IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M83 of 2015

BETWEEN:

THE STATE OF VICTORIA
Applicant

and

TATTS GROUP LIMITED
Respondent

RESPONDENT'S SUBMISSIONS

10 **Part I: Publication**

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

Part II: Issues

2. The State's appeal presents three main issues. The first concerns the proper construction of clause 7.1 of the 1995 Agreement. Both the Court of Appeal and the primary judge held that the phrase in clause 7.1, 'a new gaming operator's licence', was to be understood in its natural and ordinary sense as meaning any licence or other authority which conferred rights to carry on gaming operations in substance the same as the rights which had been conferred on the Trustees by their gaming operator's licence.[1] Their Honours also held that, on a proper construction of the 1995 Agreement, clause 7 was not
20 'spent' upon the enactment of the 1996 amendments.[2]

3. There is no issue as to the correctness of the principles of interpretation adopted by the Court of Appeal and the trial judge. It was common ground below that the construction of clause 7 was governed by the conventional principles for the interpretation of commercial contracts.[3]

4. The second issue is whether clause 7.1 was impliedly abrogated by either the 1996 amendments or the 2009 amendments as contended by the State. The argument based on the 1996 amendments was not advanced below. The argument based on the 2009 amendments was rejected by the primary judge and the Court of Appeal.[4] As the trial judge and the Court of Appeal noted, the State's argument falls to be determined on well-
30 established principles: the right to compensation conferred by clause 7.1 was a valuable contractual right and as such not subject to destruction without compensation unless the legislation was *'expressed in unequivocal terms incapable of any other meaning'*.[5]

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[1] [2014] VSCA 311 (**CA Reasons**), [146]-[158]; [2014] VSC 302 (**Trial Reasons**), [95]-[103].
[2] CA Reasons, [211]; Trial Reasons, [105]-[119].
[3] CA Reasons, [87]-[93]. See similarly in this appeal the Appellant's Submissions, [30], [32] and [43].
[4] Trial Reasons. [120]-[148]; CA Reasons, [216]-[217].
[5] CA Reasons, [214]; citing *Bromley v Forestry Commission of New South Wales* (2001) 51 NSWLR 378 (***Bromley***), 391-2 [44] (Mason P, Ipp and Heydon JJA agreeing). See also Trial Reasons [124]-[127]; citing

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5. The third issue is whether the issue of gaming machine entitlements (**GMEs**) to licensed venue operators constituted the grant of a 'new gaming operator's licence' for the purposes of clause 7.1 of the 1995 Agreement. The State's submissions emphasise form over substance by contending that the grant of GMEs cannot be aggregated with the rights granted under venue operator's licences.[6] In rejecting this argument, the trial judge and the Court of Appeal concluded that clause 7.1 is wide enough to embrace multiple authorities and that the aggregated authorities granted under the new regime are substantially the same as those which were granted under Tatts' gaming operator's licence.[7]

6. The issues identified in [3], [4] and [5] of the State's submissions are false issues.[8] As to [3], clause 8 was a 'best endeavours' provision and did not *'expressly require[s] the subsequent enactment of that promise in legislation'*.[9] In addition, as both the Court of Appeal and the trial judge found, the contractual right was different from the statutory right, and it is inaccurate to say that they embody the same promise.[10] As to [4] and [5], the critical issue in respect of the State's abrogation argument is whether Parliament has by its enactments made its intention to annihilate Tatts' rights under clause 7 of the 1995 Agreement manifestly clear,[11] not whether the statutory right and the pre-existing contractual right 'concern[ing] the same subject matter'.[12]

7. By notice of contention, Tatts contends that the orders of the Court of Appeal should be affirmed on the basis that the Court erred in rejecting Tatts' other claim seeking payment under s 3.4.33 of the Act. The central issue is whether, in applying s 3.4.33(1)(b) to the circumstances existing immediately after the expiry of Tatts' licence, the words 'gaming operator's licence' should be construed according to the meaning defined in s 1.3 (as found by the Court of Appeal) or whether they should have their natural and ordinary meaning as any licence or entitlement which in substance authorises the conduct of gaming operations at approved venues.[13]

Part III: *Judiciary Act 1903* (Cth)

8. The respondent 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 parties.

Part IV: Facts

9. The factual background set out in the State's submissions can be accepted subject to the following corrections and additional matters.

10. Upon enactment, s 33 of the 1991 Act authorised the grant of a gaming operator's licence to the Trustees and the TAB.[14] The term 'gaming operator's licence' was never defined in the 1991 Act.[15] Section 33 was amended in 1994 so as to remove the power to grant a

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Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30, 49 [43] (McHugh J); *Clissold v Perry* (1904) 363, 373 (Griffith CJ, Barton and O'Connor JJ agreeing); *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J); *Springhall v Kirner* [1988] VR 159, 165 (Crockett J).

[6] Appellant's Submissions, [59].

[7] CA Reasons, [174]-[209]; Trial Reasons [150]-[172].

[8] See Appellant's Submissions, [3], [4] and [5].

[9] Appellant's Submissions, [3].

[10] Cf. Appellant's Submissions, [3].

[11] See footnote 5 above.

[12] Cf. Appellant's Submissions, [4].

[13] CA Reasons, [41]; Trial Reasons, [197].

[14] CA Reasons, [12].

[15] Trial Reasons, [66].

licence to the TAB.[16] Under s 37, the Trustees' licence was not transferrable to any other person. As such, at the time of the 1995 Agreement, and leaving aside the casino licence mentioned below, the 1991 Act authorised the grant of only one gaming operator's licence, being the licence already issued to the Trustees.[17]

11. By itself, a gaming operator's licence did not allow the holder to conduct gaming, since gaming could not be conducted otherwise than at an approved venue operated by a licensed venue operator. Prior to the introduction of s 19A into the 1991 Act in 1994, the Trustees could have held both a gaming operator's licence and a venue operator's licence.[18] However, they chose not to do so and instead the Trustees formed contractual arrangements with the holder of a 'venue operator's licence' in respect of each approved venue at which the Trustees conducted gaming.[19] After s 19A was introduced, the Trustees were required to continue to conduct their business in that way.[20] Without such arrangements, the Trustees' gaming operator's licence was of no utility.[21]

12. The gaming licence held by Tabcorp under the 1994 Act differed from the Trustees' gaming operator's licence.[22] Nonetheless, Tabcorp was included as a 'gaming operator' under the 1991 Act.[23] The statutory authorities granted to the casino operator were treated in a similar way.[24] Although a casino operator lacked certain ancillary powers conferred by s 14 of the 1991 Act, its statutory powers were sufficient for s 32 of the 1991 Act to provide that the casino operator was taken to be a licensed venue operator, and it was authorised to obtain gaming machines, conduct gaming, and service and repair gaming equipment as if it were the holder of a gaming operator's licence.[25]

13. The 1991 Act gave the Minister for Gaming the power to make Ministerial Directions concerning, amongst other things, the maximum permissible number of gaming machines that each gaming operator was permitted to operate. The licences issued to the Trustees and Tabcorp did not specify the proportion or numbers of gaming machines. At all times, Tatts and Tabcorp were entitled under Ministerial Directions to an equal share of the authorised maximum permissible number of gaming machines in Victoria outside Crown Casino.[26]

14. As a consequence of the Tabcorp float, Tabcorp and the Trustees were placed in quite different competitive situations: Tabcorp had been required to pay a very substantial upfront licence fee, but the Trustees had not.[27] The State commenced negotiations with the Trustees in an endeavour to reach an agreement as to the basis upon which the Trustees would pay a licence fee equivalent to that paid by Tabcorp for its gaming licence and the Trustees would also receive a terminal payment on expiry of their licence in certain circumstances, calculated on a similar basis to the Tabcorp terminal payment

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[16] CA Reasons, [22] and [150]; Trial Reasons, [24].
[17] CA Reasons, [12]; Trial Reasons, [66].
[18] CA Reasons, [23].
[19] Trial Reasons, [76]; CA Reasons, [124] and [190].
[20] CA Reasons, [124].
[21] Trial Reasons, [69].
[22] CA Reasons, [150]. Tabcorp's 'gaming licence' did not confer upon it the same authorities bestowed on the Trustees by their 'gaming operator's licence': cf. Appellant's Submissions at [12]. Tabcorp's gaming licence authorised the conduct of club keno: Trial Reasons, [12]. In contrast, the Trustees' gaming operator's licence did not authorise the conduct of club keno which authority was conferred on them by separate legislation (*Club Keno Act 1993* (Vic)): Trial Reasons, [12] and [170].
[23] Trial Reasons, [66] and [70].
[24] The casino operator is, and since 1993 has been, Crown Limited (**Crown**) and the casino is known as Crown Casino.
[25] Trial Reasons, [71] and [72]; CA Reasons, [150].
[26] Trial Reasons, [54] and [70]; CA Reasons, [111].
[27] Trial Reasons, [18] and [79].

