained, but the terms on which Tatts and Tabcorp participated in that duopoly were different. Tabcorp had paid for its conjoined licences and had the benefit of a terminal payment provision. Tatts had not paid for its gaming operator's licence and did not have the benefit of a terminal payment provision.

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10 The State wanted to level the playing field between the duopolists (Tatts and Tabcorp) and to divide that playing field between them (with the limited exception of the Crown Casino). The State also wanted an adequate return from the "co-exclusive" licence which had been provided to Tatts and to put Tatts onto a more equal competitive footing with Tabcorp⁵.

1995 Agreement

11 The State entered into negotiations with Tatts. Those negotiations culminated in the 1995 Agreement. The arrangements in that agreement were broadly similar to those which applied to Tabcorp in relation to gaming⁶.

12 The recitals to the 1995 Agreement provided:

- "A. [Tatts] hold[s] a *Gaming Operator's Licence* in the [State].
- B. Clause 8 of the Gaming Operator's Licence provides for a review of amounts payable by [Tatts] under Section 136 of [the 1991 Act] to the Victorian Casino and Gaming Authority, to be undertaken not later than 1 November 1996. This Agreement when it becomes unconditional constitutes that review.
- ...
- D. This Agreement recognises that the *business* carried on by [Tatts] is to be regulated on terms substantially as favourable as the terms regulating the gaming machine business operated by [Tabcorp] or its operator, and is to otherwise have the benefit of the terms of this Agreement.
- E. The parties have agreed to enter into an arrangement on the terms and conditions contained in this Agreement." (emphasis added)

13 The term "Gaming Operator's Licence" was defined in cl 1.1 of the 1995 Agreement to mean "the gaming operator's licence issued to [Tatts] pursuant to [the 1991 Act]". "[B]usiness" was defined in cl 1.1 of the

5 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 June 1996 at 565-566 in relation to the history of the negotiations.

6 *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4 at [18]-[29].

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1995 Agreement to mean "[Tatts'] gaming machine business carried on in the [State], including the acquisition, supply, installation and operation of gaming machines".

14 Clause 8 of the 1995 Agreement, entitled "Draft Legislation", relevantly provided:

"8.1 The Minister will cause to be drafted and *will use his best endeavours to procure* that the Parliament of Victoria enacts legislation which:

8.1.1 includes [Tatts'] obligation to pay the Minister in accordance with clause 3 of this Agreement;

8.1.2 includes the obligation of the [State] to pay the Licence Value to [Tatts] in accordance with the provisions of clause 7 of this Agreement;

...

8.1.6 includes provision requiring the holder of any new gaming operator's licence issued following the expiry of the Gaming Operator's Licence to pay any licence fee by way of lump sum premium upon the grant of the new licence;

8.1.7 includes any other provision deemed necessary or desirable to give effect to this Agreement." (emphasis added)

15 So what were the obligations in cll 3 and 7 of the 1995 Agreement? Clause 3 imposed a new obligation on Tatts to pay the State an annual licence fee. The present discounted value of the annual licence fee payments to the State was substantially equivalent to the amount paid by Tabcorp from the proceeds of TAB's privatisation.

16 Clause 7, entitled "Compensation", cannot be understood without reference to cll 5 and 6. Under cl 5, headed "New Licensee", cl 5.2 provided:

"If the Gaming Operator's licence is transferred to, or a new gaming operator's licence is issued to, a related entity of [Tatts] prior to the time at which the Gaming Operator's Licence would expire by effluxion of time, no compensation will be payable to [Tatts] pursuant to clause 7 at the time of such transfer or issue but such related entity will be entitled to the

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benefit of clause 7 as a permitted assignee or properly constituted successor of [Tatts]."

17 By cl 6 of the 1995 Agreement, entitled "Other Gaming Machine Operator", the State and Tatts agreed that:

"... [T]he Minister agrees that for the term of the Gaming Operator's Licence [Tatts'] conduct of the *business* will be regulated on terms substantially as favourable as the terms regulating the gaming machine business operated by [Tabcorp] or its operator. At the time of entering into this Agreement the share of net machine income retained by [Tatts] is 33 1/3 percent and other terms regulating the business are contained in the Ministerial Directions document dated 28 August 1995 (annexed as Schedule 1). *Prior to entering into this Agreement [Tatts] received from the Treasurer of Victoria, and considered, the letter annexed to this Agreement as Schedule 2.*" (emphasis added)

18 The letter referred to was addressed to Tatts and signed by the Treasurer of Victoria, and stated:

"LICENCE PAYMENT FOR ELECTRONIC GAMING MACHINES

I am writing to confirm the principles on which the Government of Victoria is reaching agreement with you over the payments relating to your Gaming Operator's Licence.

I must, however, 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 your operations or the terms on which those operations are conducted.

The principles are as follows:-

1. You have been granted a Gaming Operator's Licence pursuant to [the 1991 Act]. This licence gives you a concurrent right (with [Tabcorp] and Crown Limited) to conduct gaming, for a fixed period.
2. The licence will expire on 14 April 2012.

