IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M81 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

BETWEEN:

TABCORP HOLDINGS LIMITED (ACN 063 780 709)

Appellant

and

STATE OF VICTORIA

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Issues

2. What is the proper construction of the words "new licences" in s 4.3.12 of the *Gambling Regulation Act* 2003 (Vic) (the **Act**)?

3. Do those words bear, as the Appellant (**Tabcorp**) contends, a 'generic' or 'less specific' meaning or, as contended by the Respondent (the **State**) and held by the Court of Appeal, a specific meaning (*viz*, a wagering licence and gaming licence issued under Part 3 of Chapter 4 of the Act)?

4. If the State's contentions on the construction of s 4.3.12 are rejected, did any or all of the gaming machine entitlements (**GMEs**) issued to multiple licensed venue operators, the wagering and betting licence granted to Tabcorp Wagering (Vic) Pty Ltd or the keno licence issued to Tabcorp Investments No 5 Pty Ltd constitute "new licences" within the meaning of s 4.3.12?

Part III: *Judiciary Act 1903* (Cth)

5. The State does not consider that notice is required to be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth) as no constitutional issues are raised by any party.

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Filed for the Respondent by:
Johnson Winter & Slattery
Lawyers
Level 34
55 Collins Street
Melbourne Vic 3000

Solicitor's Code: 40411
Tel: (03) 8611 1333
Fax: (03) 8611 1300
Ref: Chris Connor
chris.connor@jws.com.au

Part IV: Facts

6. The factual background set out in Tabcorp's submissions should be supplemented as follows.

7. By letter dated 29 June 1994, the Treasurer wrote to the Chairman of Tabcorp and the Chairman of VicRacing confirming the principles on which the Government of Victoria was privatising the TAB.[1] The letter stated:

> *"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 the operations of the TABCORP group of companies, the Victorian Racing Industry or the terms on which those operations are conducted."*[2]

8. The 2008 and 2009 amendments to the legislation ensued from an extensive review by the State of the regulatory landscape affecting gaming and wagering in Victoria.[3] Thereafter, on 10 April 2008, the then Premier announced that, as a result of the review, the State would introduce a fundamentally altered gaming regime with the consequence that Tabcorp's and Tatts' gaming licences would not be renewed. The Premier's announcement stated further 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 Tattersalls nor Tabcorp are entitled to compensation."*[4]

Part V: Statutes and regulations

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

Part VI: Argument

A. Relevance of context, including legislative history, to search for 'generic' meaning

10. As Tabcorp recognises,[5] in order to succeed on its appeal, Tabcorp must establish that the meaning of the term "new licences' in s 4.3.12 of the Act was 'generic', such that it embraced any statutory authority to engage in substantially similar gaming or wagering activities to Tabcorp's licences[6] rather than picking up the specific meaning

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[1] *Tabcorp Holdings Limited v State of Victoria* [2014] VSC 301 (**Trial Reasons**) at [217].

[2] Trial Reasons at [218]. One of the expressly non-binding 'principles' set out in the letter was as follows:
"TABCORP may apply for new licences after the initial licences terminate and on the same terms as other applicants. It is expected that the process of award of new licences will involve a public tender. It is also expected but not guaranteed that the new licences would be awarded to the highest qualifying bidder. If the new licensee is not TABCORP, TABCORP will be entitled to receive from bid proceeds received by the State an agreed capital compensation amount of approximately the net amount TABCORP will pay the Government for the initial licences calculated in accordance with the Gaming and Betting Act 1994 (subject to the bid proceeds being sufficient)."

[3] Trial Reasons at [112].

[4] Ibid.

[5] Appellant's Submissions at [2] and [17].

[6] Appellant's Submissions at [17]. The use of the term "generic" was used by Tabcorp to describe the construction of "new licences" in s 4.3.12 for which it contended at trial and on appeal (see, for example, Tabcorp's Outline of

supplied by the Act, of wagering and gaming licences issued under Part 3 of Chapter 4.

11. Tabcorp's submissions largely beg the question of when this term - deployed as it is in a section which has remained in materially the same terms since it was enacted in 1994, and had an inescapably specific meaning at that time by virtue of definitions in the statute - acquired its purported generic connotation. The following possibilities emerge, implicitly, from Tabcorp's summary of argument: (a) the term always had a generic meaning;[7] or (b) the term acquired a specific meaning upon the introduction of consolidating legislation in 2003;[8] or (c) the term acquired a specific meaning upon the introduction of s.4.3.4A as part of the amendments introduced in 2008.[9]

12. Tabcorp endeavours to side-step the question of *when* its asserted meaning arose, by adopting a selectively isolationist approach[10] to the question of construction of s.4.3.12, which largely ignores any reference to the legislative history of the provision and seeks to divorce the words from the context in which they appear in the Act[11] – a context which, as the Court of Appeal pointed out, demonstrates that *"the broader generic meaning for which Tabcorp contends would require a significant departure from the plain and ordinary meaning of the words of s 4.3.12"*.[12] Contrary to Tabcorp's submissions[13], viewed in context the 'plain' and 'ordinary' meaning of the phrase "new licences" is specific, not generic.

13. While the task of statutory construction must begin and end with the text of the statute, *"the statutory text must be considered in its context"* and *"[t]hat context includes legislative history and extrinsic materials"*.[14] Further, as the Court of Appeal recognised,[15] there is no inconsistency between an approach to construction which has regard to legislative history as an element of the statutory context and the observations

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Submissions in the Court of Appeal at [1(a)], [5], [18] and [24]). In its submissions to this Court, Tabcorp now appears to retreat from the appellation "generic" in favour of even less precise formulations such as "less specific" (see Appellant's submissions at [17]; see further [31]). How this "less specific meaning" differs from the "generic meaning" previously contended for by Tabcorp, if at all, is not stated.

[7] Appellant's Submissions at [43], and [46]-[50].

[8] Appellant's Submissions at [34] and [36].

[9] That is, by force of the *Gambling Regulation Amendment (Licensing) Act* 2008 (the **2008 Amendments**). No amendment to Part 3, Chapter 4 was effected by the amendments introduced the following year via the *Gambling Regulation Amendment (Licensing) Act* 2009 (the **2009 Amendments**), which (amongst other things) inserted a new Part 4A of Chapter 3, dealing with GMEs. Cf Appellant's Submissions at [37]-[42] and [44]-[45].

[10] Appellant's Submissions at [25], evidencing an approach which is to be contrasted with Tabcorp's reliance on legislative history at [34].

[11] Cf *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [57] per French CJ, Hayne, Kiefel and Nettle JJ, confirming that it is *"essential"* to have regard to statutory context and citing with approval Mason J's statement in *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 to the effect that reading a section *"in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context"* and that *"[p]roblems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context"*.

[12] *Tabcorp Holdings Limited v State of Victoria* [2014] VSCA 312 (**Reasons**) at [25].

[13] See, eg, Appellant's Submissions at [33].

[14] *FCT v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ, cited with approval in *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22] per French CJ, Hayne, Kiefel, Gageler and Keane JJ. See further *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523 at 539-540 [47] per French CJ, Crennan, Kiefel, Gageler and Keane JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 at [57], [62] per French CJ, Hayne, Kiefel and Nettle JJ. In each of these cases, the Court had regard to the legislative history of the relevant provision as a necessary part of the context in which it fell to be construed.