provision.[28] The potential for future regulatory change was recognised by the parties and formed a central basis of the negotiations leading up to the 1995 Agreement.[29] Sovereign risk was a mutually known fact and an important consideration in the lead-up to the execution of the 1995 Agreement.[30]

15. The Treasurer's letter was attached as Schedule 2 to the 1995 Agreement and deemed to be a part of that agreement by clause 1.1.[31] As the trial judge and the Court of Appeal pointed out,[32] the following aspects of the Treasurer's letter are relevant: [33]

    (a) the letter describes the Trustees' licence as giving them *'a concurrent right'* with Tabcorp and Crown to conduct gaming for a fixed period, thereby identifying the essence of the Trustees' licence as providing the authority to conduct gaming;

    (b) the letter notes that the State did not during the licence period intend *'to grant further gaming licences to persons who are not now authorised to conduct gaming'*. This statement describes the licences or authorities held by the Trustees, Tabcorp and Crown collectively as *'gaming licences'*, albeit that they had different names, different sources in legislation and different features; and

    (c) the letter speaks in terms of the award of *'a new licence'* or *'the new licence'* to *'the new licensee'*, says that the award may involve a public tender, and also speaks of *'any new licence'* being granted on conditions which include conditions *'substantially to the same effect as those to which the Trustees' licence is subject'* (emphasis added).

16. The ability to vary the Ministerial Directions given from time to time under the 1991 Act, combined with the explicitly non-binding nature of the six principles contained in the Treasurer's letter, made it apparent that there was considerable ongoing uncertainty as to the future regulation of gaming.[34]

17. In 1999, following a tax ruling which called into question the deductibility of the licence fee payments being made by the Trustees' on the basis that the fees were calculated by reference to the profitability of the business, the Trustees approached the Treasurer and sought amendments to the manner in which the licence fee payments to the State were calculated (so that they would be calculated by reference to revenue rather than profitability).[35] The Treasurer agreed and, as a result, the 1991 Act was amended to alter the payment obligations of the Trustees under ss 135A-135C (which had been introduced by the 1996 amendments) and the parties entered into the 1999 Agreement.[36] The 1999 Agreement amended the 1995 Agreement so that payments under clause 3 ceased with effect from 30 June 1999 and were replaced with the payments required under the amendments to the 1991 Act. By clause 4.1 of the 1999 Agreement, the parties affirmed their obligations to perform and the validity of the 1995 Agreement as amended.[37]

18. In 2003, the provisions of the 1991 Act and the 1994 Act that separately regulated the

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[28] The amount of the licence fee to be paid by Tatts, and the amount of the terminal payment to it, reflected the portion of Tabcorp's licence fee that was referable to its gaming machine business. This explains the genesis of the $520 million figure in clause 7.3 of the 1995 Agreement: Trial Reasons, [19]. See also Trial Reasons, [80] and [82]; CA Reasons, [128]-[129].
[29] Trial Reasons, [77].
[30] Trial Reasons, [77]; CA Reasons, [212].
[31] Trial Reasons, [53]; CA Reasons, [112].
[32] CA Reasons, [114] and [156].
[33] Trial Reasons, [56]; CA Reasons, [114].
[34] Trial Reasons, [57]; CA Reasons, [115].
[35] See Appellant's Submissions, [46(c)].
[36] Trial Reasons, [26] and [110]-[111].
[37] Trial Reasons, [112].

conduct of gaming by the Trustees and Tabcorp were consolidated into the Act. There was no change to the provisions governing the grant of venue operator's licences and gaming operator's licences. Nor was there any material change to the Trustees' payment entitlement under s 35A, which was re-enacted in s 3.4.33.[38] Under s 3.5 of Schedule 7, the Trustees' licence was deemed to be a gaming operator's licence under Division 3 of Part 4 of Chapter 3 of the Act.

19. In order to facilitate the public float of the estate administered by the Trustees, the Transfer Agreement was made between the State, the Trustees, Tatts and its operating subsidiaries in 2005. The Transfer Agreement and related Deed of Assignment novated all of the provisions of the 1995 Agreement in favour of Tatts, so that Tatts became entitled to enforce its provisions, as amended by the 1999 Agreement, on and from the date of the Transfer Agreement.[39]

20. The 2008 media release[40] by the then Premier described the proposed 'restructure' of gaming regulation in Victoria after expiry of the licences held by Tatts and Tabcorp, and included a statement that the then Government had formed the view that neither Tatts nor Tabcorp will be entitled to compensation as a consequence.[41]

21. Upon the grant of GMEs, the gaming operations formerly conducted by Tatts continued to be conducted by others. The new regime authorised gaming on precisely the same number of gaming machines as the previous regime.[42] The transition to the new gaming operators was seamless and barely discernible. At 11:00 pm on 15 August 2012, one hour before Tatts' licence expired, all of the gaming machines owned and operated by Tatts were disabled and as at midnight the gaming machines were sold *in situ* to the existing venue operators for use by them in accordance with their GMEs in their existing location within approved venues. At approximately 8:00 am on 16 August 2012, when the gaming venues re-opened, the same gaming machines in the same venues were re-enabled and the new gaming operators, who were already the licensed and approved venue operators, commenced their gaming operations pursuant to the authorities conferred upon them by their GMEs and venue operator's licences.[43] The customers continued to play the same games on the same machines that were situated at the same venues operated by the same licensed venue operators.[44] All that changed is that the conduct of gaming within each approved venue was now being conducted by the venue operator under the GMEs, instead of by Tatts and Tabcorp under their gaming operator's licence and gaming licence respectively.[45]

Part V: Legislation

22. The appellant's statement of applicable legislation is noted.

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[38] Trial Reasons, [27]-[28].
[39] Trial Reasons, [111]-[114].
[40] Appellant's Submissions, [18].
[41] Trial Reasons, [222]. The Government's view was repeated by statements made in a Government budget paper for the 2008–2009 financial year dated 6 May 2008: Trial Reasons, [224].
[42] CA Reasons, [168]-[169].
[43] Trial Reasons, [151]; CA Reasons, [169].
[44] Witness Statement of Frank Makryllos, [70]. The conduct of gaming continued to be subject to the same detailed array of rules and regulations around responsible gambling as applied previously. Similarly the limits on the maximum number of gaming machines (27,500), the maximum number of machines per venues (105), the split between machines in pubs and clubs (50/50), the split between machines in metropolitan and country areas (80/20) and the various caps within specified municipal districts and regional areas all continued to apply: Witness Statement of Frank Makryllos, [72]-[74].
[45] CA Reasons, [40]. In fact in many cases venues continued to use Tatts' 'Tatts Pokies' signage despite repeated requests by Tatts to have it removed: Witness Statement of Frank Makryllos, [70].

Part VI: The respondent's arguments

Construction of Clause 7.1

23. Both the primary judge and the Court of Appeal correctly found that, properly construed, the phrase 'a new gaming operator's licence' in clause 7.1 extended to a new licence or new licences substantially the same as the Trustees' existing licence.[46] As the Court of Appeal noted, the following considerations support the conclusion.[47]

24. *First*, the natural and ordinary meaning of the words 'a new gaming operator's licence' embraces a generic meaning: a gaming operator is someone who conducts gaming operations – a licence is simply an authority which has the effect of making lawful or permissible that which would otherwise be unlawful – the adjective 'new' connotes a licence that is freshly and effectively issued in the circumstances that then exist.[48]

25. *Secondly*, the specific definition of 'Gaming Operator's Licence' in clause 1.1 of the 1995 Agreement as meaning the gaming operator's licence issued to the Trustees pursuant to the 1991 Act directly contrasts with the composite phrase 'a new gaming operator's licence', which had no meaning or possible operation in the 1991 Act at the time the 1995 Agreement was executed.[49]