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3. The Government does not currently intend to grant further gaming licences to persons who are not now authorised to conduct gaming or wagering during the licence period.
4. Amounts which may be retained by you by way of commission on gaming will be maintained at 33.33% for the period of the licence.
5. [Tatts] may apply for a new licence after the initial licence terminates and on the same terms as other applicants. The process of awarding a new licence may involve a public tender. It is also expected but not guaranteed that the new licence would be awarded to the highest qualifying bidder. *If the new licensee is not [Tatts], [Tatts] will be entitled to receive from the State capital compensation as provided for in the agreement between the Minister for Gaming and [Tatts], shortly to be entered into [ie the 1995 Agreement].*
6. It is intended that any new licence will be granted on conditions which include conditions substantially to the same effect as those to which [Tatts'] licence is subject.

The Government recognises the importance of the gaming industry to the Victorian economy and, in recognition of that, it will continue to deal with [Tatts] reasonably and in good faith." (emphasis added)

19 It is in that context that cl 7, entitled "Compensation", must be construed. It was a terminal payment provision. It relevantly provided that:

- "7.1 If the *Gaming Operator's Licence* expires without a *new gaming operator's licence* having issued to [Tatts], [Tatts] shall be entitled to be paid, by the [State], an amount of money as compensation for the investment in infrastructure lost. This amount will be equal to the Licence Value of the Gaming Operator's Licence or the premium payment by the new licensee, whichever is the lesser.
- 7.2 *No amount will be payable pursuant to sub-clause 7.1 if a new gaming operator's licence is not issued to any person, or is issued to [Tatts] or a related entity of [Tatts].*
- 7.3 For the purposes of sub-clause 7.1 (but subject to sub-clause 7.4) 'Licence Value' in relation to the former Gaming Operator's Licence means the amount calculated in accordance with the following formula: ...

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7.4 The parties acknowledge that the Licence Value has been determined having regard to the value of [Tatts'] current investment in the gaming industry ..." (emphasis added)

It will be necessary to return to consider the formula later in these reasons.

20 In short, cl 7 provided for a terminal payment to be paid to Tatts "[i]f the Gaming Operator's Licence expires without a new gaming operator's licence having issued to [Tatts]" but for no amount to be payable if a new gaming operator's licence was not issued at all, or was issued to Tatts or a related entity of Tatts.

21 By entering into the 1995 Agreement, the State achieved its two objectives – to level the playing field between the duopolists (Tatts and Tabcorp) and to divide that playing field between them (with the limited exception of the Crown Casino).

22 The different outcomes in the Court of Appeal in *Victoria v Tatts Group Ltd*⁷ and *Tabcorp Holdings Ltd v Victoria*⁸ would entail that those objectives were not achieved.

1996 Act

23 As contemplated by cl 8 of the 1995 Agreement (the State's obligation to use best endeavours to procure legislation), the *Gaming Acts (Amendment) Act* 1996 (Vic) ("the 1996 Act") was enacted. It amended the 1991 Act with effect from 2 July 1996. A stated purpose of the 1996 Act was "to make further provision in relation to gaming operator's licences"⁹.

24 The 1996 Act inserted new ss 33, 33A and 35A to provide for the issue of a new gaming operator's licence on the expiration of Tatts' existing licence and for the payment of compensation to Tatts if the new gaming operator's licence

7 [2014] VSCA 311.

8 [2014] VSCA 312.

9 s 1(a) of the 1996 Act.

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was not granted to Tatts or a related entity¹⁰. These sections addressed cl 7 of the 1995 Agreement. They relevantly provided:

"33. Gaming operator's licence

- (1) Subject to this Act, [Tatts] or any other person may apply to the [Victorian Casino and Gaming] Authority for a gaming operator's licence.
- (2) A licence granted under this section must not commence before the expiry, or earlier termination, of the gaming operator's licence held by [Tatts] immediately before the commencement of section 5 of [the 1996 Act].

33A. Premium payment

- (1) Before a licence is granted under section 33, the applicant must pay to the Treasurer as consideration for the grant of the licence the amount determined by the Treasurer as the premium payment.
- (2) The premium payment is a tax.

...

35A. Entitlement of former licensee on grant of new licence

- (1) If—
 - (a) a gaming operator's licence held by a person ('**the former licensee**') expires; and
 - (b) the [Victorian Casino and Gaming] Authority grants *a gaming operator's licence to a person other than the former licensee*, or a related entity of the former licensee being a licence that commences within 6 months after that expiry; and
 - (c) the [Victorian Casino and Gaming] Authority does not grant a gaming operator's licence before the expiration of that

¹⁰ ss 5 and 6 of the 1996 Act.

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period to the former licensee or a related entity of the former licensee—

the former licensee is entitled to be paid an amount equal to the licence value of the licence held by the former licensee or the premium payment paid by the holder of the licence referred to in paragraph (b), whichever is the lesser.

..." (emphasis added)

25 A new s 135A, entitled "Amounts payable by [Tatts]", was also inserted into the 1991 Act¹¹. In general terms, it required Tatts to pay the annual licence fee equivalent to its obligations under cl 3 of the 1995 Agreement.