[15] See Reasons at [19], and [23]-[28].

of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*[16] with regard to reconciling conflicting provisions of the statutory text so as to alleviate conflict and, where possible, give effect to an assumed intention to achieve *"harmonious goals"*.[17] Contrary to Tabcorp's submission[18], the various provisions to be found in Part 3 of Chapter 4 of the Act after the 2008 Amendments were readily reconciled without the need to impute to the legislature an unspoken intention to transform radically the meaning of the words "new licences" in s 4.3.12.

14. The High Court has frequently had recourse to legislative history in construing a statutory provision, including in the foundational case of *Cooper Brookes (Wollongong) Pty Ltd v FCT*[19] where the outcome was, in fact, dictated by and dependent upon that history. The approach of the Court of Appeal, in reasoning to its conclusion that there was nothing in the 2008 Amendments which caused the meaning of "new licences" in s 4.3.12 to change from the specific meaning it bore from its inception in 1994,[20] was perfectly orthodox.

B. No generic meaning upon enactment in 1994

15. Tabcorp asserts, without reasoning, that the definition of "licence" in the *Gaming and Betting Act* 1994 (the **1994 Act**) was not applicable to the "construction of the composite expression "new licences" in s 21 of the 1994 Act.[21] Section 21(1) provided:

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

16. The term "licence" is defined in s 3 of the 1994 Act to mean "the wagering licence or the gaming licence granted under Part 2". Tabcorp appears to contend that the addition of the adjective "new", had a transformational effect upon the meaning of "licence" rather than identifying new (further), licences of the same character. As enacted, the italicised term patently bore the specific meaning contended for by the State, unambiguously referring to a grant of conjoined wagering and gaming licences pursuant to s 20 of the 1994 Act. In addition to the defined meaning of "licence", the following matters are apposite:

(a) The term "licensee", as deployed in s 21, is defined in s 3 of the 1994 Act to mean *"the holder of the wagering licence and the gaming licence"*.

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[16] (1998) 194 CLR 355 at 381-382 [69]-[71] per McHugh, Gummow, Kirby and Hayne JJ, relied upon in the Appellant's Submissions at [22]. The Court's reasoning in that case confirmed the relevance of context in the task of statutory construction (at 381 [69]), and explicitly took into account the legislative history of the provision at issue in arriving at its construction of the statute (at 382 [72]).

[17] Cf Appellant's Submissions at [18].

[18] Appellant's Submissions at [38]-[41].

[19] (1981) 147 CLR 297, cited in *Project Blue Sky* at (1998) 194 CLR 381 [69]. In *Cooper Brookes*, an examination of the legislative history of s 80C(3) of the *Income Tax Assessment Act* 1936 (Cth) (**ITAA**) led the Court to depart from the ordinary or literal meaning of the central words ("the company"), concluding that while the true meaning of the words in the context of that provision had been apparent in its original incarnation, subsequent amendments had (through the oversight of the drafters) *"stultified"* the original legislative intent (at 310-311 per Stephen J; see further 304, 306-307 per Gibbs CJ; 312 per Stephen J; 319-320, 321-322 per Mason and Wilson JJ).

[20] Reasons at [28]; see also [26]-[27].

[21] Appellant's Submissions at [34].

(b) Section 21 appears within "Part 2 – Wagering Licence and Gaming Licence", as the first section in Division 4 of Part 2, immediately following "Division 3 – Grant of licences after initial licences".[22] Each of the provisions within Division 3 (and, indeed, the preceding Divisions of Part 2) exclusively address matters referable to the wagering licence and gaming licence, including by way of the defined shorthand term "licences".

(c) The text and context of s 21 of the 1994 Act does not permit the composite term "new licences" to be assigned a different, generic meaning untied to the defined meaning:

(i) "well-settled rules of construction" require that consistent meaning should be given to a particular term wherever it appears in a suite of statutory provisions;[23]

(ii) in the immediately preceding provision, s 20(3), the composite term "new licences" appears in a context which makes clear that it is deployed (only) in the specific sense of the wagering licence and the gaming licence;[24]

(iii) the 1994 Act did not make provision for any other kinds of licences which could conceivably have fitted the description of "new licences", as used in s 21.

17. Properly understood, the word "new" therefore only adds a temporal qualification to the word "licences" rather than effecting some substantive modification of its meaning. It follows that, if the term "new licences" bore a 'generic' meaning in 2012, it must have acquired that meaning at some point *after* the original enactment of the terminal payment provision.

C. No generic meaning upon consolidation in 2003

18. In 2003, the legislation regulating gambling in its various forms was consolidated into a single enactment, the Act.[25] Section 21(1) was re-enacted as s 4.3.12(1) and the original text retained.[26] Former ss 21(2), (3), (4) and (5) now found their equivalents in ss 4.3.12(2), 4.3.12(3), 4.3.14 and 4.3.13 respectively, again with no material textual change.

19. As with its predecessor legislation, the structure of Part 3 of Chapter 4 (headed *"Wagering Licence and Gaming Licence"*[27]), as enacted, was clear. The wagering and gaming licences having been defined in Division 1 (headed *"Authority of the*

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[22] According to s 36(1) of the *Interpretation of Legislation Act* 1984 (Vic) as in force in 1994, headings to Parts, Divisions or Subdivisions into which an Act is divided form part of the Act.

[23] *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [29] per French CJ, Kiefel, Bell and Keane JJ.

[24] Section 20(3) provides that if the Governor in Council is *"unlikely to grant the licences" – viz*, the wagering licence and gaming licence referred to in s 20(1) – before expiry of the 18 year term, an extension of the term of the current licences may be approved *"until the commencement of [those] new licences"*.

[25] The Act records, at s 1.1(1), that the *"main purpose of this Act is to* ***re-enact and consolidate*** *the law relating to various forms of gambling and to establish a Victorian Commission for Gambling Regulation"* (emphasis added). The legislation which was consolidated into, and then repealed by, the Act included the *Gaming Machine Control Act* 1991 (the **1991 Act**), the 1994 Act, the *Club Keno Act* 1993, the *Lotteries Gaming and Betting Act* 1966 and various others referred to in s 12.1.1 of the Act.

[26] The only changes were the deletion of the (now redundant) parenthetical reference *"(other than the initial licences)"* and the equally unnecessary words *"in this section called"*.

[27] As before, s 36(1) provided that headings to Chapters, Parts, Divisions and Subdivisions of an Act formed part of that Act; further, by the time the Act was passed, s 36(2A) provided that headings to (relevantly) sections formed part of any Act passed after 1 January 2001.

Licences"), the criteria for their grant are set out in Division 2 (*"Grant of **Licences**"*) and the consequences for any former licensee of that grant are specified in Division 3 (*"Entitlement of Former **Licensee**"*), in which s 4.3.12 appears.[28] Further divisions ensue, each of which has as its exclusive subject matter the wagering and gaming licences. While the definition of "licence" which formerly appeared in the 1994 Act was not transposed into the Act, the meaning of the term as deployed in Part 3, Chapter 4 generally, and s 4.3.12 in particular, was unchanged. In this regard:

(a) As the learned trial judge observed, and the Court of Appeal agreed, the *"deletion of the definition of 'licence' is explicable on the basis that the Act consolidated the statutory regimes concerning many different forms of licences relating to gambling, beyond the wagering and gaming licences"*.[29] Nevertheless, the Act:

(i) by s 1.3, assigned specific meanings to "gaming licence" and "wagering licence", namely *"the gaming licence granted under Part 3 of Chapter 4"* and the *"wagering licence granted under Part 3 of Chapter 4"*, respectively;

(ii) by s 4.1.2 retained, for the purposes of Chapter 4, the specific definition of "licensee", namely *"the holder of the wagering licence and the gaming licence"*.