26. *Thirdly*, the Treasurer's letter makes clear that the existing licence held by Tatts is to be regarded as a right to conduct gaming which is concurrent with the rights held by Tabcorp and Crown. The letter treated those three different forms of gaming licence as 'gaming licences', regardless of the fact that they had different names, different sources in legislation and different features.[50] The essential characteristic of the licences was as a licence to conduct gaming.[51] The Treasurer's letter also made it clear that a new gaming operator's licence might be different from the defined 'Gaming Operator's Licence': *'It is intended that any new licence will be granted on conditions which include conditions substantially to the same effect as those to which the Trustees' licence is subject'* (underlining added).[52]

27. *Fourthly*, the composite phrase 'a new gaming operator's licence' was intended to take effect *in futuro*. The phrase 'a new gaming operator's licence' fell to be applied in 17 years' time and in circumstances where: (i) no new gaming operator's licence could be issued under the 1991 Act at the date of 1995 Agreement; (ii) the parties expressly contemplated in clause 8.1.6 that the form of the new gaming operator's licence to follow expiry of Tatts' licence would be the subject of later legislation; and (iii) the parties understood that future legislative regimes were uncertain.[53]

28. *Fifthly*, clause 7.1 provides that the Trustees would receive 'compensation for the investment in infrastructure lost'. It further contemplates that the right to compensation is prima facie the value of the licence (as calculated thereunder), but is conditional upon the grant of a new licence to a third party and limited by the amount of the licence fee paid by that third party.[54] As the trial judge and the Court of Appeal both found, it is clear that

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[46] Trial Reasons, [95]; CA Reasons, [147].
[47] CA Reasons, [147]-[157]
[48] CA Reasons, [148].
[49] CA Reasons, [149]; Trial Reasons, [96]. It was not until the 1996 amendments introduced a substituted s 33 and a new s 33A into the 1991 Act that a new gaming operator's licence could be granted under that Act: Trial Reasons, [97].
[50] Trial Reasons [56].
[51] CA Reasons, [150], [156].
[52] CA Reasons, [114], [156]; Trial Reasons [56], [100].
[53] CA Reasons, [151]-[153]; Trial Reasons, [99].
[54] CA Reasons, [154].

the parties intended that the premium paid by the new licensee would be used by the State to make the payment to Tatts under clause 7.[55] Tatts would suffer its loss, and the State would receive its premium, regardless of the precise statutory source of the right to conduct gaming operations granted to the incoming party.[56]

29. *Sixthly*, the context in which the 1995 Agreement was struck supports the view that the purpose of clause 7 was to provide compensation for the loss of Tatts' gaming business upon the expiry of the existing licence while ensuring that compensation was limited by reference to the premium received by the government (if any) for any new licence.[57]

30. *Seventhly*, there is no good commercial reason to justify the Court giving the critical phrase the specific meaning asserted by the State or to require that the right to the payment should depend upon the source of the new statutory right to conduct gaming.[58] The specific meaning would not produce a commercial result and, by reason of matters of form alone, would defeat the State's promise to make the terminal payment in return for the Trustees' agreement to pay the substantial fee stipulated in clause 3.[59]

31. The State contends that the phrase 'new gaming operator's licence' must be read narrowly and specifically as meaning a licence issued under Part 3 of the 1991 Act.[60] However, as the Court of Appeal records at [80], the State accepted that a right which was in substance the same as a gaming operator's licence issued under the 1991 Act would be caught by the phrase 'a new gaming operator's licence'.[61] Similarly, in its submissions in this appeal, the State accepts that the phrase connotes a new gaming operator's licence 'of the same kind' as the licence held by the Trustees.[62]

32. In part, the State's construction relies on the use of the term 'Gaming Operator's Licence' in clause 1 and the language of clause 1.3 of the 1995 Agreement.[63] The State misstates the findings of the Court of Appeal in this regard: the Court did not hold that the word 'new' before 'gaming operator's licence' had a transformative character.[64] Rather, the Court correctly held that neither the definition of 'Gaming Operator's Licence' nor clause 1.3 was engaged in respect of the phrase 'a new gaming operator's licence' which fell to be applied in 17 years' time and in circumstances where no new gaming operator's licence could be issued under the 1991 Act at the date of the 1995 Agreement.[65] The State's argument ignores the fact that the phrase 'a new gaming operator's licence' is

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[55] Trial Reasons, [80]; CA Reasons, [143]. This is underscored by clause 8.1.6 which provides for a lump sum payment following the expiry of the Trustees' licence and clause 7.1 which provides that the compensation payment cannot exceed the premium payment.
[56] CA Reasons, [143].
[57] CA Reasons, [155].
[58] CA Reasons [157]-[158]; Trial Reasons, [101]-[102]. The same is true of minor changes to the precise form, description, name or ancillary terms of the new gaming operator's licence.
[59] Trial Reasons, [101].
[60] Appellant's Submissions, [24]; notice of appeal dated 29 May 2015, [2].
[61] In the course of argument before the Court of Appeal, the Solicitor-General conceded on behalf of the State that a 'new gaming operator's licence' within the meaning of clause 7.1 does not have to be called a 'gaming operator's licence' and could be issued under any part of the Act, or even under a different act: see Transcript, 191-192, 195-197 and 199-200.
[62] Appellant's Submissions, [26]. The State also makes a number of assertions in footnote 51 of its submissions about the operation of the CGT provisions. Those assertions are untenable on the face of the legislation, and in any event there was no evidence that either party to the 1995 Agreement held, let alone shared, such views prior to the execution of the 1995 Agreement.
[63] Appellant's Submissions, [23].
[64] Appellant's Submissions, [25]-[27].
[65] Trial Reasons, [96]; CA Reasons, [151]. Contrary to the State's submissions at [27(b)], a reasonable business person could not identify a 'new gaming operator's licence' as a fresh gaming operator's licence issued under Part 3 of the 1991 Act because no such licence could be issued under the 1991 Act at the time the agreement was struck.

used in clear contradistinction to the defined term 'the Gaming Operator's Licence' and is repugnant to the statutory context in which the agreement was struck.

33. Contrary to the State's submissions, the Court of Appeal did not hold that the reference to 'gaming operator's licence' in s 35A of the 1991 Act had a specific meaning.[66] In any event, the State's construction depends on the further proposition that the term new 'gaming operator's licence' in clause 7.1 extends beyond the meaning which such a term would bear under the 1991 Act to include any gaming operator's licence issued under the 1991 Act as amended from time to time or as replaced by successor legislation such as the Act.[67] This argument requires words be read into clause 1.1 so that 'Act' means the 1991 Act 'as amended, repealed and replaced from time to time' and is premised on ss 16 and 17 of the *Interpretation of Legislation Act 1984* (Vic).[68] The primary judge correctly found that the addition of such words was not necessary to give business efficacy to the agreement.[69] The argument that repeal of the 1991 Act would deprive clause 7 of its trigger is pure 'bootstraps': it depends upon a specific construction of the critical phrase.[70] Moreover, the Court of Appeal rightly rejected the State's argument, saying that *"[i]t is inherently improbable that the parties objectively intended that their rights would be governed by the variable terms of definitions in future legislation and that the phrase 'a new gaming operator's licence' must be read as having whatever meaning it was given from time to time in unknown future legislation".*[71]

34. The primary judge and the Court of Appeal were also right to find that there is no sense in restricting the natural and ordinary meaning of 'a new gaming operator's licence' to a licence issued under the 1991 Act or as it might be amended or re-enacted from time to time; rather there is every reason to read it as extending to any statutory authority, howsoever denominated, of which the effect would be to confer on the holder substantially the same rights as were conferred on the Trustees by their licence at the time of its expiration.[72]

35. The State's contention that clause 7.2 is inconsistent with a generic construction of the phrase 'new gaming operator's licence' in clause 7.1 was rightly rejected by the trial judge and the Court of Appeal.[73] Clause 7.2 operates to relieve the State from making the payment in clause 7.1 in circumstances where the State determined at the expiry of the Trustees' licence not to issue any new licence or authority to operate gaming machines in Victoria or to issue any such licence or authority to a related entity of the Trustees.[74] Two factors identified in clause 7 explain the choice of the contingency, namely the terminal payment was to compensate the Trustees for their investment in infrastructure lost,[75] so long as that payment could be funded from the premium paid by the grantee of a

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[66] Appellant's Submissions, [27(a)]. At [151], the Court of Appeal said that *'[i]t may be accepted, as the State submits, that the phrase 'gaming operator's licence' had a clear meaning under the 1991 Act'* but made no finding about the use of the phrase in s 35A.

[67] Appellant's Submissions, [28]-[29].

[68] Appellant's Submissions, [29], footnote 45.