Subsequent events

26 This appeal can be decided by reference to the proper construction of the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement. It remains necessary, however, to explain the legislative and other factual history after the 1995 Agreement and the 1996 Act in order to identify what Tatts alleged to be the new licences that triggered its entitlement to payment under cl 7.

(a) 1999 Agreement

27 In July 1998, the Australian Taxation Office issued a Private Ruling which was adverse to Tatts. It ruled that the licence fees paid to the State by Tatts would not be deductible. On 28 June 1999, the State and Tatts entered an agreement purporting to amend the 1995 Agreement to reflect a change in payment arrangements as a result of that adverse Private Ruling ("the 1999 Agreement"). The recitals relevantly recorded that:

- "A. On the 17th day of November 1995 [Tatts] and the [State] entered into [the 1995 Agreement] which inter alia, reviewed amounts to be paid by [Tatts] to the Victorian Casino and Gaming Authority pursuant to Section 136 of [the 1991 Act].
- B. By [the 1996 Act] the Parliament of Victoria legislated to reflect in statutory form the payment requirements contained in clause 3 of the 1995 Agreement.

11 s 9 of the 1996 Act.

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C. The Government of Victoria and [Tatts] have decided for mutual benefit to alter the payment requirements as reflected in the 1995 Agreement and in [the 1996 Act], and for this purpose inter alia, the Government of Victoria has introduced to the Parliament of Victoria and the Parliament of Victoria has passed the *State Taxation Acts (Amendment) Act 1999* (Act No 47/1999, the '1999 Act').

D. The Government of Victoria and [Tatts] have agreed to amend the 1995 Agreement in view of the new statutory payment obligations and the parties wish to reduce their further agreement to writing."

28 The two amendments to the 1995 Agreement may be put to one side. The final clause in the 1999 Agreement, cl 4, entitled "Affirmation", provided that "[t]he parties affirm their obligations to perform and the validity of the 1995 Agreement as amended by this Agreement".

(b) 2003 Act

29 In 2003, multiple pieces of legislation in Victoria regulating gambling in its various forms were re-enacted and consolidated into the 2003 Act.

30 The duopoly was retained. Tabcorp's wagering licence and gaming licence were provided for in Pt 3 of Ch 4 of the 2003 Act. Tabcorp's terminal payment provision in s 21(1) of the 1994 Act was materially re-enacted in s 4.3.12(1) of the 2003 Act.

31 Tatts' gaming operator's licence was provided for in Pt 4 of Ch 3 of the 2003 Act. The phrase "gaming operator's licence" was defined in s 1.3(1) of the 2003 Act to mean "a licence granted under Division 3 of Part 4 of Chapter 3" of the 2003 Act. Section 3.4.2, in Pt 4 of Ch 3, headed "Authority conferred by gaming operator's licence", restated the authority conferred by a gaming operator's licence in substantially the same terms as s 14 of the 1991 Act:

"A gaming operator's licence authorises the licensee and the operator, subject to this Act and any conditions to which the licence is subject—

(a) to obtain from a person listed on the Roll [of Manufacturers, Suppliers and Testers] approved gaming machines and restricted components; and

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

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- (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."

32 The prohibition on holding both a gaming operator's licence and a venue operator's licence at the one time, previously in s 19A of the 1991 Act, was materially re-enacted in s 3.4.9 of the 2003 Act.

33 Sections 3.4.29, 3.4.30 and 3.4.33, in Div 3 of Pt 4 of Ch 3, enacted similar but not identical provisions for the issue of further gaming operator's licences and for the terminal payment provision to those which were previously in ss 33, 33A and 35A of the 1991 Act, relevantly as follows:

"3.4.29 Gaming operator's licence

The Commission, on application by [Tatts] or any other person, may grant a gaming operator's licence to [Tatts] or [the] other person.

3.4.30 Premium payment

- (1) Before a licence is granted under section 3.4.29, the applicant must pay to the Treasurer as consideration for the grant of the licence the amount determined by the Treasurer as the premium payment.
- (2) The premium payment is a tax.

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3.4.33 Entitlement of former licensee on grant of new licence

(1) If—

- (a) a gaming operator's licence held by a person ('**the former licensee**') expires; and
- (b) the Commission grants a gaming operator's licence to a person other than the former licensee, or a related entity of the former licensee, being a licence that commences within 6 months after that expiry; and
- (c) the Commission does not grant a gaming operator's licence before the expiration of that period to the former licensee or a related entity of the former licensee—

the former licensee is entitled to be paid an amount equal to the licence value of the licence held by the former licensee or the premium payment paid by the holder of the licence referred to in paragraph (b), whichever is the lesser.

..."

- (c) Listing on the ASX of the shares in Tatts and the 2005 Transfer Agreement

34 Following an announcement by the Trustees of an intention to corporatise and to list on the ASX, the Trustees requested and the State prepared amending legislation to permit the transfer of the existing gaming operator's licence (and other authorisations) from the Trustees to what is now Tatts Group Limited. The *Gambling Regulation (Amendment) Act 2004* (Vic) was assented to in September 2004.