(b) Headings and provisions of the Part refer interchangeably and without distinction to the "licences" and "the wagering licence and the gaming licence", the wagering licence and the gaming licence being the sole subject matter of the Part. Section 4.3.12 cannot be distinguished from any of the other sections in which the term "licences" appears and must be taken to connote the wagering and gaming licences issued under the Part.

(c) Section 4.3.12 itself is headed *"Entitlement of former **licensee** on grant of new licences"*, thereby invoking the defined term "licensee", which is then deployed in s 4.3.12(1) with reference to the "new licensee" – necessarily, by reason of the definition, the new 'holder of the wagering licence and the gaming licence'.

(d) Moreover, s 4.3.12(1) refers to the *"premium payment paid by the new licensee"*, which can only be a reference to the "premium payment" described in ss 4.3.5 and 4.3.8, and payable (only) on the grant of the wagering licence and the gaming licence.

(e) Integers in the 'licence value' formula in s 4.3.13 require – both upon the expiry of the initial licences, held by Tabcorp, and later wagering and gaming licences[30] – the ascertainment of amounts referable to wagering and gaming, concepts specifically referable to the licences granted under Part 3, which is at odds with an alternative 'generic' construction of "new licences".

(f) Further, the logic of the payment entitlement expressed in s 4.3.12(1), by which the former licensee receives either the value of *its* licence (calculated in accordance with the formula in s 4.3.13) or the premium payment paid by the *new* licensee, assumes a comparison of like with like, which would not occur where (as Tabcorp contends here) the provision were triggered by the issue of

[28] Emphasis added throughout.
[29] Trial Reasons at [63]; Reasons at [16].
[30] Compare integers C(a) and C(b).

licences or authorities of a wholly different kind to the wagering and gaming licences.

(g) Adoption of Tabcorp's 'generic' meaning to the term "new licences" in s 4.3.12 would necessarily capture licences issued to temporary licensees under s 4.3.33, meaning that an entitlement to a terminal payment would be enlivened both at the time of the appointment of the temporary licensee and, again, in favour of the *temporary* licensee, at the time of the grant of new wagering and gaming licences in accordance with s 4.3.33(3). However, the text and context of the section indicate that the terminal payment was not intended to be available upon the transition to and from a temporary licensee. The appointment of a temporary licensee can only occur when the holder of the wagering and gaming licences has suffered a cancellation of those licences for one or other of the reasons set out in s 4.3.32 – *viz*, serious misconduct or contravention of licence terms, insolvency, tax avoidance and the like – a scenario which militates against the holder of the cancelled licence being entitled to a very significant payment by reason of that cancellation. Further, there is no provision for the temporary licensee to make a premium payment, without which the terminal payment cannot be calculated.[31] The temporary licensee holds its licence only for a matter of months,[32] and pays nothing for it. These considerations speak against giving s 4.3.12 an operation which is triggered by the issue or termination of licences other than those provided for in the sections immediately preceding it.[33]

20. The only available textual indicators point to the conclusion that, upon enactment, the words "new licences" in s 4.3.12 bore the specific meaning contended for by the State and accepted by the Court of Appeal. Tabcorp's generic construction requires the Court to accept that, in a single section of Division 3, for the first and only time in Part 3 of Chapter 4 of the Act, Parliament adopted (without any textual or contextual signal) an ambulatory definition of the term "licences" in circumstances where the term had been, and continued to be, consistently used in a confined and defined way previously and thereafter throughout the Part. Moreover, Tabcorp's construction of "new licences" would impermissibly[34] involve the assignment of differential meanings to the singular term "licences" in the context of a single section and, indeed, single subsections.[35]

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[31] This is because, according to s 4.3.12(1), the terminal payment is the lesser of "the premium payment" and the "licence value of the former licences". The formula set out in s 4.3.13 requires consideration of the premium payment made by the outgoing licensee: see integer C. The lack of any premium payment required of the temporary licensee, and its centrality to the ascertainment of the terminal payment, are strong indicators that s 4.3.12 was not intended to be triggered by the issue or termination of a temporary licence issued under s 4.3.33.

[32] By s 4.3.33(1) and (3), the temporary licensee is appointed for a term not exceeding six months, a term which may be extended once (only) for not more than six months.

[33] That is, licences issued under Division 2 of Part 3 of Chapter 4. Note that, while s 4.3.33(4) confers the status of *"holder of the wagering and gaming licences"* on the temporary licensee, it only does so *"while so appointed"*. Section 4.3.12 only gives rise to an entitlement to payment after the temporary licence comes to an end – that is, after the temporary licensee has lost its status under s 4.3.33(4). Section 4.3.33(4) has no deeming effect at this point, after new licences have been granted, and so cannot be relied upon by a temporary licensee to obtain a windfall termination payment under s 4.3.12.

[34] Cf *Selig v Wealthsure Pty Ltd* [2015] HCA 18 at [29] per French CJ, Kiefel, Bell and Keane JJ, referred to in paragraph 16(c)(i) above.

[35] Tabcorp's construction requires that the term "licences" bears a generic connotation where it first appears in s 4.3.12(1) and where it last appears in s 4.3.12(2), but the specific meaning in each other place it appears within the section generally and those subsections in particular.

21. As noted in paragraph 16 above, Tabcorp seeks to avoid the clear meaning assigned to the word "licences" in s 4.3.12 by treating "new licences" as a composite phrase with a distinct, generic meaning.[36] However, the Act is bereft of any indication that the clear meaning of the word "licences" is displaced in s 4.3.12 by the addition of the adjective "new". On the contrary, as in the 1994 Act, the statutory context demonstrates that the term "new licences" is deployed to mean 'new wagering and gaming licences granted under Part 3 of Chapter 4'; so much appears from s 4.3.9(2), the successor to s 20(3) of the 1994 Act.[37] Contrary to Tabcorp's submission,[38] it cannot be concluded that the legislature silently determined – in the course of an exercise intended to *"re-enact and consolidate"* the previous legislation[39] – to *alter* the meaning of the term "licences", or the composite phrase "new licences", when it re-enacted s 21 of the 1994 Act as ss 4.3.12 to 4.3.14 of the Act in 2003.[40]

D. No generic meaning acquired upon passage of 2008 Amendments

22. It follows that, if the term "new licences" s 4.3.12(1) bore a 'generic' meaning as Tabcorp contends, it must have acquired that meaning upon the passage of the 2008 Amendments.[41] However, the terms of s 4.3.12 itself did not change *at all*. Only two changes were made to Part 3 of Chapter 4 of the Act by the 2008 Amendments:

(a) *first*, a new s 4.3.4A was inserted, which read:

> (1) This Part applies only with respect to the wagering licence and gaming licence that were issued on 15 August 1994 and does not authorise the grant of any further wagering licence or gaming licence.
>
> (2) Subsection (1) does not prevent the appointment of a temporary licensee under section 4.3.33 if the licences referred to in subsection (1) are cancelled.

(b) *secondly*, the words *"a wagering and betting licence under Part 3A"* were substituted for the words *"another licence under this Part"*.

Contrary to Tabcorp's submissions,[42] each of these amendments confirms the retention of a specific meaning for "new licences" in s 4.3.12.