[69] Trial Reasons, [98]. The primary judge also held (correctly) that clause 1.3 appears in a contract, not legislation, so ss 16 and 17 of the *Interpretation of Legislation Act 1984* (Vic) have no application: Trial Reasons, [98]. The Court of Appeal agreed: CA Reasons, [163].

[70] Appellant's Submissions, [28].

[71] CA Reasons, [164]; see also [160]-[163].

[72] CA Reasons, [135] and [157]; Trial Reasons, [101]-[102].

[73] CA Reasons, [142]-[143]. Cf. Appellant's Submissions, [32]-[35].

[74] For example, because the State decided to return to a total prohibition on gaming in Victoria as existed prior to the passing of the 1991 Act.

[75] The State's argument at [34] of its submissions that the Trustees had already made investment in infrastructure prior to the 1995 Agreement was not advanced below and is without substance. The purpose of the terminal payment provision is to provide 'compensation for *the* investment in infrastructure lost'. There is no good

new gaming operator's licence.[76] In fact, the State received approximately $981 million in premiums from the issuance of GMEs following the expiry of Tatts' licence.[77]

36. The Court of Appeal was also correct in rejecting the State's next argument that the use of the phrase 'a new gaming operator's licence' in clause 5.2 demands the specific meaning.[78] The Court of Appeal rightly held that the way in which the expression 'a new gaming operator's licence' is used in both clause 5.2 and clause 7 is in the broader generic sense.[79] The evident purpose of clause 5.2 is to give the benefit of clause 7 to a related entity of the Trustees.

37. Contrary to the State's submissions, neither the Court of Appeal nor the trial judge overlooked clause 8.[80] The Court of Appeal pointed out that it was implicit in the best endeavours provision in clause 8 (as well as in clauses 4 and 5) that sovereign risk was clearly understood by the parties.[81] Indeed, the Court noted that the 1995 Agreement was replete with provisions which clearly envisaged, or expressly addressed, the possibility of legislative and regulatory changes, including the recitals, clauses 4, 5, 6 and 8, and both Schedules. These matters were confirmed by the Treasurer's letter and the trial judge's unchallenged findings as to the context in which the 1995 Agreement was made.[82] Nothing in the language used in clause 8 is capable of altering or restricting the natural and ordinary meaning of clause 7.1.

38. The State's argument that s 21 of the 1994 Act supports the specific meaning was not advanced below and is without substance.[83] This argument depends on a construction of that section which is disputed by Tabcorp and there was no evidence that the construction of the section contended for by the State was an objective fact mutually known to both parties at the time the 1995 Agreement was entered into. Moreover, clause 7 was drafted in substantially different terms to s 21 of the 1994 Act. It is a fallacy to suggest, as the State does, that s 21 and clause 7 must be read as if they are identical (when they are clearly not), especially where the Trustees separately negotiated their agreement with the State whereas Tabcorp did not.

39. The argument advanced by the State that clause 7.1 does not apply to the present situation because it uses the singular phrases 'premium payment' and 'new licensee' was also rightly rejected by both the trial judge and the Court of Appeal.[84] As noted by the primary judge,[85] clause 1.1 of the 1995 Agreement states that the singular includes the plural, unless a contrary intention appears. No contrary intention can be discerned from

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commercial reason to infer that the parties intended to exclude any investment in infrastructure, whether made prior or subsequent to the execution of the 1995 Agreement. The investment in infrastructure lost included the ongoing investment made by the Trustees, and subsequently Tatts, in establishing (from scratch), developing and maintaining a gaming business which they would lose on the expiry of their licence, with a new right to do what they had been able to do being handed to the incoming licensee on the payment of a premium to the State. As the Court of Appeal correctly noted at [142], the Trustees 'investment in infrastructure' was reflected in the projected value of the licence fees. See in this regard footnote 28 above.

[76] CA Reasons, [142]-[143].

[77] Trial Reasons, [31]. The hypothetical referred to in the State's submissions at [35] in which Tatts would be deprived of the right to a payment under clause 7 if it was issued with one GME is fanciful. It was always a commercial decision for Tatts whether or not to apply for any given number of GMEs having regard to the value of the compensation right which it would stand to forego on the grant to it of any such GMEs.

[78] Appellant's Submissions, [26].

[79] CA Reasons, [137]-[138].

[80] Appellant's Submissions, [27(a)].

[81] CA Reasons, [115] and [116].

[82] CA Reasons, [125], [153] and [212].

[83] Appellant's Submissions, [31]-[32].

[84] Appellant's Submission, [36].

[85] Trial Reasons, [151].

the language of clause 7. Indeed, the phrase '*any* new gaming operator's licence' (emphasis added) connotes a number of licences in any particular statutory form.

The argument that clause 7 was spent

40. The State contends that clause 7 of the 1995 Agreement became discharged upon the introduction of s 35A of the 1991 Act in 1996.[86] The State's case depends upon the proposition that the purpose and effect of clause 7 was only to establish a contractual entitlement pending the enactment of legislation pursuant to clause 8.[87] These consequences are said to flow as a matter of construction from 'the strong textual indication', but the argument fails to identify any language in clause 8 or elsewhere in the 1995 Agreement that is capable of having that effect. The primary judge and the Court of Appeal rejected the argument for sound reasons.[88]

41. *First*, the Courts below correctly observed that the State's contentions find no support in the language of the 1995 Agreement.[89] The State's contention that parties objectively intended clause 7 to operate only until its terms were recorded in future legislation is entirely lacking in substance.[90] The limited function of clause 8 was to oblige the Minister to use his best endeavours to procure the enactment of certain legislation. There could be no guarantee that any such legislation would be enacted, either at all or in any particular form, or that it would remain in force at the expiry of the Trustees' licence. Nor is there anything else in the terms of the 1995 Agreement to suggest that clause 7 would be spent and no longer enforceable upon enactment of any legislative amendments contemplated by clause 8.

42. The Court of Appeal and the primary judge pointed out that the 1995 Agreement imposed continuing obligations over the term of the Trustees' licence, and that many textual indications showed that the agreement was intended to survive any enactment of the statutory provisions contemplated in clause 8.[91] The express terms of clauses 3 and 7 made it clear that they applied to events that would follow the commencement of any legislation contemplated by clause 8. In addition, clause 5.2 specifically contemplates that clause 7 would be operating up to the expiry date of the gaming operator's licence.

43. *Secondly*, sovereign risk was objectively an important consideration for the parties in relation to the 1995 Agreement.[92] Both the Court of Appeal and the trial judge concluded that it would be commercially improbable to attribute an intention to the parties that their rights and obligations under the 1995 Agreement should be spent upon the passage of the legislation provided for by clause 8.[93] The trial judge found that '*[i]t was obviously in the interests of the Trustees to have concurrent contractual and statutory entitlements to receive the terminal payment, as repealing a statutory right may be thought more*

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[86] Appellant's Submissions, [41].
[87] Appellant's Submissions, [40].
[88] Trial Reasons, [105]-[119]; CA Reasons, [210]-[215].
[89] Court of Appeals Reasons, [211]; Trial Reasons, [106].
[90] Appellant's Submissions, [42]. The analogy that the State seeks to draw with the first class of contract referred to in *Masters v Cameron* (1954) 91 CLR 353 is inapt. At 360, the High Court relevantly said: '*[w]here parties who have been in negotiation to reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect*'. In this case, there is neither intention to further contract nor intention to provide for fuller or more precise contractual terms.
[91] CA Reasons, [211]; Trial Reasons, [106].
[92] CA Reasons, [212]; Trial Reasons, [107].
[93] CA Reasons, [212]; Trial Reasons, [107].

politically palatable than abrogating a right created by a commercial contract'.[94]

44. *Thirdly*, there was no guarantee that legislation would be enacted pursuant to clause 8.1 or that any legislation would be the same as the scope of the rights conferred by clause 7.1. As events transpired, the Court of Appeal and the trial judge concluded that the scope of the compensation right conferred by clause 7.1 differed significantly from the scope of the compensation right conferred by s 3.4.33. There is no reason why different contractual and statutory entitlements to receive a terminal payment cannot exist concurrently.[95]

45. *Fourthly*, the primary judge and the Court of Appeal observed that the State's case is inconsistent with the 1995 Agreement and the Transfer Agreement entered into by the State.[96] The agreement upon which Tatts sues is the Transfer Agreement. The legal effect of the Transfer Agreement was that the State repeated and re-made its contractual promises in the 1995 Agreement as amended by the 1999 Agreement (without exception) in favour of Tatts so that it could be directly enforced by Tatts as a contracting party.[97] The 1999 Agreement confirmed the continuing operation of clause 7. This context provides further support for the conclusion that the intention of the parties was that clause 7 (as repeated and re-made in the Transfer Agreement) would continue to operate after the 1996 amendments.