35 Then, on 31 May 2005, the State, the Trustees and what is now Tatts Group Limited executed a "Transfer Agreement". Recital D recorded that they wished to enter into the Transfer Agreement to:

- "(i) facilitate the proposed Corporatisation and Listing [of Tatts];

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- (ii) effect the transfer of the rights and obligations under the 1995 Agreement as amended by the 1999 Agreement together with all rights and obligations of the Trustees arising pursuant to the 1999 Agreement from the Trustees to [what is now Tatts Group Limited]; and
- (iii) facilitate the transfer of the Licences from the Trustees to [what is now Tatts Group Limited]."

36 "Licences" was defined to mean the licences and authorisations then held by the Trustees under the 2003 Act, which included the gaming operator's licence held under that Act.

37 Clause 10 of the Transfer Agreement, headed "1995 Agreement", stated that:

"The rights and obligations of the Trustees arising pursuant to the 1995 Agreement as amended by the 1999 Agreement together with all rights and obligations of the Trustees arising pursuant to the 1999 Agreement are transferred to [what is now Tatts Group Limited] in accordance with clause 11 of the 1995 Agreement, as contemplated by the [*Gambling Regulation (Amendment) Act* 2004 (Vic)]."

- (d) The Premier's announcement, the 2008 Amendments and the 2009 Amendments

38 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."

39 The reference to "current licences" was, of course, a reference to the licences held by Tatts and Tabcorp. The new structure was relevantly introduced

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through amendments to the 2003 Act passed in 2008 in respect of wagering¹² ("the 2008 Amendments") and in 2009 in respect of gaming¹³ ("the 2009 Amendments"). The text of the terminal payment provision in s 3.4.33 of the 2003 Act was not altered by the 2008 Amendments or the 2009 Amendments.

40 Section 3.4.3 was inserted by the 2009 Amendments. It was headed "Application of Part—gaming operator's licences" and it provided:

"This Part applies only with respect to the gaming operator's licence that was issued on 14 April 1992 and does not authorise the grant of any further gaming operator's licence."

Put simply, there was to be a new regime and the duopoly was not to continue.

41 The 2009 Amendments also provided for the creation of GMEs and their subsequent allocation to operators of approved venues¹⁴. By amendments to s 3.4.1 of the 2003 Act, the 2009 Amendments also provided for the expansion of the authority conferred by a venue operator's licence so as to include the acquisition and transfer of GMEs; the conduct of gaming on approved gaming machines in an approved venue operated by the licensee while holding GMEs; selling or disposing of gaming equipment while holding a GME; and servicing, repairing or maintaining gaming equipment through the services of a licensed technician while holding a GME¹⁵.

(e) Allocation of GMEs

42 On 7 June 2010, the Minister for Gaming created 27,500 GMEs with an effective date of 16 August 2012, being the day after Tatts' gaming operator's licence expired. GMEs were allocated to holders of venue operator's licences. The result was that the gaming operations which Tatts conducted under its

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

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

14 By a new Pt 4A of Ch 3 of the 2003 Act, inserted by s 25 of the *Gambling Regulation Amendment (Licensing) Act 2009* (Vic).

15 s 3.4.1(1)(aa)-(ad) of the 2003 Act.

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gaming operator's licence ceased and were then carried on by the holders of GMEs. Tatts did not apply for, or receive, any GMEs. Recipients of the GMEs were required to make payments totalling approximately \$981 million to the State. The State made no payment to Tatts under the 1995 Agreement or under s 3.4.33 of the 2003 Act.

(f) Tatts' claim for payment

43 On 16 August 2012, Tatts issued proceedings seeking, amongst other things, a payment in excess of \$490 million plus interest pursuant to cl 7 of the 1995 Agreement and/or s 3.4.33 of the 2003 Act.

Previous decisions

44 The primary judge upheld Tatts' entitlement to payment under cl 7 of the 1995 Agreement and ordered the State to pay Tatts \$451,157,286 plus interest. The primary judge found that the reference in cl 7 to "the issue of 'a new gaming operator's licence' after expiry of the defined 'Gaming Operator's Licence' would have been understood by a reasonable businessperson as the issue of any licence or other authority of substantially the same kind as [Tatts'] existing gaming operator's licence"¹⁶.

45 The Court of Appeal (Nettle, Osborn and Whelan JJA) upheld that conclusion¹⁷. The Court of Appeal also concluded that the 1995 Agreement was intended to survive the enactment of the 1996 Act incorporating the statutory provisions which the 1995 Agreement envisaged¹⁸. The Court of Appeal stated that "it would be commercially improbable to attribute an intention to the parties that their rights and obligations under the 1995 Agreement should be spent upon the passage of the legislation provided for by cl 8" of the 1995 Agreement¹⁹.

16 *Tatts Group Ltd v Victoria* [2014] VSC 302 at [95].

17 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [133]-[146].

18 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [211]-[215].

19 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [212].

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Proper construction of cl 7 of the 1995 Agreement

Issue

46 Did the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement mean a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time) or any statutory authority whose effect was to confer on the holder substantially the same rights as were conferred on Tatts by its gaming operator's licence at the time of its expiration?