23. Tabcorp contends[43] that the proper reconciliation of ss 4.3.4A and 4.3.12 involves affording the latter provision a generic construction, so that its conditional payment entitlement is not defeated. Necessarily inherent in this submission is the proposition that the introduction of s 4.3.4A brought about an *enlargement* in the meaning of the term "new licences" in s 4.3.12. However, no legislative intention to alter the

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[36] Appellant's Submissions at [34].

[37] This provision – which is in materially identical terms to s 20(3) discussed in paragraph 16(c)(ii) above – operates where the grant of a wagering licence and gaming licence under s 4.3.8 is unlikely to occur prior to the expiry of the current wagering and gaming licences, and makes provision for the extension of the expiry date of the current wagering and gaming licences *"until the commencement of the new licences"*. It cannot be gainsaid that the term "new licences" in s 4.3.9 means 'new wagering and gaming licences' and is incapable of bearing a broader, generic meaning (see Trial Reasons at [79] and [80]). See, further, s 4.3.10 which deploys the composite term "each licence" to refer to each of the wagering licence and the gaming licence.

[38] Appellant's Submissions at [34].

[39] See s 1.1(1) of the Act, referred to in footnote 25 above.

[40] See, further, paragraphs 27 and 28 below.

[41] As noted, only the 2008 Amendments effected any amendment to Part 3 of Chapter 4; the provisions of that Part were not altered by the 2009 Amendments. Tabcorp submits, at paragraph 25 of its submissions, that *"one must start with the text of the Act as it stood in 2012 and construe that text, as a single text, without assuming that unamended parts of the text had the same meaning as they had before."*

[42] Appellant's Submissions at [37]-[42].

[43] Appellant's Submissions at [31] and [37]-[42].

meaning of these words can be discerned, either in the text or context of the 2008 Amendments.

24. The starting point for Tabcorp's submission is the proposition that s 4.3.4A "expressly preserved the operation of Part 3 of Chapter 4 as regards Tabcorp's licences".[44] However s 4.3.4A(1) contains no language of 'preservation'; the statement is only true in the sense that the provision does not deprive Part 3 of any and all operation vis-à-vis Tabcorp's wagering licence and gaming licence. Section 4.3.4A(1) contains, and contains only, terms of limitation (*"applies only"*; *"does not authorise"*);[45] nothing in the section expressly preserves – still less *enlarges* – the operation of any particular provisions in Part 3.

25. On the contrary, the effect of s 4.3.4A is necessarily to deprive certain sections in Part 3 of Chapter 4 of any further operation entirely, and to limit the operation of others to the appointment of temporary licensees pursuant to s 4.3.33 (an operation expressly preserved by s 4.3.4A). The effect of s 4.3.4A on the operation of individual provisions of Part 3 of Chapter 4 is illustrated by the table annexed to these submissions. For example, ss 4.3.6 to 4.3.8 inclusive – which provide for the procedure by which, upon the recommendation of the Victorian Commission for Gambling and Liquor Regulation, the Governor in Council may grant a wagering licence and a gaming licence to an approved applicant upon payment of the premium payment – could no longer have any operation following the enactment of s 4.3.4A.[46] Other provisions, such as s 4.3.5, could (at best) enjoy limited ongoing operation with respect only to the appointment of temporary licensees. In at least one case – that of s 4.3.9 – s 4.3.4A had the effect of bringing the operation of one of its subsections to an immediate end,[47] while allowing the other subsection[48] to have a continuing operation until the expiry of Tabcorp's licences.

26. Once it is appreciated that the necessary effect of s 4.3.4A was to deny or limit the operation of other provisions of Part 3 of Chapter 4, Tabcorp's contention that the proper reconciliation of that provision with s 4.3.12 involves an expansionary alteration in the connotation of "new licences" cannot succeed. In this regard:

    (a) As the Court of Appeal accepted,[49] and contrary to Tabcorp's contentions,[50] the State's construction of s 4.3.12 involves no contradiction with s 4.3.4A.[51] So far from being a case where the two provisions *"cannot live together"* and therefore *"cannot both receive their full meaning as it is expressed"*,[52] section 4.3.4A does not require any alteration or 'adjustment' in the meaning

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[44] Appellant's Submissions at [38]. Emphasis in original.

[45] Section 4.3.4A(2) is properly characterised as 'preservational', in that it expressly preserves the operation of s 4.3.33 with respect to the appointment of a temporary licensee. This only serves to underscore the point that s 4.3.4A(1)'s operation is one only of *limitation*; s 4.3.4A(2) is necessary precisely because the only effect of s 4.3.4A is to *contract* the operation of Part 3.

[46] They had no application to the appointment of a temporary licensee by the Commission; that appointment – which is a *direct* appointment by the Commission, as opposed to an appointment by the Governor in Council, and does not (unlike the appointment of a permanent licensee) involve the making of a premium payment – takes place in accordance with the terms of s 4.3.33.

[47] *Viz*, s 4.3.9(2), which operates on its terms only where the grant of "new licences" is pending pursuant to s 4.3.8, a scenario made impossible by s 4.3.4A.

[48] *Viz*, s 4.3.9(1).

[49] See Reasons at [19], and [23]-[28].

[50] Appellant's Submissions at [39].

[51] Cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

[52] *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 626 per Dixon J, citing Lord Dunedin in *In re Silver Bros Limited* [1932] AC 514 at 523.

of s 4.3.12 or any other provision of Part 3. To attempt such an adjustment which gave all of the provisions of the Part ongoing work to do would be to *defeat* the evident purpose and effect of s 4.3.4A. The introduction of that provision, as a means of 'ring-fencing' Part 3, was a logical and reasonable alternative to a more complex, multi-step process by which:

(i) some provisions in the Part were repealed with immediate effect;

(ii) others were amended so as to afford them a more limited operation, pending expiry of Tabcorp's wagering and gaming licences, with respect to the appointment of temporary licensees under s 4.3.33; and

10 (iii) the Part was thereafter repealed in its entirety following the expiry of Tabcorp's licences.

(b) So viewed, the State's construction, accepted by the Court of Appeal, involves no 'redundancy' or superfluity of the kind referred to in *Project Blue Sky Inc v Australian Broadcasting Authority*[53] and like cases.[54] Section 4.3.12 is, following the 2008 Amendments, no more redundant or superfluous than those other provisions of Part 3 which are undeniably deprived of practical operation by s 4.3.4A; what s 4.3.4A does is eliminate the *possibility* of any further wagering and gaming licences being issued, thereby ensuring, simply, that the pre-condition to the payment entitlement for which s 4.3.12 provides cannot be
20 satisfied.

(c) Contrary to Tabcorp's submission,[55] the Court of Appeal's specific construction does not depend upon the words "under this Part" being read into s 4.3.12 by *"necessary implication"*.[56] Rather, that construction was, and must be, afforded to s 4.3.12 because the text of Part 3 of Chapter 4 admits of no other meaning.[57] It is not a matter of the Court of Appeal reading in or implying words into the statute in order to arrive at a specific construction of "new licences". The only kinds of "new licences" which could, having regard to the text and context of Part 3, be referenced in s 4.3.12 are licences the issue of which is provided for in that Part.[58]

30 (d) Tabcorp's argument – which posits that s 4.3.4A afforded s 4.3.12 a single operation in respect (only) of Tabcorp's licences[59] – seeks to tread an impossible tightrope as it involves accepting that s 4.3.4A had the effect of expanding the meaning of "new licences" so that it could engage the issue of

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[53] (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ, citing Griffith CJ's invocation of *R v Berchet* (1688) 1 Show KB 106 [89 ER 480] in *Commonwealth v Baume* (1905) 2 CLR 405 at 414; see also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 38 [41] per French CJ; 76-77 [172] per Hayne J; 168 [450] per Kiefel J.