46. The State contends that it would be commercially improbable to attribute an intention of the parties for there to be concurrent obligations to pay *two* licence fees (in the case of the Trustees) and *two* terminal payments (in the case of the State).[98] The notion that the Trustees would be required to make *two* licence fee payments and the State would be required to make *two* terminal payments under concurrent statutory and contractual provisions is lacking in common sense and is contrary to legal principle. There is no difficulty in a debt being secured by two collateral or independent obligations, and the performance of either of the obligations will fulfil or satisfy the other.[99]

47. The State's argument that it would still be improbable to have concurrent rights is based in part on the erroneous premise that there would be no utility in clause 8.1 if clauses 3 and 7 were intended to have ongoing effect.[100] This flies in the face of the findings of the trial judge regarding sovereign risk and that it was in the interests of Trustees to have concurrent contractual and statutory entitlements to receive the terminal payment.[101] It also ignores the fact that both the Court of Appeal and the trial judge found that the contractual right in clause 7 was different from the statutory right. On that basis, the State's argument proceeds on a misconception that the contractual obligation was embodied in the subsequent legislation and the same rights existed in parallel.[102]

48. The Court of Appeal and the trial judge were correct to observe that the co-existence of clause 7 of the 1995 Agreement with the 1996 amendments also derives support from the

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[94] Trial Reasons, [107]. Not only is it to be expected that Parliament would be more reluctant to tear up a contract entered into by a Minister of the Crown than to repeal a statutory right, other benefits might flow from a contract: see the discussion in Seddon, N, *Government Contracts* (Federation Press, 2013, 5th ed), 128-9 [3.12].
[95] Trial Reasons, [108]; CA Reasons, [213].
[96] Trial Reasons, [109]-[117]; CA Reasons, [214].
[97] Trial Reasons, [114], citing *James Miller & Partners Ltd v Whitsworth Street Estate (Manchester) Ltd* [1970] AC 583, 603 (Lord Reid).
[98] Appellant's Submissions, [39] and [43].
[99] *Stock Motors Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 134 (Starke J) and 135-6 (Dixon J, in dissent but not on this issue).
[100] Appellant's Submissions, [40], footnote 67.
[101] Trial Reasons, [107]. The State did not appeal these findings.
[102] Appellant's submissions, [39], [41], [43], [44]

decision in *Bromley*.[103] As noted by the primary judge, the reasoning in *Bromley* recognises that parallel contractual and statutory rights may exist and that changes to the statutory right do not affect the operation of the contractual right unless the changes have the effect that exercise of the contractual right will abrogate, or stand in the way of the operation of, the amended statute.[104] It does not matter that the statutory right pre-dated the contractual right.[105]

49. Furthermore, the State's submissions misunderstand the relevance and effect of the two subsequent agreements.[106] Tatts is not seeking to rely on these agreements as subsequent conduct in aid of construction of 1995 Agreement. In addition, contrary to the State's submissions, the 1999 Agreement did not remove clause 3 from the 1995 Agreement altogether.[107] The 1999 Agreement relevantly left in place clauses 3.1.4(a) and (c), which continued to operate in respect of the year ended 30 June 1999.[108] Thus, a substantial quarterly payment was payable on 30 June 1999 (after the entry into the 1999 Agreement on 28 June 1999) under the amended clause 3.1.4(a)(iv) and the audit and reconciliation process under clause 3.1.4(c) continued to apply post 30 June 1999 in respect of the year ended 30 June 1999. The amendments to clause 3 effected by the 1999 Agreement reflected the parties' agreement and recognition that separate licence fees would cease after 30 June 1999, and that they would thereafter be encompassed within a class of taxing provision that the 1995 Agreement had never addressed. They do not undermine the continuing operation of clause 7 which was un-amended and affirmed by the terms of the 1999 Agreement. In this way, the parties plainly intended by the 1999 Agreement to alter the ongoing and continuing operation of clause 3 so that the payment and ancillary obligations in respect of the financial year ended 30 June 1999 continued to bind the parties. Once this is accepted, as it must be, it must also follow that the parties objectively intended that clause 7 should continue to apply.

The argument that clause 7 was abrogated

50. The State further contends that clause 7.1 was impliedly abrogated by:

    (a) the introduction of s 35A into the 1991 Act by the 1996 amendments;[109] or

    (b) the introduction of s 3.4.3 into the Act by the 2009 amendments.[110]

51. The applicable principles are well established.[111] Parliament can annihilate contractual promises but must make its intention manifestly clear.[112] This requires the legislation to be *'expressed in unequivocal terms incapable of any other meaning'*.[113] Legislation will not be construed as appropriating, abolishing or interfering with private property or

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[103] Trial Reasons, [142]; CA Reasons, [213]. Cf. Appellant's Submissions, [41]-[43]. It has never been the State's case that that the process of consultation between the parties in relation to the subsequent enactment gave rise to an agreement to vary or discharge the 1995 Agreement.
[104] Trial Reasons, [148]; *Bromley*, esp. at 393 [57] (Mason P, Heydon and Ipp JJA agreeing).
[105] Cf. Appellant's Submissions, [45].
[106] Appellant's Submissions, [46].
[107] Appellant's Submissions, [46].
[108] The State also submits (in footnote 93) that if the parties understood and intended that clause 3 survived in parallel with the statute, the amendments to the 1995 Agreement would have incorporated the new sub-s 136(3A). This contention fails to understand the difference between the obligation on the Trustees to pay licence fees (ss 135A-135C) and the separate and distinct obligation on the Trustees to pay taxes (s 136). The obligation to pay taxes was never part of the 1995 Agreement and so it does not follow that an equivalent to the new taxing provision in sub-s 136(3A) would be inserted into the 1995 Agreement.
[109] Appellant's Submissions, [47]-[52].
[110] Appellant's Submissions, [53]-[56].
[111] There was no issue as to the applicable principles before the primary judge and the Court of Appeal.
[112] Trial Reasons, [124]; CA Reasons, [214]; see *Clissold v Perry* (1904) 1 CLR 363, 373.
[113] *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563 (Griffith CJ and Rich J).

contractual rights in the absence of clear words compelling that conclusion.[114]

52. Contrary to the State's submissions,[115] *Bromley* does not stand for the proposition that a contractual right is abrogated if it is left without 'work to do' by a statutory right or that the repeal of a statutory right, which deals with the same subject matter as a contractual right, could result in abrogation of the contractual right. In *Bromley*, Mason P concluded that the subject matter of the 1984 statutory scheme and contractual right were virtually the same.[116] The 1984 statutory scheme was repealed and replaced with the 1989 statutory scheme, yet Mason P concluded that the contractual right still existed. Mason P rejected the submission that the 1984 statutory scheme abrogated the contractual right.[117]

The argument that clause 7 was abrogated: 1996 amendments

53. The argument that clause 7 was abrogated by the 1996 amendments[118] was not pleaded nor advanced by the State below.[119] The State submits that the Court of Appeal made three errors in rejecting its argument.[120] However, each of the passages referred to by the State were directed to the disposition of the different argument that the State advanced below, namely that clause 7 was spent as a matter of construction upon the enactment of the 1996 amendments.[121]

54. In any event, the State's argument has no merit. The statutory provision was in similar, but not identical, terms to the contractual terminal payment provision contained in clause 7 of the 1995 Agreement.[122] The 1996 amendments did not purport to prohibit the payment of contractual compensation to Tatts. Further, the 1995 Agreement was not mentioned in the 1996 amendments or in any of the extrinsic material. As the Court of Appeal noted, there was nothing about the 1996 amendments which detracted, and certainly not clearly and unequivocally, from the continuing operation of clause 7.[123]

55. The State contends that the 1996 amendments gave the Trustees two concurrent rights to the terminal payment which operated to confer a 'windfall' on the Trustees, and alleges that it would be irrational to attribute this intention to Parliament.[124] This is a wrong assumption. Tatts only ever claimed a single payment, on alternative bases. Moreover, as Tatts is asserting common law rights in relation to the breach of clause 7, basic common law principles would prevent double recovery by Tatts, as noted by Mason P in *Bromley* (quoted by the trial judge).[125] In addition, as explained above, the State could satisfy both obligations by performance of either one.[126]

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[114] Trial Reasons, [125]-[127]; CA Reasons, [214]; see also *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Springhall v Kirner* [1988] VR 159, 165 (Crockett J); *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30, 49 [43] (McHugh J).

