IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M52 of 2019

BETWEEN: Commissioner of Taxation of the Commonwealth of Australia

Appellant

and

10 Sharpcan Pty Ltd

Respondent

RESPONDENT'S AMENDED SUBMISSIONS

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

20 2. During the year of income ended 30 June 2010, Spazor Pty Ltd, in its capacity as trustee of the Daylesford Royal Hotel Trust **(the Trustee)**, incurred 18 liabilities **(the Outgoings)**, each in the sum of $33,350, in respect of gaming machine entitlements **(GME's)** allocated to it under the *Gambling Regulation Act 2003* (Vic) as amended as at 1 January 2010 **(the GRA)**.[1] It is not in issue that the Outgoings fell within the first or second positive limb of s 8-1 of the *Income Tax Assessment Act 1997* (Cth) **(the 1997**

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[1] Greenwood ACJ (with whom McKerracher J agreed) [30] **[CAB50]**. The Trustee's obligation in relation to each GME arose from its successful bids at an auction conducted pursuant to a Determination of the Victorian Minister dated 18 March 2010 **(the Determination)** made pursuant to ss 3.4A.3 and 3.4A.5(9) of the GRA: see *Federal Commissioner of Taxation v James Flood Pty Ltd* (1953) 88 CLR 492 at 506 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

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Act), the relevant business being the hotel business at the Royal Hotel in Daylesford (**the Royal**) carried on by the Trustee.[2]

3. The principal issue is whether the Outgoings were denied deductibility pursuant to s 8-1 of the 1997 Act by reason of the Outgoings being capital or of a capital nature. In the alternative ~~the question arises whether~~, if they were outgoings on capital account, the respondent submits that the Outgoings were nonetheless deductible over five years under s 40-880 of the 1997 Act.

Part III:

4. The respondent certifies that notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV:

5. The underlying facts are not in dispute. However, the appellant's narrative statement of facts[3] and chronology is, with respect, incomplete.

6. The Trustee's business was at all times an "integrated interdependent business operation"[4] which provided, and derived income from, a number of activities at the Royal including accommodation, food and drink, gaming on 18 electronic gaming machines and wagering on racing and keno.[5]

7. In 2005, when the Trustee acquired the Royal hotel business, it was assigned a lease over the premises upon which the business was conducted. The lease had a term remaining of 27 years, including options for extensions.[6] This lease was subsequently renegotiated for

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[2] Greenwood ACJ [36] **[CAB51]**.
[3] [AS8] to [AS15].
[4] Greenwood ACJ [65] **[CAB60]**.
[5] Greenwood ACJ [3] **[CAB43]**.
[6] Greenwood ACJ [48] **[CAB54]**.

a principal term of ten years from 1 April 2012 plus an option for a further 20 years, which would, if extended, expire in 2042.[7]

8. In relation to the conduct of its business the Trustee was required to hold a "wide-range of approvals" relating to accommodation, the sale of food, the sale of liquor and compliance with other health regulations.[8]

9. The statutory regime for the conduct of gaming in Victoria was at all relevant times regulated by Chapter 3 of the GRA, as amended from time to time. From the time the Trustee acquired the Royal hotel business until 16 August 2012,[9] gaming on gaming machines was restricted to "approved venues" for which a "venue operator's licence" had been granted,[10] and holders of "gaming operator's licences" were authorised to conduct gaming at approved venues.[11] The conduct of gaming itself, including the payment of returns to players[12] and the location of gaming machines, was closely regulated under the GRA.[13]

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10. When the Trustee acquired the Royal hotel business, it acquired a "venue operator's licence". That licence authorised it to (inter alia) "obtain" and "possess" gaming machines and equipment and to manage and operate an "approved venue" at which gaming was conducted.[14] The Trustee also entered into a venue operators' agreement with Tattersalls (**Tatts**), which held a "gaming operator's licence", relating to the