[54] Cf Appellant's Submissions at [39(a)].

[55] Appellant's submissions at [26].

[56] Reasons at [25].

[57] Reasons at [23].

[58] Tabcorp contends (at [28] – [30] of its submissions) that the Court of Appeal erred (in [24] of the Reasons) in that (according to Tabcorp) it transposed paragraph 23 of its decision in *State of Victoria v Tatts Group Limited* [2014] VSCA 311 (**Tatts Reasons**), which made reference to the *"precise definition of 'gaming operator's licence' in s 1.3"* in that case, to its use of the *"definition of 'gaming licence' in s 1.3"* in this case. Even if this reasoning was transposed from the Tatts Reasons, nothing turns on it. At paragraph 23 of its Reasons, the Court of Appeal clearly and correctly set out why "new licences" in s 4.3.12 must mean a new wagering licence and a new gaming licence as defined in s 1.3 of the Act. That logic did not require the words *"new gaming licence* and wagering licence" to appear in the text of s 4.3.12, which would be necessary if Tabcorp's complaint were to have any substance.

[59] Appellant's Submissions at [38].

the GMEs[60] but left the specific meaning of the word "licences" in the same section unaffected.[61] Not only is this at odds with the "well-settled rules of construction" referenced at paragraph 16(c)(i) above, such a construction would, in fact, afford Tabcorp – as the only ever "holder of the licences last in force" – a windfall entitlement to payment each time *in the future* new GMEs were allocated.[62] Clearly, this is not the intended operation of the section; it is intended to provide an outgoing licence holder with a payment following expiry of its licences, where new licences of the same kind are issued.

(e) Tabcorp's argument also involves a further, unexplained paradox, in postulating that the meaning of "new licences" expanded so as to accommodate the issue of GMEs: when s 4.3.4A was introduced, the only kind of authority to conduct gaming activities for which the legislation provided was the gaming licence provided for under Part 3 of Chapter 4 and the gaming operator's licence provided for in Part 4 of Chapter 3. Legislation amending the Act so as to provide for the issue of GMEs was not introduced until the following year, when the 2009 Amendments were passed.

(f) As the Court of Appeal pointed out,[63] the matter may be tested by reference to a counterfactual whereby s 4.3.4A was not introduced into the legislation – thereby eliminating the source of Tabcorp's expanded, generic meaning – but the State had, in accordance with the Premier's 10 April 2008 announcement,[64] simply not issued any further wagering and gaming licences. In these circumstances, "new licences" in s 4.3.12 would undeniably have retained its specific meaning, and the conditional payment entitlement would not have been triggered. It cannot reasonably be supposed that the introduction of a provision expressly *limiting* the application of the Part reflected a legislative intention to ensure that the payment was, in fact, made. If this were the intention, one would have expected an amendment to s 4.3.12, to provide expressly for the payment to be triggered by the issue of the GMEs.[65] In this respect, the amendment to s 4.3.33 effected by the 2008 Amendments is significant in its explicit substitution of *"the grant of a wagering and betting licence under Part 3A"* for the former reference to

[60] See paragraph A(c) of the prayer for relief in Tabcorp's Amended Statement of Claim, seeking a declaration that "the GMEs are new licences within the meaning of section 4.3.12".

[61] Tabcorp apparently eschews any argument that the non-composite term "licences" also acquired a generic meaning as to do so would involve a different absurdity: if "licences" in s 4.3.12(1) has a generic meaning, the section was unaffected by s 4.3.4A, and will be triggered each time a new suite of GMEs is issued. However the terms of the section, and the formula in s 4.3.13, are entirely ill-adapted to respond where the "licences" in question comprise thousands of individual, machine-specific, authorities rather than the wagering and gaming licences issued under Part 3 of Chapter 4; so much is demonstrated when the words "gaming machine entitlements" are substituted for "licences" wherever appearing in ss 4.3.12 to 4.3.14. The conclusion regarding absurdity is not avoided by the opening words of s 4.3.4A ("[t]his Part applies only with respect to ...") since these words could have no limiting operation on a section which (*ex hypothesi*) deals with generic gaming authorities as opposed to wagering and gaming licences.

[62] The absurdity of this construction is demonstrated by substituting the term "new GMEs" for the term "new licences" in s 4.3.12, and the words "wagering and gaming licences" for the word "licences" wherever otherwise appearing in the section; the result is that Tabcorp, as the "holder of the [wagering and gaming] licences last in force" is entitled to a terminal payment on any grant of "new [GMEs]".

[63] Reasons at [26].

[64] This announcement explained not only that no further licences would be issued to the gaming operators following the expiration of the current licences issued to Tatts and Tabcorp, but that the government's view was that neither gaming operator was "entitled to compensation".

[65] Further, if it was intended to give rise to a payment entitlement upon each new grant of GMEs, s 4.3.12 could be expected to have been re-enacted in Part 4A of Chapter 3, dealing with GMEs, rather than being left in a Part of the legislation which would become entirely redundant upon the expiry of Tabcorp's wagering and gaming licences.

> *"another licence under this Part"*: where Parliament, in making the 2008 Amendments, intended to reference "licences" other than the wagering and gaming licences, it did so by way of an explicit reference to the newly introduced replacement for Tabcorp's wagering licence.

27. In *Cooper Brookes (Wollongong) Pty Ltd v FCT*,[66] Stephen J noted that, like s 4.3.12, s 80C(3) of the ITAA had been in "substantially the same form" since its enactment; his Honour then continued, in a passage which – with appropriate transposition of references to the ITAA – could equally have been written about Tabcorp's submissions in the present case:

> Involved in the appellant's submissions must be the proposition that s. 80C(3) should, in 1965, *abruptly have changed its character* from that of a provision concerned exclusively with the deductibility of a subsidiary's losses to that of a provision concerned exclusively with the deductibility of the past losses of the subsidiary's holding company. That would be strange enough. *That such a change should occur by a side wind, without any relevant amendment occurring in s. 80C(3) itself, would be stranger still.* That, so transformed, the sub-section should be allowed to remain as an integral part of a section otherwise exclusively devoted to the case of subsidiary companies raises to a high level indeed the degree of improbability that such a change was the intention of the legislature. (Emphasis added).

28. It is, similarly, impossible to attribute to the legislature an intention, in 2008, to substitute, silently and via a side wind, a generic meaning for the specific connotation which the term "new licences" in s 4.3.12 bore from its inception.[67]

Legality

29. Tabcorp relies[68] on the 'legality' principle – the rule of construction which proceeds on the premise that *"it is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness"*[69] – in order to found a submission that the Court of Appeal was wrong to hold that s 4.3.12 had been "emasculated" by the enactment of s 4.3.4A.[70] Tabcorp's reliance on the principle is misplaced, however, for several reasons.

30. *First*, and fundamentally, it is not this emasculatory construction of s 4.3.4A adopted by Court of Appeal which prevents Tabcorp recovering a terminal payment under s 4.3.12. If, as the State contends and the Court of Appeal found, the words "new licences" in s 4.3.12 bears the specific meaning of 'new wagering and gaming licences issued under Part 3 of Chapter 4', Tabcorp is not entitled to a terminal payment for the simple reason that no such licences have issued. Conversely, if, as Tabcorp contends,

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[66] (1981) 147 CLR 297 at 312; emphasis added.