[115] Appellant's Submissions, [48].

[116] *Bromley* (Mason P, Heydon and Ipp JJA agreeing), 393 [54].

[117] At [55]-[56].

[118] Appellant's Submissions, [47].

[119] The State's argument below was that clause 7 was spent upon the enactment of the 1996 amendments as a matter of proper construction of the 1995 Agreement: Trial Reasons, [104]; CA Reasons, [210]-[212]. In the course of argument before the Court of Appeal, the Solicitor-General confirmed that the State was not contending for '*some principle of law that says that once a contractual obligation is put into statute the contractual obligation does not exist anymore*': see Transcript, 220.

[120] Appellant's Submissions, [47]-[52].

[121] CA Reasons, [210]-[215].

[122] Trial Reasons, [25].

[123] CA Reasons, [214].

[124] Appellant's Submissions, [49(a)].

[125] Trial Reasons, [146]. See also *National Mutual Property (Aus) Pty v Citibank Savings Ltd* (1995) 132 ALR 514, 536 and *Registrar-General (NSW) v Behn* (1981) 148 CLR 562, 568-9 (Gibbs CJ, Mason J agreeing).

[126] See [46] above.

56. There is nothing about the language used in s 35A which suggests that Parliament was intending to eliminate the contractual right by also creating a right with legislative status.[127] The section makes no reference to the 1995 Agreement or the contractual right. Furthermore, s 35A and clause 7 allow for payments in different circumstances. Under s 35A, Tatts is entitled to a payment even if it is granted a gaming operator's licence provided that licence is granted more than 6 months after the expiry of Tatts' previous licence – in contrast with clause 7.2 of the 1995 Agreement.

57. The State's reliance on other cases dealing with statutory agreements is flawed.[128] It is commonplace to find State governments entering into agreements that have ongoing contractual force, even if those agreements are also ratified by statute or rendered enforceable as if they were statutory provisions. This is, for instance, a common situation with State mining and infrastructure agreements, particularly in Western Australia.[129] The fact that legislation gives the agreement this force does not mean that the agreement ceases to operate and that contractual rights have disappeared.[130]

58. The 1996 amendments do not give the 1995 Agreement force as if enacted.[131] The amendments do not even refer to the 1995 Agreement or clause 7. Indeed, there is nothing in in the extrinsic material to show that Parliament was aware of the 1995 Agreement. As the Court of Appeal found, the clear intention is that clause 7 should co-exist in parallel with the statutory right.[132] No issue about Parliamentary supremacy arises since there is no inconsistency of rights as between the 1996 amendments and clause 7 that would attract abrogation principles.

59. The suggestion by the State that the doctrine of merger by higher security *may* be applicable can be dismissed.[133] The doctrine does not apply in this situation, and further it can have no possible application where the right may only be triggered at a future date and would not result in double recovery.[134] If any merger doctrine is relevant, the species most analogous to the present case is merger by judgment.[135] On this basis, the right of Tatts to a payment under clause 7 would only merge if and when Tatts recovered the same amount under s 3.4.33, thereby precluding double recovery.

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[127] Cf. Appellant's Submissions, [49(a)].

[128] Appellant's Submissions, [51].

[129] Ratifying legislation in Western Australian tends to take two forms: one form provides that the provisions of the agreement have the force of statute; and another form simply authorises the entry into the agreement and provides that the provisions of the agreement will operate notwithstanding any other act or law: see *Re Michael; ex parte WMC Resources Ltd* (2003) 27 WAR 574, 581 [26]; *Commissioner of State Revenue v Oz Minerals Ltd* (2013) 46 WAR 156, 189-90 [179] (Buss JA, Newnes JA agreeing and Murphy JA agreeing on this point). See also s 4(2) of the *Iron Ore (Mt Goldsworthy) Agreement Act 1964* (WA) discussed in *Brown v Western Australia* (2012) 208 FCR 505, 531 [127]-[128], 566 [266] and 571-2 [349] (Greenwood J). Victorian examples of enactments in the former category tend to include the *Port Bellarine Tourist Resort Act 1981* (Vic), *Casino Management Agreement Act 1993* (Vic) and *Melbourne City Link Act 1995* (Vic). The *Eastlink Project Act 2004* (Vic) is an example in the latter category. Notably, when the *Port Bellarine Tourist Resort Act 1981* (Vic) was repealed by the *Port Bellarine Tourist Resort (Repeal) Act 2012* (Vic), the repealing Act expressly terminated the contract at the same time as repealing the statutory rights without compensation: see ss 4, 5 and 10 of the *Port Bellarine Tourist Resort (Repeal) Act 2012* (Vic).

[130] Even where the whole of the agreement is enacted in legislation, the authorities referred to by the State do not support the proposition that the contract ceases to exist: see Appellant's Submissions, [51], footnote 104. While Stephen and Mason JJ in *Sankey v Whitlam* (1978) 142 CLR 1 spoke of contractual rights being 'converted', their Honours did not find that the contractual rights were extinguished.

[131] Trial Reasons, [104]-[119]; CA Reasons, [210]-[215].

[132] Trial Reasons, [107]-[108], [139], [141] and [148]; CA Reasons, [211]-[212].

[133] Appellant's Submissions, [51].

[134] *Skinner v M'Kenzie* (1884) 6 ALT 165; *Barclays Bank Ltd v Beck* [1952] QB 47, 53; *Twopenny v Young* (1824) 3 B & C 208.

[135] *Chitty on Contract* (31st edition), 1739 [25-007].

The argument that clause 7 was abrogated: 2009 amendments

60. The primary judge and the Court of Appeal correctly rejected the State's argument that clause 7 was abrogated by the 2009 amendments.[136] As the Court of Appeal noted, the State's argument must be premised on the erroneous assumption that 'a new gaming operator's licence' within the meaning of clause 7 of the 1995 Agreement has the narrow specific meaning of a new gaming operator's licence issued under Division 3 of Part 4 of Chapter 3 of the Act.[137]

61. The 2009 amendments did not repeal s 3.4.33, which provided a statutory right to compensation in certain events. At most, as the Court of Appeal observed, they precluded the occurrence of circumstances under which an entitlement to payment of compensation could arise under s. 3.4.33.[138] The 1995 Agreement was not mentioned in the 2009 amendments or in any of the extrinsic material.[139] The 2009 amendments did not purport to prohibit the payment of contractual compensation to Tatts. The amendments left the separate and distinct contractual right to compensation under clause 7 of the 1995 Agreement to continue to operate according to its terms, as the primary judge and the Court of Appeal correctly found.[140]

62. The decisions in *Thomson's case* and *Magrath* have no relevance or application in this case.[141] Clause 7 does not stand in the way of the operation of the 2009 amendments, as those amendments at their highest did no more than preclude the occurrence of circumstances under which a different entitlement to a statutory payment would arise under s 3.4.33. There is no basis to conclude that the object of Parliament in enacting s 3.4.3 was to eliminate Tatts' entitlement to compensation under the contract.[142] Parliament certainly did <u>not</u> make any intention to do so manifestly clear.[143]

<u>A 'new gaming operator's licence' has been issued</u>

63. The State also contends that the Court of Appeal erred in finding that the issue of GMEs constituted the grant of a 'new gaming operator's licence' because they were 'equivalent in substance' to the respondent's gaming operator's licence.[144] This argument was rightly rejected by the primary judge and the Court of Appeal.[145] Their Honours correctly characterised the State's contentions as focusing entirely upon the form, and not the substance, of the statutory authorisations to conduct gaming under the old and new regimes.[146]

64. The conclusion that the rights conferred on licensed venue operators by the grant of gaming machine entitlements were substantially and relevantly the same as the rights enjoyed by Tatts under its licence is ultimately a determination of fact and degree.[147] The Courts below considered this question carefully and arrived unanimously at the same result.[148]