47 As just seen, both the primary judge and the Court of Appeal rejected the State's contention that the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement referred to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time). Both the primary judge and the Court of Appeal concluded that the expression "new gaming operator's licence" in cl 7 of the 1995 Agreement meant "any licence or other authority of substantially the same kind as [Tatts'] existing gaming operator's licence"²⁰.

48 The Court of Appeal stated²¹:

"Whilst it is plain that the State is correct to submit that the gaming operator's licence held by [Tatts] at the date of the 1995 Agreement was specifically defined and identified as one granted under the 1991 Act, it does not follow that 'a new gaming operator's licence' contemplated by cl 7 taking effect some 17 years later was intended to be so confined."

49 The Court of Appeal continued²²:

"[H]ad [honest and reasonable business people in the position of the parties] been asked at the point of entry into the 1995 Agreement whether 'a new gaming operator's licence' meant not only a new gaming operator's licence issued under the 1991 Act (as it might be amended,

20 *Tatts Group Ltd v Victoria* [2014] VSC 302 at [95]. See also *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [147].

21 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [132].

22 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [146].

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re-enacted or replaced from time to time) but also any form of authority which conferred rights to carry on gaming operations in substance the same as the rights which were conferred on [Tatts] by the Gaming Operator's Licence, they would undoubtedly have answered, yes."

50 For the reasons that follow, that construction should not be accepted.

51 The phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement referred to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time). That construction is supported by reference to the text, context and purpose²³ of cl 7 of the 1995 Agreement.

Text of the 1995 Agreement

52 Clause 7 of the 1995 Agreement relevantly stated:

"7.1 If the *Gaming Operator's Licence* expires without a *new gaming operator's licence* having issued to [Tatts], [Tatts] shall be entitled to be paid, by the [State], an amount of money as compensation for the investment in infrastructure lost. This amount will be equal to the Licence Value of the Gaming Operator's Licence or the premium payment by the new licensee, whichever is the lesser.

7.2 *No amount will be payable pursuant to sub-clause 7.1 if a new gaming operator's licence is not issued to any person, or is issued to [Tatts] or a related entity of [Tatts].*

7.3 For the purposes of sub-clause 7.1 (but subject to sub-clause 7.4) 'Licence Value' in relation to the former Gaming Operator's Licence means the amount calculated in accordance with the following formula: ..." (emphasis added)

53 Words and phrases appearing in the 1995 Agreement had, by reason of cl 1.3 of that agreement, the same meaning as in the 1991 Act unless the contrary intention appeared. Section 3(1) of the 1991 Act, at the time of the 1995 Agreement, relevantly defined "gaming operator" to mean "the holder of a gaming operator's licence under Part 3" of the 1991 Act. There was nothing in

23 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 at 998-999 [46]-[51]; 325 ALR 188 at 197-198; [2015] HCA 37.

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the text of cl 7 of the 1995 Agreement to suggest that the phrase "gaming operator" was not to be defined by reference to the meaning in the 1991 Act. The phrase "gaming operator" in cl 7 therefore meant "the holder of a gaming operator's licence under Part 3" of the 1991 Act.

54 The Court of Appeal accepted the State's submission that the phrase "gaming operator's licence" had a clear meaning under the 1991 Act²⁴. That conclusion was not surprising. That phrase was used throughout the 1991 Act and had one relevant meaning – a gaming operator's licence issued under Pt 3 of the 1991 Act.

55 However, contrary to the view expressed by the Court of Appeal²⁵, the meaning of the phrase "gaming operator's licence" in cl 7 did not change because of the addition of the word "new". When construing that phrase it is to be presumed, as the State submitted, that the parties used the phrase consistently²⁶. There was nothing in cl 7 to suggest a different meaning.

56 That conclusion is supported by the fact that Tatts' "Gaming Operator's Licence" and the "new gaming operator's licence" referred to in cl 7 were not unconnected instruments. The commercial value of the "new gaming operator's licence" (ie the premium payment to be paid by the new licensee) was treated as one indicator of the amount Tatts could be entitled to if its "Gaming Operator's Licence" expired without a "new gaming operator's licence" being issued to it²⁷. Similarly, the other method of calculation of the amount to which Tatts could be entitled on the expiry of its "Gaming Operator's Licence" was the "Licence Value" of its Gaming Operator's Licence. The Licence Value of Tatts' Gaming Operator's Licence was to be calculated by the application of the formula in cl 7.3, which incorporated reference to \$520 million, the sum generated by the float in respect of Tabcorp's gaming business. In other words, the Licence Value was to reflect the market value of the advantage secured by Tatts' semi-exclusive right to conduct the business of gaming in Victoria. Tatts' "Gaming Operator's Licence" and the "new gaming operator's licence" were not unconnected.

24 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [151].

25 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [149], [151].

26 See, for example, *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; [1973] HCA 36.

27 cl 7.1 of the 1995 Agreement.