[67] See Reasons at [26]-[28].

[68] Appellant's Submissions at [55]-[61]. At paragraph 80 of the Appellant's Submissions, it is argued that the 2008 Amendments expanded the connotation of "new licences" in s 4.3.12 beyond *both* the connotation and denotation that the phrase had under the 1994 Act (*viz*, the wagering and gaming licence held by Tabcorp); this contradicts the Appellant's Submissions at [78] which posit that the connotation of the term remained fixed. As set out above, there is nothing in the 2008 Amendments which could have this transformatory effect on the core meaning of the term. For the reasons outlined, those amendments could have no such effect.

[69] *Maxwell on Statutes*, 4th ed, p 121, cited by O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 at 304 (applying the rule of construction to fundamental rights of citizenship); *Lee v NSW Crime Commission* (2013) 251 196 at 264-265 [171]-[173] per Kiefel J, 307 [307]&ff per Gageler and Keane JJ (addressing potential abrogation of the privilege against self-incrimination).

[70] Reasons at [35]; see also at [24], [30].

the meaning of "new licences" in s 4.3.12 is generic, then s 4.3.4A's prohibition on the issue of new wagering and gaming licences under Part 3 has nothing to say about the operation of s 4.3.12.[71]

31. Accordingly, there is simply no occasion for the application of the 'legality' principle.[72]

32. *Secondly*, and in any event, as the Court of Appeal rightly observed, attributing a specific meaning to the words "new licences" in s 4.3.12 does not have the effect of depriving Tabcorp of any right to payment to which it was previously entitled.[73] The entitlement in s 4.3.12 arises, if at all, only upon the happening of events which might never occur.[74] It is not an entitlement of kind referred to by Griffith CJ in *Clissold v Perry* when he adverted to the *"general rule to be followed in the construction of Statutes ... that they are not to be construed as interfering with* ***vested*** *interests unless that intention is manifest"*.[75]

33. So much is illustrated by the High Court's decision in *WA Planning Commission v Temwood Holdings Pty Ltd*,[76] which is relied upon by Tabcorp.[77] There, as here, no right to compensation – whether vested, deferred, contingent, conditional or otherwise[78] – existed unless and until the occurrence of (one of) the events upon which it was conditioned. Both at the time the 2008 Amendments were passed, and in August 2012 when Tabcorp's licences expired, Tabcorp had no rights of any kind

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[71] The effect of s 4.3.4A was, simply, to *preclude* the State from doing what it had, according to the Premier's statement on 10 April 2008, already determined it would not do as a matter of policy – *viz*, issuing fresh wagering and gaming licences upon the expiry of Tabcorp's licences.

[72] In truth, Tabcorp's contention amounts to no more than a circular submission that the term "new licences" in s 4.3.12 should not be afforded the 'specific' construction since this would, in the events which have occurred, deny it an entitlement to the terminal payment. This is not a permissible approach to statutory construction, still less one which is suggested or mandated by the 'legality' principle which operates where one statutory provision arguably interferes with a right provided by *another* provision or the common law.

[73] Reasons at [32]. Contrary to Tabcorp's submissions (at [57]), the State did – as the Court of Appeal records at Reasons [32] – challenge the trial judge's conclusion that the principle of legality applied to the conditional payment entitlement in s 4.3.12.

[74] Sections 4.3.5 - 4.3.9 of the Act, as it stood prior to the 2008 Amendments, made clear that there was a prospect that no new wagering and gaming licences might be granted upon the expiry of Tabcorp's licence – for example, if the Minister was not satisfied of the matters set out in s 4.3.8(2), or if (as occurred here) the State simply determined not to issue any further such licences. This latter possibility was expressly contemplated by the Treasurer's letter to Tabcorp of 29 June 1994, which warned that the statement of principles set out in the letter – including, at item 6, those relating to the grant of future licences and the making of a terminal payment – *"does not bind this Government or future Governments"*.

[75] *Clissold v Perry* (1904) 1 CLR 363 at 373 per Griffith CJ (Barton and O'Connor JJ agreeing); emphasis added. See further at 376 (*"the Statute is to be construed, if possible, so as not to interfere with vested rights"*).

[76] (2004) 221 CLR 30. That case concerned s 11 of the *Town Planning and Development Act* 1928 (WA), which provided a mechanism for compensation to a person whose land had been injuriously affected by the making of a town planning scheme. Section 36(3) of the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) provided that no such compensation was payable until the happening of one of three specified events. The High Court held that the respondent, which owned land injuriously affected by the making of a town planning scheme, had no right or entitlement to compensation – whether vested, deferred, contingent, or conditional – under s 11 prior to the happening of one or other of the events specified in s 36(3).

[77] See footnotes [64] and [66] in the Appellant's Submissions.

[78] Cf *Temwood* at (2004) 221 CLR 46 [33] per McHugh J (*"at no stage prior to the Commission's conditional approval of Temwood's development application did Temwood have any right, contingent or otherwise, to compensation. Any right of Temwood could only arise upon its election to treat the condition as unacceptable and not proceed with the subdivisions"*). See further, and generally, his Honour's discussion at 45-46 [30]-[33], 49-50 [42]-[44]; and the observations of Gummow and Hayne JJ at 68-70 [96]-[103]. The majority expressly distinguished *Clissold v Perry* (1904) 1 CLR 363: at 46 [31], 49-50 [43]-[44] per McHugh J; 68-70 [97]-[100] per Gummow and Hayne JJ.

under s 4.3.12. The predicate for the rule of construction applied in *Clissold v Perry* – potential interference with a pre-existing right – does not exist in this case.[79]

34. *Thirdly,* the 'legality' principle is a rule of construction, not a guarantee against legislative interference with, or alteration of, existing rights.[80] And, "legislation may necessarily imply" such interference or alteration; that object need not be express.[81] In the present case, the legislature could not have expressed its intention to eliminate the necessary trigger to the s 4.3.12 payment entitlement more clearly. Immediately prior to the enactment of the 2008 Amendments, the words "new licences" in s 4.3.12 bore the specific meaning of the wagering licence and the gaming licences (as defined in the Act).[82] By the 2008 Amendments, the legislature expressly provided, in s 4.3.4A, that no further licences of that kind could be granted. It thereby expressly denied the future availability of the very thing upon which the terminal payment entitlement depended. Accordingly, if it be relevant, the necessary and inescapable implication from the enactment of s 4.3.4A is that the legislative intention was to prevent the payment entitlement being enlivened.

Other textual indicators relied upon by Tabcorp

35. This legislative intention is also manifest in another provision relied upon by Tabcorp.[83] The 2009 Amendments, amongst other things, effected amendments to the provisions in Part 4 of Chapter 3 of the Act pertaining to venue operator's licences and gaming operator's licences,[84] as well as inserting a new Part 4A in Chapter 3, dealing with GMEs. As part of the 2009 Amendments, Parliament enacted ss 3.4.1A and 3.4.4A which provided that the granting to a person of a venue operator's licence or a monitoring licence, respectively, under Part 4 of Chapter 3:

> is not to be taken to be taken to be a granting of –
>
> (a) a gaming operator's licence to that person under this Part; or
>
> (b) a gaming licence to that person under Chapter 4.

