IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M81 of 2015

BETWEEN:

TABCORP HOLDINGS LIMITED (ACN 063 780 709)
Appellant

and

STATE OF VICTORIA
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: Publication

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

Part II: Argument in Reply

2. The State's submissions dated 10 July 2015 (**State's Submissions**) are directed predominantly to the meaning of the words "new licences" in s 21 of the 1994 Act, and to advancing submissions as to why particular changes to the statutory scheme, at the time each change was made, did not "change" the meaning of "new licences".[1] There are three points to note about those submissions.

3. *First,* to construe an Act in its original form and then examine later amendments for evidence of a change in meaning is to invert the correct analysis. The starting point in construing the *Gambling Regulation Act* must be examination of the text of s 4.3.12 within the context of the Act in its amended form in 2012.[2]

4. None of the decisions referred to by the State[3] involved or sanctioned any different approach. It is one thing to look to legislative history to confirm the purpose or mischief of the legislation,[4] or to confirm how an anomaly or mistake arose.[5] It is altogether different to seek to make legislative history paramount and controlling at the expense of the text of the Act as it appears at the time it must be construed. As this Court has recognised, "*the fundamental duty of the Court is to give meaning to the legislative command according to the terms in which it has been expressed;*

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[1] See State's Submissions at [10]-[28].
[2] *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 309 ALR 209, 214 [25]; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 479; Tabcorp's Submissions dated 19 June 2015 (**Tabcorp's Submissions**) at [25] and the authorities referred to therein.
[3] State's Submissions at [13]-[14] (including fn 14) and [27].
[4] See, eg, *Federal Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, 541 [53]; *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17; (2014) 308 ALR 202, 209 [24]; *Achurch v The Queen* [2014] HCA 10; (2014) 306 ALR 566, 582-584 [44], [47], [51]; *Li v Chief of Army* (2013) 250 CLR 328, 337 [17].
[5] See, eg, *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297, 306-7, 311-12; *Australian Communications Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; (2015) 317 ALR 279, 289 [39].

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legislative history and references to the pre-existing law should not deflect the Court from its duty in resolving an issue of statutory construction which ultimately is always a text based activity."[6]

5. Consistently with its inverted mode of analysis, nowhere in its submissions does the State seek to construe the Act as a single and harmonious text having regard to the scheme of the Act as it stood in 2012. The proper question to ask is, what is the meaning of s 4.3.12(1) having regard to the scheme of the Act as it stood in 2012, including that: no further wagering licence or gaming licence could be granted; licences which stood in the place of the wagering licence and the gaming licence could now be granted; neither the expression "new licences", nor the word "licence", was defined; and, s 4.3.12(1) was retained in the Act and its operation was expressly preserved.

6. *Secondly*, the State's approach seeks to isolate particular aspects of changes to the Act that occurred. This tendency is most pronounced in the State's submissions in relation to s 4.3.4A. For example, in looking at the 2008 Amendments, the State focuses on the fact that only two changes were made to Part 3 of Chapter 4 of the Act.[7] The State ignores other changes made by the 2008 and 2009 Amendments which must be taken into account. In particular, the 2008 Amendments: (a) introduced a new Part 3A in Chapter 4 of the Act, which provided for a wagering and betting licence that would take over from and authorise substantially the same activities as the existing wagering licence;[8] and (b) introduced a new Chapter 6A in the Act, which provided for a keno licence that would take over from and authorise substantially the same activities as the existing authority to conduct keno pursuant to the gaming licence.[9]

7. *Thirdly*, the State's argument proceeds from the foundation that the phrase "new licences" "*had an inescapably specific meaning at that time [1994] by virtue of definitions in the statute*".[10] For the reasons given in Tabcorp's Submissions at [81]-[82], that is not correct.

8. Other points to be noted are: *first*, the State's submission that s 4.3.4A did not preserve the operation of s 4.3.12 (as part of Part 3 of Chapter 4)[11] is contrary to the reasoning of the Court of Appeal[12] and not consistent with the language of the section. The words "*This Part applies*" are plainly words of preservation since they confirm the continued application of the Part (including s 4.3.12) but, as the balance of the section provides, only in relation to Tabcorp's original licences (to which s 4.3.12 applied). Once this is recognised, the State's assertion that the Court of Appeal

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[6] *Northern Territory v Collins* (2008) 235 CLR 619, 623 [16] (Gummow ACJ and Kirby J); approved in *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 314 ALR 182, [42]. See also *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, 662 [112].

[7] State's Submissions at [22] and fn 41.

[8] See s 8 of the *Gambling Regulation Amendment (Licensing) Act 2008* (Vic), which introduced the following sections into the Act: ss 4.3A.1 (which granted the authority to conduct the same wagering activities as did s 4.3.1), 4.3A.7(2)(b) and (c) (which contemplated that the new wagering and betting licence would take over from the wagering licence, including through the nexus of contractual relationships it involved); 4.3A.8(2) (providing that the wagering and betting licence could not take effect while the wagering licence was in effect); and, 4.3A.13 (providing that the Minister may require the wagering and betting licensee to pay a premium payment).