57 The ability of any other person to apply for a gaming operator's licence²⁸, and the likely resulting bidding to fix the market value of the new gaming operator's licence provided for under the 1991 Act and the 2003 Act, stand in stark contrast with the statutory price fixing mechanism for GMEs under the 2003 Act. The premium payment referred to in cl 7.1 reflects that to acquire the new gaming operator's licence, the new licensee must have been willing and able to pay a significant sum to acquire a semi-exclusive entitlement to conduct the gaming business throughout Victoria. The regime in relation to GMEs is different – the person acquiring the GME(s) must pay the price fixed by the Minister for the right to operate a certain number of gaming machines at a specific venue in respect of which a venue operator's licence must also be held²⁹.

58 Next, although cl 7.1 describes the amount of money payable as "compensation for the investment in infrastructure lost", it must be read with cl 7.2, which expressly provides that no amount is payable at all – whatever the value of infrastructure lost – if Tatts' Gaming Operator's Licence expires without a new one being "issued to any person". In other words, if a new gaming operator's licence having the commercial advantages of Tatts' existing Gaming Operator's Licence was not issued to any person, no amount would be payable. The terms of cl 7.2 are inconsistent with a suggestion that Tatts would become entitled to the terminal payment simply upon the expiration of its Gaming Operator's Licence.

59 Indeed, in other provisions of the 1995 Agreement³⁰ the phrase "new gaming operator's licence" was used to refer to a new gaming operator's licence issued under Pt 3 of the 1991 Act, being of the same kind as Tatts' Gaming Operator's Licence. For example, cl 5.2 of the 1995 Agreement provided that if Tatts' "Gaming Operator's licence is transferred to, or a *new gaming operator's licence* is issued to, a related entity of [Tatts] prior to the time at which the Gaming Operator's Licence would expire by effluxion of time, no compensation will be payable to [Tatts] pursuant to clause 7 at the time of such transfer or issue but such related entity will be entitled to the benefit of clause 7 as a permitted assignee or properly constituted successor of [Tatts]" (emphasis added).

28 See s 33 of the 1991 Act and s 3.4.29 of the 2003 Act.

29 See ss 3.4A.1 and 3.4A.5 of the 2003 Act.

30 See, for example, cll 5.2 and 8.1.6.

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60 This provision (and the other provisions that use the phrase similarly) supports a construction of "new gaming operator's licence" in cl 7 as referring to a new gaming operator's licence issued under Pt 3 of the 1991 Act which was to serve the same purpose as Tatts' initial Gaming Operator's Licence.

Context and purpose of the 1995 Agreement

61 That the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement referred to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time) is further supported by the context and purpose of the 1995 Agreement.

62 The Court of Appeal took the view that honest and reasonable business people in the position of the parties, at the point of entry into the 1995 Agreement, would have answered "yes" to the question whether "a new gaming operator's licence" extended to "any form of authority which conferred rights to carry on gaming operations in substance the same as the rights which were conferred on [Tatts] by the Gaming Operator's Licence"³¹.

63 The question posed by the Court of Appeal did not reflect the context in which the question arose or the purpose of the 1995 Agreement. That context and purpose should have led to a different answer.

1995 Agreement predicated upon the existence of the duopoly

64 First, the 1995 Agreement was predicated upon the existence of the duopoly in the operation of gaming machines in Victoria. The question posed by the Court of Appeal failed to take sufficient account of that important contextual consideration.

65 That the duopoly existed and was the basis of the 1995 Agreement is reflected in that agreement's terms. Recital A recorded that Tatts held a "Gaming Operator's Licence" in Victoria (under the 1991 Act). The only other entity authorised to operate gaming machines in Victoria at the time the 1995 Agreement was executed was Tabcorp, which held its conjoined wagering licence and gaming licence under the 1994 Act.

66 Recital D recorded that the 1995 Agreement recognised that the business carried on by Tatts was to be regulated on terms "substantially as favourable" as

31 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [146].

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the terms regulating Tabcorp's gaming machine business and that Tatts was otherwise to have the benefit of the 1995 Agreement. Recital D acknowledged the existence of the duopoly and that an object of the 1995 Agreement was to ensure that the balance of power was not distorted by government regulation.

67 Clause 6, in referring to the "Other Gaming Machine Operator", assumed the existence of the duopoly. It went on to provide that the Minister agreed that "for the term of the Gaming Operator's Licence [Tatts'] conduct of the business will be regulated on terms substantially as favourable as the terms regulating the gaming machine business operated by Tabcorp". In other words, the clause acknowledged the existence of the duopoly.

68 Indeed, it is not possible to understand or explain the reference to "the premium payment" in cl 7 of the 1995 Agreement without understanding it as being a payment by the new licensee which would reflect the value of the right to participate in the duopoly. For the payment entitlement under cl 7.1 to arise, it was necessary that the duopoly continue and that the new licence to participate in that duopoly not be issued to Tatts. If the duopoly were to continue and Tatts was not granted a new licence, the value of the business which it had built up, and paid for under cl 3 of the 1995 Agreement, would have been amortised because the right lawfully to carry it on would have been denied to it and given to another. But if the duopoly were not continued, then even though Tatts would no longer share in the advantages of the duopoly in respect of gaming operations, the business which it built up and paid for would not have been given to another.