36. The *only* conceivable purpose of ss 3.4.1A(b) and 3.4.4A(b) is to prevent s 4.3.12 being triggered by the issue of a venue operator's licence or a monitoring licence – that is, to preclude *precisely* the kind of 'generic equivalence' argument put forward by Tabcorp in the present case. No other identified purpose is served by the provisions. The enactment of these provisions confirms, then, the legislative purpose evident in s 4.3.4A to eliminate any avenue to the payment entitlement in s 4.3.12.

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[79] Related to the absence of any right to payment, vested or otherwise, in Tabcorp, is Tabcorp's contention that the Court of Appeal's construction of "new licences" in s 4.3.12 failed to have regard to the purpose of that section (Appellant's submissions at [72] and [73]). However that purpose – maximising returns from the TAB float by making an end-of-licence payment to Tabcorp dependable upon the issue of new licences - was served by the specific meaning initially given to the phrase "new licences" in the 1994 Act. Apart from anything else, there were no licences other than the wagering and gaming licences held by Tabcorp capable of being granted. If it is Tabcorp's submission that the construction must change from specific to generic (or "less specific") in order to satisfy this statutory purpose, then it must proffer some basis as to why s 4.3.4A, with its evidently emasculatory purpose, *enlarged* the operation of s 4.3.12. For the reasons outlined above, Tabcorp is unable to do so, with the consequence that its contention about statutory purpose does not advance its argument in any practical way.

[80] See, eg, *Lee v NSW Crime Commission* (2013) 251 196 at 310-311 [313]-[314] per Gageler and Keane JJ.

[81] See, eg, *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 149 [142] per Hayne and Bell JJ.

[82] As already pointed out, if the term "new licences" did not bear that specific meaning at the time of the 2008 Amendments, but bore the generic meaning contended for by Tabcorp, there is no occasion to consider the operation of the 'legality' principle; the only issue will be whether the GMEs fell within that generic meaning.

[83] Appellant's Submissions at [44].

[84] These amendments included the insertion of s 3.4.3, which was the equivalent of s 4.3.4A, in that it provided Part 4 applied "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".

37. Tabcorp relies[85] upon the lack of any similar provision addressed to the GMEs in support of its generic construction. This reliance is misplaced:

(a) *first*, the lack of a provision expressly negativing the equation of GMEs with gaming licences does not imply the existence of the converse intention (ie, that GMEs *should*, despite the definition of "gaming licence" in s 1.3, be taken to be gaming licences for the purposes of s 4.3.12);

(b) *secondly*, GMEs were not styled as 'licences' but 'entitlements', and conferred only a limited authority to conduct gaming on a single, approved machine.[86] It is therefore unsurprising that the drafters of the 2009 Amendments thought it unnecessary to include in the legislation an equivalent provision to ss 3.4.1A and 3.4.4A in respect of GMEs, to preclude arguments of the kind now pursued by Tabcorp;

(c) *thirdly*, the legislation expressly provides that the granting of a venue operator's licence, *without which a GME cannot be obtained*, is not to be taken to be a granting of a gaming licence, with the evident purpose of denying a potential trigger for the s 4.3.12 terminal payment entitlement. Why, it might be asked rhetorically, would Parliament go to the trouble of enacting this exclusion, if it was intended that GMEs issued to those same venue operators would nevertheless trigger the payment entitlement?

38. Finally, Tabcorp relies[87] on the fact that the Act includes a number of provisions expressly denying a right to compensation but includes no such provision directed towards the s 4.3.12 payment entitlement. These provisions do not, however, assist it. They invariably address the potential consequences of other provisions of the Act, the operation of which might *collaterally* occasion damage, inconvenience or an interference with rights[88] and, therefore, arguably give rise to an entitlement to compensation if such an entitlement were not expressly negatived. They are of a different character entirely to s 4.3.12, which is, itself, a payment provision. And if, as the State submits, the purpose and effect of s 4.3.4A was to deprive s 4.3.12 of a trigger so that it could not give rise to a payment entitlement, it did not need to go on and provide that there would be no compensation available; so much manifestly went without saying.[89]

39. Further, and in any event, for the reasons set out in paragraphs 32 to 33 above, s 4.3.12 did not establish, as at 2008 or 2012, a right or entitlement in Tabcorp the abolition of which could arguably give rise to compensation.

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[85] Appellant's Submissions at [44].

[86] See section 3.4A.2 of the Act. The holder of GMEs is referred to in the Act as the "entitlement holder" (cf s 4.3.12's language of "holder of the licences" and "licensee").

[87] Appellant's Submissions at [45].

[88] For example, s 2.5A.14 (concerning banning orders); s 3.2.5 (directions by the Commission under s 3.2.4 enforcing regional limits on gaming machines set by the Minister); s 3.4.28F (prohibited venue agreements); ss 3.4.48B, 3.4.59LB, 3.4A.6B, 3.4A.11B, 4.3A.10AB, 4.3A.34AB, 6A.3.10B, 6A.3.34B (ministerial directions to enter into particular agreements); s 3.4.59Q (loss occasioned by a person as a result of authorised activity by the monitoring licensee); ss 3.4A.20J, 3.4A.29, 3.4A.31 (reduction, extinguishment or forfeiture of GMEs); s 3.5.33N (limitations on ATMs in venues); ss 3.7.6C, 4.3.34(4), 4.3A.39A(4), 6.6.1(4), 6A.3.39A(4) (ministerial directions to provide information); s 3.8.12 (compulsory provision of access and/or information and/or assistance); ss 4.2.11(6), 6A.2.4A(6) (compulsory termination of agreements).

[89] Conversely, if s 4.3.4A was, as Tabcorp contends, intended to preserve the payment entitlement in s 4.3.12, the 'no compensation' provisions are of no relevance. It follows that these provisions simply do not assist to confirm the proper construction of the provisions in issue here.

40. Moreover, the inclusion of a provision expressly negativing the availability of compensation does not imply that such compensation would be available *but for* that provision; conversely, the absence of such a provision does not imply the existence of such a right to compensation.

Part VII: Argument on notice of contention

41. Even if the specific construction of "new licences" contended for the State is rejected, the appeal ought still to be dismissed on the basis that the authorities which issued following the expiry of Tabcorp's wagering licence and gaming licence did not constitute "new licences" within the meaning of s 4.3.12.[90] There are three principal reasons why this is so.[91]

42. *First*, the new authorities were materially different[92] in substance from Tabcorp's gaming licence and wagering licence so as to be incapable of constituting "new licences" for the purpose of s 4.3.12 of the Act.

43. The proper approach in determining whether the former licences and the new authorities are sufficiently similar to engage the generic meaning of "new licences" in s 4.3.12 is, *first*, to identify the essential features of the conjoint gaming licence and wagering licence held by Tabcorp and, *secondly*, to analyse whether those features are substantially the same as the essential features of the new authorities.

44. Even if a generic construction is accepted, the phrase "new licences" cannot be divested of its conjoined character of authorising *both* gaming and wagering. Thus, to engage s 4.3.12, each authority must, at a minimum, possess the essential features of *both* the wagering licence and the gaming licence. Plainly, the wagering and betting licence issued to Tabcorp bestows no authority with respect to the conduct of gaming, and the GMEs (and venue operator's licences) do not concern wagering. Accordingly, each must fail at the first hurdle of an essential features analysis.