65. As the trial judge and the Court of Appeal noted, there is no difference between the extent

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[136] Trial Reasons. [120]-[148]; CA Reasons, [216]-[217].
[137] CA Reasons, [217].
[138] CA Reasons, at [62].
[139] Trial Reasons, [141].
[140] Trial Reasons, [141]; CA Reasons, [217].
[141] Trial Reasons, [124]-[141]. Cf. Appellant's Submissions, [53]-[56].
[142] Appellant's Submissions, [56].
[143] Trial Reasons, [124]; CA Reasons, [214]; see *Clissold v Perry* (1904) 1 CLR 363, 373.
[144] Appellant's Submissions, [57]-[60].
[145] Trial Reasons, [161]-[172]; CA Reasons, [188]-[208].
[146] Trial Reasons, [153]; CA Reasons, [170].
[147] CA Reasons, [189].
[148] Trial Reasons, [150]-[172]; CA Reasons, [165]-[207].

of the authorities granted under each regime for the 'conduct of gaming' as defined in the legislation, and the new regime thus provided for the authorisation of the conduct of gaming on precisely the same number of gaming machines as the previous regime.[149]

66. The primary judge was correct in concluding that a basic flaw in the State's argument is that it fails to aggregate the authorities conferred by a GME when held together with a venue operator's licence.[150] The provisions of the 1991 Act always insisted upon a necessary link between the authorities conferred by a gaming operator's licence and a venue operator's licence. Section 11 of the 1991 Act authorised the 'conduct of gaming' in an 'approved venue'. An 'approved venue' was defined in s 3(1) to mean the premises on which a venue operator is licensed to conduct gaming.[151] The statutory authority to conduct gaming under a gaming operator's licence could not be carried into effect without the holder having a contractual arrangement with a venue operator or, prior to the 1994 amendments, a gaming operator also holding a venue operator's licence.

67. Another flaw in the State's argument is that the rights to manufacture, supply, service, repair and maintain gaming machines were always incidental to the basic right to conduct gaming at an approved venue.[152] The key authorisation conferred upon Tatts by its expired licence was the 'conduct of gaming'. The core authorisation permitting the 'conduct of gaming' is now conferred upon holders of GMEs when they hold that entitlement together with a venue operator's licence. The ancillary nature of the authority to manufacture is evidenced by the fact that any person on the Roll could manufacture gaming machines under the legislative regime in place at the time of the 1995 Agreement (and today). A similar observation applies to maintenance, service and repair by licensed technicians but noting, contrary to the State's submission, that the authorisation granted to the holder of the gaming operator's licence and to venue operators who hold GME's are identical in this regard. The reference to the conduct of the business in Recital D and clause 6 of the 1995 Agreement shows that the parties intended to have regard to the actual business being carried on by the Trustees at the time of the agreement.

68. The Court of Appeal righty concluded that although the aggregate of rights conferred on venue operators issued with GMEs was not identical to the rights conferred on Tatts by its gaming operator's licence, for the purposes of this enquiry they are substantially and relevantly the same. Under the Gaming Operator's Licence, Tatts had the right to, and did, conduct gaming operations at approved venues. Under the GMEs, the several venue operators have the right to, and do, carry on identical gaming operations at identical venues.[153]

Part VII: The respondent's notice of contention

69. The Court of Appeal concluded that s 3.4.33 had been deprived of *'any present utility'* and *'any relevant application because the references to 'gaming operator's licence' in that section meant a 'gaming operator's licence' as defined by s 1.3 and s 3.4.3 had 'abrogated' the State's ability to issue further 'gaming operator's licences'*.[154] Tatts submits that the Court of Appeal erred in its construction of s 3.4.33 and s 3.4.3 of the Act.

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[149] Trial Reasons, [162]; CA Reasons, [168].
[150] Trial Reasons, [164].
[151] See also ss 13 and 14.
[152] Trial Reasons, [162] and [166].
[153] CA Reasons, [188].
[154] CA Reasons, [51]-[52]. [52] refers to the issue of 'new wagering and gaming licences', which were the licences formerly held by Tabcorp. This appears to be a typographical error. The correct reference is to 'gaming operator's licence'.

70. The primary judge concluded that the definition of 'gaming operator's licence' in s 1.3 was *'simply too strict'* to allow the Court to conclude that the identical defined phrase had a different meaning in s 3.4.33.[155] The Court of Appeal essentially agreed.[156] The Courts reached this conclusion even though it was accepted that this interpretation would deprive s 3.4.33 of any operation[157] and the Act must be construed *'with the aim of giving coherent operation to all of its provisions with best effect to their purpose and language'*.[158]

71. Depriving Tatts of its rights under s, 3.4.33 would cause the loss of a valuable right without compensation. The Court of Appeal acknowledged that this may be *'thought to be manifestly unfair'*.[159] The principle of legality requires a clear statement of legislative intention to achieve such an uncompensated loss.[160] In addition, where Parliament sets out to abolish or neuter valuable rights it must do so directly and clearly.[161]

72. In order to properly construe the Act and the relationship between ss 3.4.33 and 3.4.3, it is necessary to have regard to the history of the legislative scheme.[162] The predecessor of s 3.4.33, s 35A of the 1991 Act, was introduced by the 1996 amendments. The term 'gaming operator's licence' was never defined in the 1991 Act.[163] Instead, the 1991 Act merely enumerated the authorities it conferred.[164] At the time s 35A was enacted, there were three licences allowing the conduct of gaming under the 1991 Act each with a different name, statutory source and features.[165]

73. In 2003, the provisions of the 1991 Act and the 1994 Act that separately regulated the conduct of gaming by the Trustees and Tabcorp were consolidated into the Act. There was no change to the provisions governing the grant of venue operator's licences and gaming operator's licences. Nor was there any material change to the Trustees' payment entitlement, which was re-enacted in s 3.4.33. The Trustees' licence was not a 'gaming operator's licence' as defined in s 1.3 but, due to s 3.5(1) of schedule 7 of the Act, the Trustees' licence was deemed to be such.

74. The 2009 amendments did not amend, or repeal, or seek to make any change to s 3.4.33. Conversely, where Parliament intended to repeal a provision, or to exclude a right to compensation by the 2009 amendments, it did so explicitly.[166] There are many indications, both extrinsic and intrinsic to the 2009 amendments, that Parliament chose not to repeal s 3.4.33 and that it was intended to have a continuing operation.[167] To the

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[155] CA Reasons, [204].
[156] CA Reasons, [53].
[157] CA Reasons, [52].
[158] CA Reasons, [51].
[159] CA Reasons, [62].
[160] CA Reasons, [50(3)]. The Court of Appeal was wrong to conclude that the principle of legality does not apply because Tatts' right under s 3.4.33 was 'only ever a contingent right': CA Reasons, [63]. The rationale for the principle is to prevent manifest unfairness. This was recognised by the Court of Appeal: CA Reasons, [61].
[161] As Lord Hoffman remarked in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131: *'Parliament must squarely confront what it is doing and accept the political cost'*. This observation has been quoted and referred to numerous times by this Court: *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 309 [311] (Gageler and Keane JJ).
[162] See e.g., *Beckwith Trustee (WA) v State Energy Commission* (1976) 135 CLR 569, 579-83 (Mason J).
[163] See s 3 of the 1991 Act.
[164] See s 14 of the 1991 Act.
[165] Being the licence of the Casino (s 32 of the 1991 Act), the gaming operator's licence of the Trustees (s 33) and the gaming licence of Tabcorp (s 3).
[166] See e.g. ss 2.5A.14, 3.2.5, 3.4.28F, 3.4.48B, 3.4.59LB, 3.4.59Q, 3.4A.11B, 3.4A.29, 3.4A.31, 3.5.33N, 3.7.6C, 3.8.12, 4.3A.10AB, 4.3A.34AB, 6A.3.10B and 6A.3.34B.
[167] The Budget Papers tabled in Parliament on 6 May 2008 make it very clear that Parliament did not intend to

extent to which there is any tension or conflict between ss 3.4.3 and 3.4.33, as alleged by the State, the relevant principles require the Court to give the provisions a construction that allows both to operate while producing the greatest harmony and least inconsistency.[168]

75. On a proper construction of ss 3.4.3 and 3.4.33, their respective fields of operation can easily be reconciled and harmonised by giving the words 'gaming operator's licence' in s 3.4.33 their natural and ordinary meaning (i.e. any licence or entitlement which in substance authorises the conduct of gaming operations at approved venues) while giving the phrase in s 3.4.3 the defined meaning contained in s 1.3. Tatts submits that the Court of Appeal erred in holding that the statutory language prevented this construction.[169]

76. There is no conflict between ss 3.4.3 and 3.4.33 when the two provisions are construed harmoniously in the way described above. The limited function and purpose of s 3.4.3 is to draw a line saying that after the expiry of Tatts' licence there is to be no further grant of a gaming operator's licence under Part 4 of Chapter 3 since, after that point of time, the work done by the grant of the gaming operator's licence will be achieved by the grant of GMEs to licensed venue operators. This can be discerned from the two limbs of s 3.4.3.