69 Clause 5.2 of the 1995 Agreement also assumed the existence of the duopoly³². The right to payment under cl 7 would not arise if Tatts transferred the licence to a related entity. However, Tatts' related entity would have been entitled to the benefit of cl 7, reflecting the value of the right it would then hold to participate in the duopoly whilst it continued.

70 Finally, reference should be made to the Treasurer's letter which, it will be recalled, was annexed to the 1995 Agreement as Sched 2³³. It confirmed the existence and the terms of the duopoly by stating that:

32 See [16] above.

33 See [18] above.

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- (1) the Gaming Operator's Licence granted to Tatts under the 1991 Act gave Tatts "a concurrent right (with [Tabcorp] and Crown Limited) to conduct gaming, for a fixed period";
- (2) the Gaming Operator's Licence would expire on 14 April 2012;
- (3) the Government did not then intend to grant further gaming licences to persons who were not then authorised to conduct gaming or wagering during the licence period;
- (4) Tatts' entitlement to retain amounts by way of commission on gaming would be maintained at 33.33 per cent for the period of the licence;
- (5) Tatts (or its successors) could "apply for a new licence after the initial licence terminates and on the same terms as other applicants. The process of awarding a new licence [might] involve a public tender. It [was] also expected but not guaranteed that the new licence would be awarded to the highest qualifying bidder. If the new licensee [was] not [Tatts], [Tatts would] be entitled to receive from the State capital compensation as provided for in [the 1995 Agreement]";
- (6) it was "intended that any new licence [would] be granted on conditions which include[d] conditions substantially to the same effect as those to which [Tatts'] licence [was] subject"; and
- (7) those principles did not bind "this Government or future Governments" and "the Victorian Parliament [had] the power at any time to amend existing legislation or pass new legislation affecting [Tatts'] operations or the terms on which those operations [were] conducted".

71

Reasonable business people reading the Treasurer's letter would understand that the "new licence", like the initial gaming operator's licence held by Tatts, would be an element of the duopoly and that Tatts' entitlement to receive "capital compensation" from the State was dependent upon another applicant's successful tender for that new gaming operator's licence on the basis that the duopoly continued. Reasonable business people reading the Treasurer's letter would not have failed to appreciate that the grant of a new licence – which was necessary to create and fund an entitlement to the terminal payment – was dependent upon the continuation of the duopoly and the concomitant

commercial advantages which that entailed for the new duopolist. Reasonable business people reading the Treasurer's letter would have appreciated the evident need for the payment to Tatts to be revenue neutral for the State. They would have understood that this meant that there would need to be a payment by an entity ready and able to make a payment which would reflect the market value of the share of the duopoly which the grant of the new licence would carry with it.

72 No less importantly, reasonable business people reading the Treasurer's letter would have appreciated that the 1995 Agreement gave no assurance that the duopoly would be continued, and that if the Executive government and legislature were not persuaded that the duopoly should continue, the entitlement to "capital compensation" would not arise. The statements in the Treasurer's letter, and the terms of cl 7 of the 1995 Agreement itself, withheld any assurance that the duopoly would continue. That was both unsurprising and understandable. It could be expected that, following the experience of years of the duopoly, a political judgment might be made that the continuation of the duopoly was not in the public interest. Arrangements which restrict competition have generally been regarded as contrary to the public interest³⁴, and the socio-economic issues attending gambling (and the extent of State involvement in, and revenue raised by, those activities) might be expected to be of concern to legislators. The Executive government was, understandably, not willing to commit the State to a position whereby a decision as to the public interest might be compromised by entrenched interests of the duopolists, whose exercise of their powers and advantages as duopolists would necessarily be a factor in any political judgment as to the future of the gaming industry.

Other contextual matters

73 Another important contextual matter was the fact that the "business" protected by the 1995 Agreement was that defined in cl 1.1 of that agreement – "[Tatts'] gaming machine business carried on in the [State], including the acquisition, supply, installation and operation of gaming machines". The Court of Appeal concluded that the aggregate of rights conferred on venue operators with GMEs was substantially and relevantly the same as those conferred on Tatts by the Gaming Operator's Licence. But the authority conferred by a GME, when linked – as is required by the 2009 Amendments – to a venue operator's licence, is limited in its effect and value, both geographically and functionally, when

34 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 56-62.

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compared with the value of the authority conferred on Tatts and Tabcorp under the legislative regime which sustained the duopoly.

74 Finally, the Court of Appeal³⁵ and the primary judge³⁶ were of the view that it made "commercial nonsense" of the State's promise to make the terminal payment, as compensation for infrastructure lost under cl 7 in return for Tatts' agreement to pay the substantial fees set out in cl 3 of the 1995 Agreement, to construe the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement as referring to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time). This approach was based on too broad a view of the commercial interests of Tatts that were protected by cl 7 of the 1995 Agreement. Protection of Tatts' commercial interests was limited³⁷. Tatts' commercial interests were protected whilst the duopoly continued. They were not protected if the duopoly did not continue.

The proper construction of cl 7

75 For these reasons, the text, context and purpose of the 1995 Agreement all support the conclusion that the phrase "new gaming operator's licence" in cl 7 of the 1995 Agreement referred to a gaming operator's licence granted under Pt 3 of the 1991 Act (as it might be amended, re-enacted or replaced from time to time).