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[7] Greenwood ACJ [250] **[CAB101]**. His Honour incorrectly referred to this as an extension to 2032.
[8] Greenwood ACJ [49] **[CAB54]**.
[9] The date a new regime regulating gaming came into force pursuant to the *Gambling Regulation Amendment (Licensing) Act 2009* (Vic): Greenwood ACJ [18] [**CAB45**].
[10] In accordance with Parts 2 and 4 of Chapter 3 of the GRA: see ss 3.2.1 and 3.4.1 of the GRA.
[11] Section 3.4.2(d) of the GRA.
[12] Section 3.6.1 of the GRA.
[13] Requirements for approval of premises for gaming are in Part 3 of Chapter 3 of the GRA.
[14] Section 3.4.1(a), (b) and (c) of the GRA.

operation of the 18 gaming machines already at the Royal.[15] Tatts also conducted audits and other compliance activities mandated under the GRA.[16]

11. Gaming at the Royal was conducted in a specific gaming room.[17] The position of this room was relocated by the Trustee within the Royal in 2007 with approval from the Victorian Commission for Gambling Regulation (**VCGR**), and these improvements enhanced the use of the public bar by patrons of the gaming area.[18]

12. On a daily basis the staff of the Trustee physically managed the gaming activities at the Royal, attending to the gaming room, paying winnings and banking net daily takings.[19]

13. The net gaming revenue from the gaming machines was reconciled and deposited into a special purpose bank account in the Trustee's name on a regular basis.[20] Payments to the Trustee, Tatts, the Victorian State Government and a community support fund were all made from this account in specified percentages, pursuant to ss 3.6.6 and 3.6.7 of the GRA.[21] Section 3.6.6 of the GRA provided that the venue operator, here the Trustee, was to be paid a fixed percentage of the "daily net cash balance" from its special purpose bank account.

14. The 18 gaming machines at the Royal provided an "entertainment option" to supplement the other activities on offer at the hotel, and they were a "key component" of the hotel's offering to customers.[22] The income derived by the Trustee from the 18 gaming machines was an important component of the income of its business and the presence of gaming machines at the Royal made, at least in part, the Trustee's derivation of income from all other activities conducted at the hotel "more robust".[23]

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[15] Greenwood ACJ [4] [**CAB43**] and [49] [**CAB54**].
[16] Tribunal Reasons [9] [**CAB12**]; Greenwood ACJ [54] [**CAB56**].
[17] As required by s 3.5.18 of the GRA.
[18] Greenwood ACJ [50] [**CAB55**].
[19] Greenwood ACJ [54] [**CAB55-6**].
[20] Greenwood ACJ [54] [**CAB55-6)**].
[21] Greenwood ACJ [8]-[10] [**CAB44-45**].
[22] Greenwood ACJ [50] [**CAB54-55**].
[23] Greenwood ACJ [17] [**CAB47**] and [31] [**CAB50**].

15. In April 2008, the Victorian State Government announced changes to the regulation of gaming in Victoria. Those changes were enacted in 2009 via the *Gambling Regulation Amendment (Licensing) Act 2009* (Vic) **(the 2009 Act)**.

16. As this Court explained,[24] the 2009 Act relevantly provided for the creation of GME's and their subsequent allocation to holders of venue operator's licences pursuant to a new Part 4A in Chapter 3 of the GRA. It "provided for the expansion of the authority conferred by a venue operator's licence so as to include the acquisition and transfer of GMEs; [and] the conduct of gaming on approved gaming machines in an approved venue operated by the licensee while holding GMEs", amongst other things.[25] The new and
10 amended provisions of the GRA included:

    a) new s 3.4.1(1)(aa) and (ab), which provided as follows:

    > *(1) A venue operator's licence authorises the licensee, subject to this Act and any conditions to which the licence is subject—*
    > *(aa) to acquire and transfer gaming machine entitlements in accordance with Part 4A; and*
    > *(ab) while holding gaming machine entitlements, conduct gaming on approved gaming machines in an approved venue operated by the licensee;...*

    b) s 3.4A.1(1)(a), which provided as follows:

    > *(1) On and after the day declared by the Minister under subsection (2)* [16
20 August 2012[26]] *(the gaming machine entitlement declared day), the conduct of gaming in an approved venue is lawful only if—*
    > *(a) the venue operator holds a gaming machine entitlement that authorises the conduct of that gaming...*

    c) s 3.4A.2(1)(b), which provided as follows:

    > *(1) A gaming machine entitlement authorises the venue operator that holds the entitlement, subject to this Act, any related agreement referred to in section 3.4A.6 and any conditions to which the entitlement is subject—*
    > ...

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[24] *Victoria v Tatts Group Limited* (2016) 328 ALR 564.
[25] *Victoria v Tatts Group Limited* (2016) 328 ALR 564 at 573 [41].
[26] Being the "gaming machine entitlement declared day" being when the amended regime came into force: see the determination of the Minister dated 7 June 2010 made pursuant to ss 3.4A.5(1)(a) and 3.4A.5(9)(e) of the GRA.

> *(b) to conduct gaming on one approved gaming machine in an approved venue operated by the venue operator; ...*

d) s 3.4A.3, which empowered the Minister to make rules for or with respect to the process for the allocation of, and transfer of, GME's. An agreement that purported to transfer a GME to a person who was not a venue operator, or that purported to transfer a GME to a person other than in accordance with the GRA and GME "allocation and transfer rules", would be void;[27]

e) subject to the GRA, each GME was to remain in force for 10 years,[28] with an extension period of two years if granted by the Minister;[29]

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f) s 3.4A.6, which provided that the Minister could refuse to allocate a GME to a venue operator unless the operator entered into an agreement with the Minister (or his nominee) dealing with matters related to the GME. Default by a venue operator under certain provisions of such an agreement would lead to forfeiture of the GME[30] and, on the day of forfeiture, any amount owed to the State for the allocation of the GME would become immediately due and payable;[31]

g) if a venue operator transferred a GME to another venue operator prior to six months after 16 August 2012, the transferor was obliged to pay to the Treasurer 75% of its profit from the transfer;[32] and

h) Division 6 of the new Part 4A in Chapter 3 of the GRA, which provided for forfeiture of GME's not used for the conduct of gaming by venue operators.[33]

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17. The changes effected by the 2009 Act were perceived by the Trustee to be a "strategic threat to the custom and profitability" of the Trustee's hotel business.[34] In order to

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[27] Sections 3.4A.16(2) and 3.4A.17(2) of the GRA.
[28] Section 3.4A.7(1)(b) of the GRA.
[29] Section 3.4A.7(4) of the GRA.
[30] Section 3.4A.27 of the GRA.
[31] Section 3.4A.32 of the GRA.
[32] Unless the venue operator had been granted an exemption under s 3.4A.19: s 3.4A.18 of the GRA.
[33] In particular, ss 3.4A.23 and 3.4A.24 of the GRA.
[34] Greenwood ACJ [34] [**CAB51**].

continue to offer gaming at the Royal on the 18 gaming machines at the venue, the Trustee had to be allocated a GME in respect of each machine. In the absence of such an entitlement, the Trustee could not conduct gaming in respect of that machine and, accordingly, *pro tanto* could not continue to generate income from gaming as part of its business.[35] This represented a "major threat to the revenues and profitability of the hotel and to the value of the goodwill based on the attractive force of gaming for the hotel's custom".[36] The Royal's custom "would be significantly less in the counterfactual scenario without gaming onsite".[37]

18. On 18 March 2010, the Minister made the Determination, which was published in the State Government Gazette. The Determination provided that the Minister was to allocate GME's to successful bidders (being holders of venue operator's licences)[38] at an auction and the market price would be the amount payable by the successful bidder. The allocation of entitlements was to be subject to the venue operators executing related agreements[39] that contained the terms of payment as determined by the Minister for their respective entitlements.[40] The payment terms offered provided for the payment for the allocation of entitlements in quarterly instalments with no interest payable.[41]