45. But even if it were possible to separate the gaming licence held by Tabcorp from its wagering licence, the GMEs issued to licensed venue operators are materially different to the gaming licence held by Tabcorp. The rights conferred by Tabcorp's gaming licence were: to obtain, manufacture, supply, service, repair and maintain approved gaming machines; to conduct gaming at an approved venue; and to conduct and promote club keno games.[93] Contrary to the Court's conclusion,[94] a licence which

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[90] Cf Reasons at [37], opining that if "new licences" had the generic meaning for which Tabcorp contended, the GMEs would fall within it. In this regard, the Court cross-referred to its discussion in Tatts Reasons at [11]-[23], however the referenced paragraphs appear to be an error. The Court's discussion of the 'substantial similarity' issue in the Tatts Reasons appears at [165]-[208]. The wholesale adoption of the Tatts Reasons on this subject was inapt, given:

(a) the differences between Tatts' singular gaming operator's licence and Tabcorp's conjoined wagering and gaming licences (cf, for example, the hypotheticals posed in the Tatts Reasons at [189] and [194], which do not logically extend to the conjoined licences owned by Tabcorp, and the reference at [190] to the pre-1994 terms of the 1991 Act which were altered, by the insertion of s 19A, at the time s 21 of the 1994 Act was enacted);

(b) the contractual foundation for Tatts' claim vs the statutory foundation for Tabcorp's claim (cf, for example, the Tatts Reasons at [173]-[179], where the Court's discussion focusses peculiarly on the construction of the contract).

[91] See further, the State's submissions in *State of Victoria v Tatts Group Limited* (M83 of 2015) at [57]-[60].

[92] Assuming the 'generic' meaning to encompass any statutory authority to engage in substantially similar gaming orwagering activities to Tabcorp's licences. Upon this assumption, the generic connotation of "new licences" would require the demonstration, at least, of a substantial similarity between the former licences and the new authorities (such that if there is a material difference between the two, s 4.3.12 would not be triggered).

[93] According to s 7 of the 1994 Act and s 4.3.2 of the Act, the authority conferred by a gaming licence was the same as that conferred on the holder of a gaming operator's licence, as to which see s 14 of the 1991 Act and s 3.4.2 of the Act.

[94] Tatts Reasons at [195]&ff.

does not at least authorise its holder to perform each of these functions is materially different to its predecessor.

46. The narrow authority conferred by GMEs is, relevantly, limited to acquiring approved gaming equipment and conducting gaming on one (only) gaming machine.[95] Section 3.4A.2 expressly provides that a GME "does not authorise the entitlement holder to engage in any business by way of" manufacturing, supplying servicing, repairing or maintaining gaming machines.

47. The Court endorsed[96] three fundamental errors in the learned trial judge's reasoning which had led him wrongly to conclude that the GMEs issued to licensed venue operators would satisfy the 'generic' meaning:

(a) The first error involved the elevation of some (only) of the elements of the concept of the "conduct of gaming" to pre-dominance over the other rights conferred by the gaming licence, thereby dismissing the relevance of those aspects of the authority conferred by the gaming licence that are absent from the authority conferred by the GMEs.[97] This was even though some elements of the "conduct of gaming" as defined in s 3.1.4 of the Act – *viz*, the service, repair and maintenance of gaming equipment – are expressly excluded from the authority conferred by GMEs.[98]

(b) The second error involved the aggregation of the authorities conferred by GMEs and venue operator's licences.[99] There is no textual or contextual justification in the statutory wording to permit the marshalling of rights conferred by two or more distinct authorities in order to satisfy the "new licences" trigger. Further, this approach ignores the fact that Tabcorp, as the holder of a gaming licence under the Act, was prohibited from holding a venue operator's licence.[100] It also denies effect to s 3.4.1A, which provides that the grant of a venue operator's licence is not to be taken to be a granting of a gaming licence under Chapter 4.[101]

(c) The third error was dismissing entirely the relevance of activities which were authorised by the gaming licence but which are excluded from the authority conferred by the GMEs and the venue operator's licence: *viz*, the supply and manufacture of gaming machines.[102]

48. *Secondly*, properly construed, s 4.3.12 requires the "new licences" to be issued to the same licensee, which has not occurred. This is so even if the meaning of "new licences" is 'generic'; it is plain that, particularly when s 4.3.12 is read in its context in Chapter 4 of Part 3, the term contemplates the issue of more than one "new licences", commencing on the *same* day,[103] to a *single* licensee.[104] The Court – in simply

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[95] And activities necessarily incidental thereto: see s 3.4A.2(1) of the Act.
[96] Tatts Reasons at [198]-[202].
[97] Tatts Reasons at [198].
[98] See s 3.4A.2(2)(c) of the Act.
[99] Tatts Reasons at [199].
[100] Section 19A of the 1991 Act; s 3.4.9 of the Act; in each case, Tabcorp was a "gaming operator" by force of definitions in s 3 of the 1991 Act and s 1.3 of the Act.
[101] See further paragraphs 35 to 37 above.
[102] Tatts Reasons at [200]-[201].
[103] See, eg, s 4.3.14, providing that the terminal payment is to be made "not later than 7 days after the commencement of the new licences".
[104] Section 4.3.12(1) provides for a payment in the amount of the licence value "or *the* premium payment paid by *the* new licensee"; see further integer C in the formula in s 4.3.13: "*the* premium payment paid by *the* former licensee for the former *licences*".

adopting its reasoning in respect of Tatts' gaming operator's licence – did not address this requirement.

49. *Thirdly*, the requirement in s 4.3.12 that the amount to be paid be calculated by reference to "the premium payment paid by the new licensee" is not able to be satisfied by the GMEs allocated to licensed venue operators. Section 3.4A.5(9)(b) permits, but does not require, the Minister to determine an amount to be paid by a person to whom a GME is allocated. It says nothing about a "premium payment".

Part VIII: Estimate

50. The State estimates it will require 2.5 hours for presentation of its oral argument.

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Wendy Harris
Tel: (03) 9225 7719
Fax: (03) 9225 8808
Email:
harriswa@vicbar.com.au

Robert Craig
Tel: (03) 9225 8410
Fax: (03) 9225 7728
Email:
rcraig@vicbar.com.au

Kane Loxley
Tel: (03) 9640 3217
Fax: (03) 9640 3103
Email:
kane.loxley@vicbar.com.au

20 **Counsel for the Respondent**

Annexure

Effect of 2008 Amendments on provisions in Part 3 of Chapter 4

Section	Status	Note
4.3.1	Continuing operation	
4.3.2	Continuing operation	
4.3.3	Continuing operation	
4.3.4	Continuing operation	
4.3.5(1)-(3)(c)	Continuing operation	Relevant to appointment of any temporary licensee under s4.3.33
4.3.5(3)(d)	No further operation	Cf s4.3.33(7): temporary licensee to use best endeavours to continue arrangements with VicRacing and Racing Products
4.3.5(4)-(5)	Continuing operation	Relevant to appointment of any temporary licensee under s4.3.33
4.3.6	No further operation	Commission does not make a *recommendation* in respect of a temporary licensee – it is a direct appointment: s4.3.33(1)-(2)
4.3.7	No further operation	Commission does not make a recommendation in respect of a temporary licensee: s4.3.33(1)-(2)
4.3.8	No further operation	Commission does not make a recommendation in respect of a temporary licensee: s4.3.33(1)-(2)
4.3.9(1)	Continuing operation	
4.3.9(2)	No further operation	Consequential on s 4.3.8 becoming inoperative
4.3.10	Continuing operation	
4.3.10A	Continuing operation	
4.3.11	Continuing operation	
4.3.12	No further operation	
4.3.13	No further operation	
4.3.14	No further operation	
4.3.15 – 4.3.34	Continuing operation	