[9] See s 17 of the *Gambling Regulation Amendment (Licensing) Act 2008* (Vic), which introduced the following sections into the Act: ss 6A.3.1 (which conferred the authority to conduct keno; cf s 4.3.2(b), which provided that the gaming licence conferred authority to conduct keno games); 6A.3.8(2) (which provided that the new keno licence could not authorise the conduct of keno games while the existing authority under the gaming licence was in effect); and, 6A.3.13 (providing that the Minister may require the keno licensee to pay a premium payment).

[10] State's Submissions at [11].

[11] State's Submissions at [24].

[12] AJ[29]-[30]

was right to conclude that s 4.3.12 involves no contradiction with s 4.3.4A,[13] cannot be accepted.[14]

9. *Secondly*, the State's Submissions founder on the redundancy consequent on its construction. The State persists with its speculative explanation based on asserted drafting complexities,[15] and does not explain why Division 3 in its entirety could not simply have been repealed.[16]

10. The State advances a second related argument: that because s 4.3.4A necessarily deprived some provisions in Part 3 of Chapter 4 of ongoing work, it is proper to conclude that s 4.3.4A had that effect in relation to s 4.3.12.[17] However, s 4.3.12 was of a quite different character from the other provisions in Part 3 which were necessarily deprived of operation. Section 4.3.12 differed in at least the following respects: (a) it is not concerned with the *mechanics* of the licensing regime, but with the operation of a substantive right (to receive the terminal payment, which right was integral to the success of the float that was underpinned by the provision). The conferral of that right secured a higher price for Tabcorp shares; the objective of the section was to be achieved by payment on the grant of new licences; (b) uniquely, s 4.3.12 is deprived of operation by the specific construction, but has an appropriate substantive operation if a less specific meaning is adopted; (c) uniquely, the specific construction leads to manifest unfairness by rendering nugatory a valuable right that was paid for by investors; (d) uniquely, the construction contended for by Tabcorp is not ruled out by the express language or unambiguous context of s 4.3.12.

11. *Thirdly*, the State's reliance on the meaning of "new licences" in s 4.3.9(2) – to aid a submission that "new licences" in s 4.3.12(1) must be given the same meaning – is misplaced for similar reasons.[18] On Tabcorp's construction, "new licences" includes both: (a) licences that are themselves issued under Part 3 of Chapter 4; and, (b) licences issued under another Part or Chapter of the Act in respect of activities substantially similar to licences granted under Part 3. In s 4.3.12(1), the reference is to both type (a) and type (b) licences. In contrast, in s 4.3.9(2) the reference is only to type (a) licences. The expression "new licences" does not have a different *meaning* in the two sections: it is simply that in s 4.3.9 the expression, by virtue of its context, has a more limited *operation*. There is nothing in the least incongruous about this.

12. *Fourthly*, the State's submissions in relation to the purpose of s 4.3.12 are relegated to a footnote[19], and do not explain why the purpose of s 4.3.12 does not support a construction of the phrase "new licences" *even in 1994* that would encompass licences substantially similar to Part 3 licences if such licences were to exist.

13. *Fifthly*, the State's argument that s 3.4.1A (and s 3.4.4A) confirm that the legislative purpose of s 4.3.4A was to eliminate any avenue to the payment entitlement in s 4.3.12, and that no other purpose could be served by the provisions,[20] is misconceived. The evident purpose of ss 3.4.1A and 3.4.4A is to make clear that the grant of a venue operator's licence and a monitoring licence

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[13] State's Submissions at [26(a)].

[14] Indeed the State's case at trial was that s 4.3.4A involved an implied repeal of s 4.3.12: J[105], [110].

[15] Eg. State's Submissions at [26(a)]. Indeed, those Submissions at [26(a)(i)-(iii)] illustrate how other drafting alternatives would have been straightforward.

[16] As the trial judge said, "*The ease with which Parliament could have directly repealed Division 3 is self-evident*": J[124]. See also paragraphs 13 and 14 below, which indicate other simple ways in which an intention to render s 4.3.12 inoperative could have been achieved.

[17] State's Submissions at [26(a), (b)] (eg, the State submits that s 4.3.12 is "*no more redundant or superfluous than those other provisions of Part 3 which are undeniably deprived of practical operation by s 4.3.4A*").

[18] State's Submissions at [21] (see also at [16(c)(ii)]).

[19] State's Submissions at fn 79.

[20] State's Submissions at [36].

does not infringe the prohibition in ss 3.4.3 and 4.3.4A on the grant of any further gaming operator's licence or gaming licence. What is telling is that no similar provision was included in relation to the wagering and betting licence, the keno licence, or the GMEs. That the legislature did not do so – when such a drafting technique is used elsewhere – denies the purpose that the State seeks to attribute to s 4.3.4A. The absence of a corresponding provision in relation to the wagering and betting licence, keno licence and GMEs is, if anything, indicative of the fact that they were intended to be "new licences" within the meaning of s 4.3.12(1).