19. The Trustee, as the holder of a venue operator's licence (a necessary precondition),[42] decided that it would participate in the auction. Its purpose in doing so (and in ultimately being allocated the 18 GME's) was to enable it to continue to conduct gaming in respect of the 18 machines (and only those machines) located at the Royal which had historically produced gaming income for its business.[43]

20. On 10 May 2010, at the auction held for the allocation of GME's, 112 GME's were available for allocation in the Hepburn Shire (in which the Trustee's hotel was located)

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[35] Greenwood ACJ [19] **[CAB47]**.
[36] Greenwood ACJ [32] [**CAB51**].
[37] Greenwood ACJ [32] **[CAB51]**.
[38] Section 3.4.1 of the GRA.
[39] Section 3.4A.6 of the GRA.
[40] Cl 28(h) of the Determination.
[41] Greenwood ACJ [145] [**CAB78**].
[42] Greenwood ACJ [57] [**CAB56**] and [72] [**CAB61**].
[43] Greenwood ACJ [29] [**CAB49**].

of a total of 27,500 GME's available for allocation in Victoria.[44] The Trustee placed bids for 18 GME's. It did not seek to be allocated the GME's for transfer or trade.[45] The Trustee was successful in respect of all 18 GME's.[46] The evidence established that there was a bowling club 200 metres from the Royal which had acquired 32 GME's.[47] The available allocation of 112 GME's for the Hepburn Shire was never reached.[48]

21. Subsequent to the allocation to it of the 18 GME's the Trustee entered into an agreement with the Minister for Gaming for the payment by quarterly instalments of the total amount payable for the 18 GMEs.[49]

22. On 16 August 2012 the amended regulatory regime came into effect.[50] The Trustee continued its physical practices in relation to banking and Intralot Gaming Services Pty Ltd assumed Tatts' prior role as monitor of the gaming.[51] The Trustee engaged PVS Australia Pty Ltd (**PVS**) to "install" and maintain the 18 gaming machines (ownership of which, although at all material times in place at the Royal, had now been acquired by PVS) and undertake audit and other compliance activities previously undertaken by Tatts.[52]

23. Apart from the changes in methodology, the business of the Trustee did not, in any practical sense, alter as a result of the allocation of GME's to it – after the amended regulatory regime came into effect it continued to derive revenues from its integrated services of accommodation, food and drink, gaming, and wagering on racing and keno.[53]

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[44] Greenwood ACJ [25] [**CAB48**].
[45] Tribunal Reasons, [10] [**CAB13**]. GME's could only be transferred to another venue operator; there was no general secondary market: Greenwood ACJ [74] [**CAB62**].
[46] The GME's were allocated by an Allocation Instrument issued by the Minister for Gaming pursuant to s 3.4A.5 of the GRA: see Annexure DJC-37 of the Witness Statement of David John Canny dated 28 April 2017.
[47] Thawley J [293] [**CAB116**].
[48] Greenwood ACJ [25] [**CAB48**].
[49] Greenwood ACJ [145] [**CAB78**].
[50] Greenwood ACJ [31] [**CAB50**].
[51] Greenwood ACJ [55] [**CAB56**].
[52] Greenwood ACJ [20] [**CAB47**].
[53] Greenwood ACJ [63] [**CAB59**].