76 As a "new gaming operator's licence" was never issued to any person, Tatts is not entitled to payment under cl 7 of the 1995 Agreement.

The 1995 Agreement and the 1996 Act

77 The Court of Appeal also concluded that the 1995 Agreement "was intended to survive the enactment of the statutory provisions which it envisaged ... [I]t would be commercially improbable to attribute an intention to the parties that their rights and obligations under the 1995 Agreement should be spent upon the passage of the legislation provided for by cl 8"³⁸.

35 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [157]-[158].

36 *Tatts Group Ltd v Victoria* [2014] VSC 302 at [101]-[102].

37 See [64]-[72] above.

38 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [211]-[212].

78 Given the view formed about the proper construction of the 1995 Agreement, it is not necessary to address the correctness of that conclusion or the two propositions which underpinned it. The two propositions were, first, that the creation of an enforceable promise by the State to make the terminal payment was entirely a matter for agreement between the parties without the need for the legislation contemplated by cl 8 of the 1995 Agreement and, second, that the parties intended that cl 7 should continue to have an operation independent of that legislation. The first proposition may raise questions under the State Constitution, as to which we say nothing. The second is essentially constructional and does not sit well with cl 8.

79 The express words of cl 8, which have already been set out in these reasons, provide support for the conclusion that, objectively speaking, the parties did not intend that the terminal payment obligation in cl 7 of the 1995 Agreement should have an operation independent of, and more extensive than, the provisions of the 1991 Act dealing with that subject. Indeed, cll 8.1.1 and 8.1.2 of the 1995 Agreement are readily understandable as directed to providing the desirable certainty and avoidance of doubt.

80 The balance of cl 8 of the 1995 Agreement provides further support for that conclusion. The text of cl 8.1.7 indicates that the provisions of the legislation referred to in the earlier sub-clauses were intended by the parties "to give effect to this Agreement". The natural reading of this provision is that there was to be only one legal "effect" or outcome on the performance of cl 8. Next, cll 8.1.1 and 8.1.2 contemplate that the legislation will "include" obligations to pay, the content of these obligations being in accordance with cll 3 and 7 of the 1995 Agreement. The possibility of variance between what may be achieved by the Minister by the exercise of his best endeavours and the effect of cll 3 and 7 of the 1995 Agreement is necessarily acknowledged by the fact that the Minister's obligation was *only* to "use his best endeavours". But there is no suggestion that the Minister did not comply with his obligation. The respective obligations as to payment imposed upon Tatts and the State were included in the legislation to "give effect to" that agreement.

81 Put simply, the parties' expectation was that, upon the passing of the legislation, their respective payment obligations would be included in the legislation and have effect. There is nothing to suggest that the parties intended that the obligations which were to be "included" would remain operative independently of the legislation contemplated by the 1995 Agreement. If that supposition were adopted, there would be two charters of the parties' rights in respect of the same subject matter operative at the same time. Such a result is unlikely. One would not readily attribute to the parties an intention that Tatts

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should be obliged to make two sets of payments, one under cl 3 and one under the legislation passed to give effect to cl 3. Such a result would be inconsistent with the express terms of the 1995 Agreement that this payment obligation was to be "included" in the legislation.

Effect of 2009 Amendments

82 The State also contended that if the relevant provisions of the 1995 Agreement survived the enactment of the 1996 Act, then those provisions were abrogated by the enactment of the 2009 Amendments. Given the view formed about the proper construction of the 1995 Agreement and the effect of the 1996 Act on the 1995 Agreement, it is not necessary to address this contention.

Tatts' Notice of Contention and s 3.4.33 of the 2003 Act

83 By a Notice of Contention, Tatts sought to support the orders of the Court of Appeal on the basis that it was entitled to payment under s 3.4.33 of the 2003 Act because the phrase "gaming operator's licence" in that section included "any licence or entitlement which in substance authorises the conduct of gaming operations at approved venues", which in turn would include the allocation of GMEs by the State.

84 That contention cannot be accepted for the reasons stated by the primary judge³⁹ and by the Court of Appeal⁴⁰ – namely, that the precise definition of "gaming operator's licence" in s 1.3(1) as "a licence granted under Division 3 of Part 4 of Chapter 3" of the 2003 Act leaves no room for an alternative, broader interpretation of "gaming operator's licence".

Conclusion and orders

85 For those reasons, the appeal to this Court should be allowed with costs. The orders of the Court of Appeal made on 4 December 2014 should be set aside and, in their place, there should be orders that:

- (a) the appeal be allowed with costs;

39 *Tatts Group Ltd v Victoria* [2014] VSC 302 at [204], [250].

40 *Victoria v Tatts Group Ltd* [2014] VSCA 311 at [51]-[53].

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- (b) orders 1 and 2 of the orders of the primary judge made on 27 June 2014 be set aside and, in their place, the proceeding be dismissed with costs;
- (c) Tatts Group Limited pay the State of Victoria \$540,467,887.92 with interest, calculated from 27 June 2014.