14. *Sixthly,* the State seeks to address the absence of a "no compensation" provision in relation to s 4.3.12 in the State's Submissions at [38]-[40]. However, the provisions referred to in footnote 54 of Tabcorp's Submissions illustrate how simple it would have been to render inoperative or remove Tabcorp's entitlement to payment under s 4.3.12.

The principle of legality

15. The State submits that there is no occasion for the application of the principle of legality, because s 4.3.4A has nothing to say about the operation of s 4.3.12.[21] However, a significant aspect in the Court of Appeal's reasoning was that s 4.3.4A had the purpose of precluding Tabcorp's entitlement to the terminal payment from arising,[22] and rendered s 4.3.12 inoperative in a circuitous manner because of a legislative intention to eschew the perception that Tabcorp had a right to a payment which was being taken away.[23] The principle of legality nevertheless meant that if Parliament intended to render s 4.3.12 redundant and inoperative, it needed to do so clearly and directly. A legislative intention "*to deprive that right [under s 4.3.12] of any practical content*" (AJ[30]) could only be achieved by language of sufficient clarity. In this way, the principle of legality obviated the findings of the Court of Appeal as to purpose and legislative intention.

16. As to the State's Submissions at [34], Tabcorp has never contended that the principle of legality provides a guarantee against legislative interference with its right to a terminal payment under s 4.3.12. Tabcorp's submission is no more than that to empty such a right of all content calls for a clarity of language, which is lacking here.[24]

Notice of Contention

17. If "new licences" in s 4.3.12(1) is not construed as if followed by the confining words "under this Part", then it is clear that – as was held below – the grant of the wagering and betting licence, keno licence, and GMEs, constituted the grant of "new licences". The State's Notice of Contention advances three reasons for challenging this finding.[25]

18. *First,* the State submits that the new authorities granted by the wagering and betting licence, keno licence, and GMEs, were materially different in substance from Tabcorp's gaming licence and wagering licence[26] for two distinct reasons. First, that to be a new licence any new authority must authorise all of the same activities as the gaming licence and wagering licence *together* authorised.[27] The submission requiring that new licences must be "conjoined" should be rejected

[21] State's Submissions at [30]-[31].
[22] See Tabcorp's Submissions at [67]-[71].
[23] See Tabcorp's Submissions at [62]-[66].
[24] The State's contention that the legislature could not have expressed its intention "more clearly" (State's Submissions at [34]) is plainly wrong.
[25] State's Submissions at [41].
[26] State's Submissions at [42]-[43].
[27] State's Submissions at [44].

because it: (a) in substance seeks to reinstate the construction limiting new licences to those issued under Part 3 of Chapter 4; or (b) seeks to introduce into the meaning of "new licences" a limitation that is not found in the text of the Act and which serves no purpose.

19. The second point advanced is that the GMEs are materially different to the gaming licence.[28] The State's submissions in this regard fail for the reasons set out Tabcorp's Submissions at [87].[29] As to the point raised elsewhere by the State based on nomenclature,[30] s 1.1(3)(b) of the Act refers to the authority granted by the GMEs as being "the conduct *under licence* of gaming on gaming machines" (emphasis added).

20. *Secondly*, the State submits that s 4.3.12 requires the "new licences" to be issued to the same licensee.[31] If it is accepted that the phrase "new licences" is not confined to licences issued under Part 3 of Chapter 4, then the phrase "new licensee" should be construed to have a corresponding non-specific meaning, such that it is not necessary for new licences to be issued to the same licensee.[32] The fact that under the old regime the wagering licence and the gaming licence could only be held by the one person says nothing about whether new licences that are *not* required to be held by the one person must be held by the same person before s 4.3.12 is engaged.

21. *Thirdly*, the State seeks to raise a point not advanced at trial and not in its Notice of Contention in the Court of Appeal.[33] The State's contention is that the amount paid by the persons to whom GMEs were allocated[34] is not a premium payment within the meaning of s 4.3.12(1) because the payment is not labelled as such in s 3.4A.5(9).[35] The application of the provision cannot turn on whether the payment in relation to GMEs is labelled "an amount to be paid" rather than a "premium payment".

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[28] State's Submissions at [45]-[47]. The State does not seek to submit that there is a material difference between: (a) the wagering and betting activities authorised under the wagering licence and those authorised under the wagering and betting licence; or (b) the keno activities authorised under the gaming licence and those authorised under the keno licence. No challenge is made to Tabcorp's Submissions at [86] or [88].

[29] See also Tatts Group Limited's submissions in *State of Victoria v Tatts Group Limited* (M83 of 2015) at [63]-[68].

[30] State's Submissions at [37(b)]: "*GMEs were not styled as 'licences' but 'entitlements'*".

[31] State's Submissions at [48].

[32] Tabcorp's Submissions at [89]-[90].

[33] State's Submissions at [49].

[34] It is common ground that 27,300 GMEs were allocated to venue operators, and that the persons to whom those GMEs were allocated paid a total sum of approximately $981 million: Amended Statement of Claim at [27] – [28]; Amended Defence at [27] – [28].

[35] The State does not seek to contend that the payments made by the persons to whom the wagering and betting licence and the keno licence were issued were not premium payments within the meaning of s 4.3.12.