Part V:

Section 8-1

24. It is submitted that the following propositions are established by the authorities:

(a) *first*, "[t]he characterisation of an outgoing depends on what it 'is calculated to effect', to be judged from 'a practical and business point of view'".[54] The character of the advantage sought is the "chief, if not the critical, factor in determining the character of what is paid";[55]

(b) *second*, the characterisation of expenditure must be considered having regard to the context of the business activities of the taxpayer;[56]

10 (c) *third*, the fact that expenditure may be unusual does not preclude its characterisation as revenue in nature – "actual recurrence of the specific thing need not take place or be expected as likely";[57]

(d) *fourth*, the fact that an outgoing is for a period of years does not prevent the outgoing from being on revenue account if no permanent asset is acquired;[58] and

(e) *fifth*, expenditure may be revenue in nature where it is incurred in order to enable a taxpayer to continue to carry on business "unfettered by a particular difficulty

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[54] *Commissioner of Taxation v Citylink Melbourne Limited* (2006) 228 CLR 1 at 43 [148] per Crennan J (with whom Gleeson CJ, Gummow, Callinan, and Heydon JJ agreed).
[55] *GP International Pipecoaters Pty Ltd v Commissioner of Taxation* (1990) 170 CLR 124 at 137 per Brennan, Dawson, Toohey, Gaudron and McHugh JJ.
[56] *Ausnet Transmission Group Pty Ltd v Commissioner of Taxation* (2015) 255 CLR 439 at 474 [74] per Gageler J; *BP Australia Ltd v Commissioner of Taxation* (1965) 112 CLR 386 at 399.
[57] *Sun Newspapers Ltd and Associated Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337 at 362 per Dixon J; see also *W Nevill & Co Ltd v Federal Commissioner of Taxation* (1937) 56 CLR 290 at 306 per Dixon J; *Charles Moore & Co (WA) Pty Ltd v Federal Commissioner of Taxation* (1956) 95 CLR 344 at 351 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ and *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd* (1958) 99 CLR 431 at 446 per Fullagar J.
[58] *Commissioner of Taxation v Citylink Melbourne Limited* (2006) 228 CLR 1 at 44 [153-154] per Crennan J.

which [has] arisen in the course of the year".[59] Thus, this Court – in *Hallstroms* – held outgoings to be on revenue account where they were incurred by a taxpayer in order to maintain its "existing position"; in "keeping [its] business going on the same basis as in the past, without any change in the constituent elements of the profit-yielding structure"; and to "safeguard an existing right".[60] This Court has also held that outgoings incurred by a taxpayer in order to "sustain its business and continue carrying it on in anything like the same volume or according to the same plan" and to prevent a "decline in its custom" were on revenue account – even where the expenditure "was not recurrent" and even if it "must be regarded as abnormal".[61] Such a case is distinguishable from those involving monopolistic or anti-competitive elements.[62]

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25. Applying these propositions to the facts, the respondent submits that the Outgoings are revenue in nature for the reasons which follow.

26. From a practical and business point of view, the character of the advantage sought by the Trustee was to be able to continue lawfully to conduct its business, to maintain its existing customer base and the revenues it derived from those customers. Gaming revenue was "critical" to the business.[63] Gaming ought not be segregated from other aspects of the taxpayer's business[64] – the business must be analysed as an integrated whole and not as a series of disintegrated activities.[65] Contrary to the submissions of the

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[59] *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 at 641 per Latham CJ.

[60] *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 at 641-2 per Latham CJ; 655 per Williams J.

[61] *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd* (1958) 99 CLR 431 at 437 per Dixon CJ and 446 per Fullagar J; see also *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213.

[62] e.g. *Sun Newspapers Ltd and Associated Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337; *Broken Hill Theatres Pty Ltd v Federal Commissioner of Taxation* (1952) 85 CLR 423; *John Fairfax & Sons Pty Ltd v Federal Commissioner of Taxation* (1959) 101 CLR 30; *Henriksen v Grafton Hotel Ltd* [1942] 2 KB 184.

[63] Greenwood ACJ [242] **[CAB99]**.

[64] *Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 303-4 [50-51] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[65] See paragraph 6, supra.

appellant,[66] for the purpose of determining the deductibility of the Outgoings, there was no separate "gaming business" of the Trustee.