77. The first limb of s 3.4.3, which reads *'This Part [4] applies only with respect to the gaming operator's licence that was issued on 14 April 1992'*, limits the operation of s 3.4.33 to the expiry of Tatts' gaming operator's licence so that the expiry of future gaming operator's licences will not give rise to an entitlement under s 3.4.33. The second limb, which reads *'This Part [4] ... does not authorise the grant of any further gaming operator's licence'*, simply acknowledges that no further 'gaming operator's licences' *as defined by s 1.3* will be granted. In this regard, s 1.3 defines a 'gaming operator's licence' as a licence granted under Division 3 of *Part 4* of Chapter 3. This second limb does not prevent the grant of a 'gaming operator's licence' under a Part of the Act other than Part 4.

78. The harmonious construction described above most closely accords with the different function of each provision. The evident purpose of s 3.4.3 is to prevent the grant of any further 'gaming operator's licences' under Division 3 of Part 4 of Chapter 3 following the inception of the new regime. The application of the definition in s 1.3 achieves that purpose. By contrast, the evident purpose of s 3.4.33 is to compensate Tatts in the event that the rights to carry on gaming operations, which it enjoyed under its licence, are conferred on others. To achieve that purpose, the generic meaning must be adopted otherwise there will be circumstances, such as the present case, where those rights will be conferred on others and Tatts will receive no compensation.

79. The effect of schedule 7 of the Act is significant. Under schedule 7, Tatts' licence ceased to be a deemed 'gaming operator's licence', as defined by s 1.3, upon its expiry. Section 3.4.33(1)(a) refers to a 'gaming operator's licence' expiring as a condition for a payment under s 3.4.33. Since Tatts' licence ceased to be a 'gaming operator's licence' as defined by s 1.3 upon its expiry, a generic meaning must apply to 'gaming operator's licence' in s

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alter, amend or abrogate the compensation provisions that operated for the benefit of Tatts and Tabcorp. Page 237 of Chapter 7 of the *Statement of Finances 2008-09* states that the '*government does not intend to alter or amend the provisions in the* Gambling Regulation Act 2003 *that deal specifically with the end of licence arrangements for Tatts Group and TABCORP.*'

[168] *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 (Gummow J); *Goodwin v Phillips* (1908) 7 CLR 1, 10 (Barton J); *Saraswati v R* (1991) 172 CLR 1, 17 (Gaudron J); and *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 556, 584-5[47]-[51] (Gummow and Hayne JJ).

[169] CA Reasons, [51].

3.4.33(1)(a), otherwise s 3.4.33(1)(a) could never be engaged by the expiry of Tatts' licence and it would be a section without a purpose regardless of the form the new licences took.

80. If the definition of 'gaming operator's licence' in s 1.3 is applied to s 3.4.33, that section will be rendered superfluous. It is a *'known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'*.[170] This rule of interpretation requires a generic meaning to be adopted for s 3.4.33.

81. It is important to note that s 3.4.33 was deliberately retained by Parliament and hence the language of the Act indicates an intention for the section to have continued operation. Section 3.4.33 serves no purpose other than to provide compensation to Tatts. There is nothing to suggest that Parliament's objective when introducing s 3.4.3 was to deny Tatts a payment under s 3.4.33. To the contrary:

    (a) s 3.4.3 expressly provides that s 3.4.33 (as a provision of Part 4 of Chapter 3) shall continue to apply *with respect to* the licence issued to the Trustees on 14 April 1992; and

    (b) on several occasions Parliament specifically provided in the Act that compensation is not payable but *did not do* so in relation to s 3.4.33.

82. Contrary to the Court of Appeal's conclusion, the definition of 'gaming operator's licence' in s 1.3 of the Act does not prevent or constrain a construction that gives the words 'gaming operator's licence' their natural meaning and connotation. This is so for the following reasons.

    (a) The definition of 'gaming operator's licence' was introduced into s 1.3 of the Act by a consolidating act which did not intend in any way to change the substantive operation of the relevant provisions. In this regard, s 1.1(1) of the Act states that the *'main purpose of this Act is to re-enact and consolidate the law relating to various forms of gambling.'* The definition was only an organisational provision that was not intended to alter the substantive operation of s 3.4.33. A consolidating act of this kind, particularly one which merely inserts an ancillary definition, is presumed not to change the law;[171]

    (b) Definitions such as those in s 1.3 are always subject to context and to indications of a contrary intention. If the effect of applying the definition to a particular provision is to bring about the consequence that the provision will not appropriately work, a contrary intention will have been demonstrated, and the definition should not be applied;[172]

    (c) Section 3.4.33 is intended to operate in stipulated circumstances. Those circumstances are that Tatts' gaming operator's licence has expired and a new licence authorising the conduct of gaming operations is thereafter granted to another person allowing that person to conduct gaming operations in Victoria at licensed venues. In other words, the section assumes that there will be further licences authorising the conduct of gaming operations. In substance and truth, that is what has transpired; and

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[170] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ) quoting *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ).

[171] *Re Davis* (1947) 75 CLR 409, 429 (Williams J).

[172] *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 12 NSWLR 104, 108 (Mahoney JA).

(d) The principle that s 3.4.33 is to be regarded as *'always speaking'* or *'speaking continuously in the present'*[173] requires the phrase 'gaming operator's licence' to embrace new forms of gaming operator's licences, in the generic sense, as they might be enacted or amended from time to time. This construction is also supported by the principle that a later, general enactment (in this case, ss 1.3 and 3.4.3) is not intended to interfere with an earlier special provision (in this case, s 3.4.33), unless it manifests that intention very clearly.[174]

83. Section 3.4.1A provides that a venue operator's licence is *not* taken to be a gaming operator's licence. There is *no* equivalent to s 3.4.1A in respect of GMEs. There is *no* provision saying that a GME is not a 'gaming operator's licence' *nor* is there a provision saying that a GME and venue operator's licence, when held together, is not a 'gaming operator's licence'. The absence of such provisions acknowledges that a GME when held with a venue operator's licence may constitute a 'gaming operator's licence'. This supports the generic interpretation of 'gaming operator's licence' which Tatts proposes.

84. No direct and clear intention to abolish Tatts' rights under s 3.4.33 can be discerned from the 2009 amendments,[175] particularly in circumstances where: (a) s 3.4.33 was deliberately retained; (b) on several occasions Parliament specifically provided in the Act that compensation is not payable but did not do so in relation to s 3.4.33; (c) ss 3.4.3 and 3.4.33 are capable of harmonious operation in the manner referred to above; and (d) there is no support for the intention in the extrinsic material.

85. The Court of Appeal tried to explain the failure to remove s 3.4.33 by saying that *'the relevant provisions of the legislation evince a calculated legislative intent to prevent the change in regime being seen or treated as an alteration to the rights constitutive of Tatts' gaming operator's licence.'*[176] There is nothing in language of the 2009 amendments (or the extrinsic material) to support this conclusion. Legislative intention must only be a search for the intention revealed by the meaning of the language.[177] Furthermore, as Tabcorp has noted, it would be remarkable to construe legislation by reference to an assumed intention where the assumed intention is to employ a disguise.[178]

Part VIII: Estimate

86. The respondent estimates it will require three hours for presentation of its oral argument.

Dated: 10 July 2015

NEIL J YOUNG PHILIP D CRUTCHFIELD NICHOLAS P DE YOUNG

Clayton Utz

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Solicitors for the Respondent

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[173] See *Commissioner of Police v Eaton* (2013) 252 CLR 1, 32-3 [97] (Gageler J, in dissent); and *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 102, 119-20 [82].

[174] See *Commissioner of Police v Eaton* (2013) 294 ALR 608, 19 [46] (Crennan, Kiefel and Bell JJ); and *Cobiac v Liddy* (1969) 119 CLR 257.

[175] Cf. CA Reasons, [62].

[176] CA Reasons, [59] (emphasis added).

[177] CA Reasons, [60], citing *Momcilovic v The Queen* (2011) 245 CLR 1, 175 [441] (Heydon J). See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591-2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[178] Appellant's Submissions in Tabcorp Holdings Limited v State of Victoria (proceeding M81 of 2015), 13 [63].