27. The GME's only had a value to the Trustee in the context of its ongoing hotel business – a business that had a continuing existence both before and after the allocation of the GME's. It sought to be allocated the GME's "as a means to secure the custom and patronage of the business in order to secure revenue and profits".[67] The Outgoings were incurred in order to react to legislative change affecting the Trustee's ability to continue conducting its business "in substantially the same manner and by substantially the same means that have attracted custom to it".[68] The change did not alter in any "practical way"
10 the nature or composition of the Trustee's business, or the manner in which its revenues were derived. The Trustee merely "succeeded in maintaining an existing position"[69] by overcoming an "obstacle to its trading".[70]

28. The situation is not unlike that in *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation*, where outgoings which the taxpayer incurred to respond to an "attack... [that] arose out of the day to day selling activities of [its] business", in order to protect the "reputation and goodwill" of that business, were held to be on revenue account. In that case, Brennan J (as his Honour then was) recognised that goodwill "frequently grows out of activities the cost of which is a charge on revenue account".[71]

29. Describing (as the appellant does)[72] the advantage sought by the Outgoings as "the
20 acquisition of GMEs" in circumstances where those GME's were the means to the end

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[66] [**AS22**].
[67] Greenwood ACJ [242] [**CAB99**].
[68] *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 615 [23] per Gaudron, McHugh, Gummow and Hayne JJ.
[69] *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 at 641 per Latham CJ; see also Greenwood ACJ [32] [**CAB50-51**].
[70] *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 229 per Brennan J.
[71] *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 229 per Brennan J.
[72] [**AS21**].

of continued trading does not answer the question, "what [was] the money really paid for?"[73]

30. Just as the taxpayer's "real object" in *BP Australia Ltd v Commissioner of Taxation* was "not the tie but the orders which would flow from the tie",[74] the Trustee's "real object" was not the GME's as assets in themselves, but the removal of a legislative obstacle to its continued lawful operation of gaming as an integral part of its interdependent activities.[75]

31. Contrary to the appellant's submissions,[76] the GME's did not relevantly provide an enduring benefit to the Trustee. The GME's necessarily expire and, the gaming laws having remained constant, will require renewal or replacement when they expire. They are also subject to forfeiture in certain circumstances.

32. The allocation of the GME's was not related to the acquisition or establishment of a new business or business line by the Trustee.[77] Nor did they confer on the Trustee the right to conduct its hotel business, or any right to trade.

33. Unlike the gaming operator's licences formerly held by Tabcorp and Tatts up to August 2012,[78] the GME's conferred no "element of monopoly":[79] there were a maximum of 27,500 GME's available for allocation,[80] 32 gaming machines operating within close proximity of the hotel and the Hepburn Shire's potential allocation was 112 GME's in total. The purpose of the Outgoings was not to "secure for [the Trustee] freedom from

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[73] *AusNet Transmission Group Pty Ltd v Commissioner of Taxation* (2015) 255 CLR 439 at 456 [24] per French, CJ, Kiefel and Bell JJ.
[74] *BP Australia Ltd v Commissioner of Taxation* (1965) 112 CLR 386 at 398.
[75] *Magna Alloys & Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 229 per Brennan J.
[76] [**AS22**].
[77] *cf AusNet Transmission Group Pty Ltd v Commissioner of Taxation* (2015) 255 CLR 439 at 446 [3] and 451-2 [17-18] per French, CJ, Kiefel J and Bell JJ and at 476 [80] per Gageler J.
[78] *Victoria v Tatts Group Limited* (2016) 328 ALR 564 at 576 [57] and 578 [71].
[79] *cf AusNet Transmission Group Pty Ltd v Commissioner of Taxation* (2015) 255 CLR 439 at 451 [16] per French, CJ, Kiefel and Bell JJ.
[80] Greenwood ACJ [25] [**CAB48**].

further competition in the locality where it carried on business".[81] 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 compared with the value of the authority conferred on Tatts and Tabcorp under the legislative regime which sustained the duopoly".[82]

Section 40-880

34. In the alternative, the respondent submits that if the Outgoings are capital or of a capital nature under section 8-1(2), they are nonetheless deductible under s 40-880(2) of the 1997 Act.

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Subsection 40-880(6)

35. Subsection 40-880(6) applies to:

"expenditure you incur to preserve (but not enhance) the value of goodwill if the expenditure you incur is in relation to a legal or equitable right and the value to you of the right is solely attributable to the effect that the right has on goodwill".

36. There is no dispute that if the Outgoings were capital, they were incurred in relation to rights of the kind referred to in s 40-880(6).[83] Consequently s 40-880(6) will apply if:

a) the Trustee incurred the Outgoings to preserve the value of the goodwill of its business, rather than to enhance the value of its goodwill; and

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b) the value to the Trustee of the rights it obtained, being the rights conferred under s 3.4.1(1)(ab) of the GRA to enable the Trustee as a venue operator to continue to carry on gaming on each machine in respect of which it obtained a GME was solely attributable to the effect that those rights had on goodwill.

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[81] *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd* (1958) 99 CLR 431 at 452 per Taylor J, where his Honour was distinguishing *Ward & Company Ltd v Commissioner of Taxes* (1923) AC 145 and *Broken Hill Theatres Pty Ltd v Federal Commissioner of Taxation* (1952) 85 CLR 423; see also *BP Australia Ltd v Commissioner of Taxation* (1965) 112 CLR 386 at 395-6.

[82] *Victoria v Tatts Group Limited* (2016) 328 ALR 564 at 579 [73].

[83] [**AS58**].

Expenditure you incur to preserve (but not enhance) the value of goodwill

37. In construing the phrase "expenditure you incur to preserve (but not enhance) the value of goodwill":

    a) it is not in dispute[84] that the word "to" requires an assessment of what the expenditure was calculated by the taxpayer[85] to effect, judged from a practical and business point of view – or, put another way, the taxpayer's purpose or "real object";

    b) this assessment is to be made as at the time the expenditure was incurred and is a question of fact;

    c) that purpose was to preserve goodwill. Subsection 40-880(6) is not concerned with
10 the effect of the expenditure. *"The word 'purpose' means, not motive, but the effect which it is sought to achieve – the end in view. The word 'effect' means the end accomplished or achieved";*[86]

    d) what must be preserved (but not enhanced) is the value of goodwill, as distinct from the goodwill itself.[87] In *Federal Commissioner of Taxation v Murry,*[88] this Court said:

        "The value of the goodwill of a business is... tied to the fortunes of the business. It varies with the earning capacity of the business and the value of the other identifiable assets and liabilities";[89]

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[84] [**AS47**].

[85] *cf Federal Commissioner of Taxation v Spotless Services Limited* (1996) 186 CLR 404 at 418 (per Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ); *Commissioner of Taxation v Hart* (2004) 217 CLR 216 at 242-3 per Gummow and Hayne JJ.

[86] *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 8; see too *Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 at 466 per Aickin J.

[87] *cf* the appellant's submissions, which focus extensively on goodwill as a concept: see, for example, [**AS42**].

[88] (1998) 193 CLR 605.

[89] *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 624 [48] per Gaudron, McHugh, Gummow and Hayne JJ; see also *Commissioner of State Revenue v Placer Dome Inc* (2018) 362 ALR 190 at 206 [77] per Kiefel CJ, Bell, Nettle and Gordon JJ.

e) reading the phrase "value of goodwill" in s 40-880(6) as a single term, the requisite purpose is to preserve the earning capacity of the business. Separating it into two things (namely, "value" and "goodwill"), produces no different result. Goodwill is "an indivisible item of property which is distinct from and does not inhere in the assets of a business"[90] and goodwill, as property, is "the legal right or privilege to conduct a business in substantially the same manner and by substantially the same means that have attracted custom to it".[91] The "value of goodwill" then is the value of that legal right or privilege; and

f) in contrast to the legislative provisions at issue in *Commissioner of State Revenue v* 10 *Placer Dome Inc*,[92] s 40-880(6) does not require quantification of the "value of goodwill" or the going concern value of a business. In this context the emphasis placed by the appellant on the distinction between goodwill and trading income[93] is misconceived; the maintenance of custom is necessarily reflected in the maintenance of trading income.

38. Here, the Tribunal made the following finding of fact in relation to purpose:[94]

> "*...The expenditure on the gaming machine entitlements was to enable the trustee to derive directly the income from gaming activities which the trustee had previously derived indirectly as commissions by the gaming activities carried on by Tattersalls. That purpose of the expenditure (on the assumption that it was of capital) was, from* 20 *a practical and business point of view, to preserve the value of goodwill and was also reflected in the trustee's goodwill.*"

39. The Tribunal did not find that the Outgoings were incurred to enhance goodwill, although it did find[95] that the 10 year term of the GME's had the *effect* of enhancing goodwill. That was not, however, a finding as to purpose.[96]

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[90] *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 626 [53].
[91] *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 615 [23]; *Commissioner of State Revenue v Placer Dome Inc* (2018) 362 ALR 190 at 205 [71].
[92] (2018) 362 ALR 190 at 192-3 [5]-[9].
[93] [**AS42**]-[**AS44**].
[94] At [26] [**CAB23**].
[95] At [27] [**CAB24**].
[96] *cf* Thawley J [324] [**CAB125**].

40. The value of the Trustee's goodwill would have been adversely affected if it did not incur the Outgoings.[97] The Outgoings prevented a reduction in the earning capacity of the Trustee's business which would have occurred if it had not been able to continue to conduct its business after 15 August 2012 in "substantially the same manner and by substantially the same means" as it had prior to that date. In order to achieve its purpose, the Trustee had no choice but to be allocated GME's for a 10 year term; that was all that was on offer.

Value to you of the right is solely attributable to the effect that the right has on goodwill

41. In construing the phrase "value to you of the right is solely attributable to the effect that
10 the right has on goodwill" (the third "integer" in s 40-880(6)) – the word "value" means the importance, merit or significance of the right to the taxpayer.[98] "Inherent value" forms no part of the enquiry.[99] Again, the value to the taxpayer need not be quantified.

42. It is submitted that this requirement is met. The GME's were not acquired by the Trustee "for transfer or trade";[100] their value (viz. their importance) to the Trustee was in enabling it to continue to carry on its integrated hotel business utilising the 18 gaming machines already at the Royal.[101]

43. With respect, the appellant's treatment of the "income stream produced from the gaming activities" as a substantial financial benefit separate and distinct from any consequence on goodwill[102] is misconceived. Like "trading income", the "income stream" is derived
20 from the earning capacity of the business, which is attributable to the attraction of custom.

44. Finally, contrary to the appellant's submissions,[103] the Explanatory Memorandum to the *Tax Laws Amendment (2006 Measures No 1) Bill 2006* cannot "displace the clear meaning of the [statutory] text".[104] In particular, the construction of s 40-880(6) depends

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[97] Greenwood ACJ at [241] [**CAB99**].
[98] Macquarie Dictionary, 7th ed, definition of "value".
[99] *cf* [**AS60**] and [**AS68**].
[100] Tribunal Reasons [10] [**CAB13**].
[101] Greenwood ACJ [242] [**CAB99**]; *cf* [**AS60**].
[102] For example, [**AS61**].
[103] [**AS66**]-[**AS68**].
[104] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

upon its text, which focuses on the value of rights "to you" (the taxpayer), rather than on the question whether the right is unlimited in duration or has any distinct value in itself.

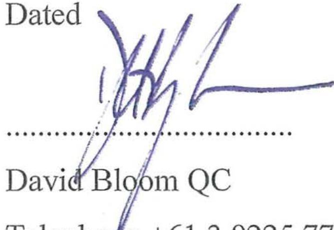
Part VI:

Not applicable.

Part VII:

Two (2) hours.

10 Dated



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