HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A10 of 2024**

BETWEEN: **SKYCITY ADELAIDE PTY LTD**
Appellant

and

TREASURER OF SOUTH AUSTRALIA
First Respondent

STATE OF SOUTH AUSTRALIA
Second Respondent

APPELLANT'S FURTHER SUBMISSIONS

I PUBLICATION

1. This submission is suitable for publication on the internet.

II SUBMISSIONS

2. At the hearing of this matter on 12 September 2024, the Respondents sought to rely for the first time upon an Adelaide Casino Control **Standard** at CAB 142-153, in support of their position on the appeal. Reliance on this Standard was not foreshadowed in any sense.
3. In those circumstances, the Appellant briefly addressed the Standard orally, submitting that the Standard is irrelevant to the interpretation of the CDA. The Appellant additionally sought and was granted leave to file supplementary submissions directed to the Standard.
4. The Appellant continues to rely upon its oral submissions and briefly addresses below five matters in further support of its position.
5. **First**, the definition of "gross gambling revenue" in the CDA was present in its original form as made on 27 October 1999, some 15 years prior to the Standard (21 March 2014), such that the drafting and the interpretation of the CDA could not be affected by it.
6. **Second**, the Standard takes the form of an order of the Liquor and Gambling **Commissioner**, made pursuant to s 38 of the Casino Act. Three matters concerning s 38 should be noted. *First*, the approval of standards is associated with the casino licence rather than the CDA. *Second*, s 38(2) makes clear that the standards are addressed to operational matters *under* the licence, rather than being addressed to the *construction* of the licence or any other agreement. *Third*, there is no suggestion that the standards can or should bear upon the interpretation of the terms of the licence agreement or the CDA.
7. **Third**, the Standard was supplied by the Appellant and approved by the office of the Commissioner: CAB 142. However, the CDA is between the Treasurer, and SkyCity; that is, different parties. The Commissioner has no statutory or administrative relationship with the Treasurer. The interpretation of an agreement between the Treasurer and SkyCity, as a matter of privity, cannot be affected by a Standard that was proposed by only one party to the CDA and then "approved" by a *different* entity not party to the CDA.

8. **Fourth**, and consistently with the third matter, cl 12 of the CDA relevantly states that the Licensee "must ensure that the Casino Business is carried on in accordance with the systems and procedures for the time being *approved by the Treasurer* in respect of: … (a) calculation and recording of gross gambling revenue and net gambling revenue in respect of gaming". The Standard is not approved by the Treasurer, it is approved by the Commissioner. It therefore does not fall within cl 12 and is not a document addressed in the CDA. So much so is recognised by the "Modifications/Exceptions" section at CAB 143, which states that whilst the Standard has been approved under s 38 of the Casino Act, the licensee must comply with the "systems and procedures approved by the *Treasurer*" under cl 12 of the CDA. This is further emphasised at cl 2.2 of the Standard at CAB 145. There is no gateway through which the Standard could bear upon the CDA's interpretation.

9. **Fifth**, in cl 3.2 of the Standard it is expressly recognised that where the procedures under the Standard are inconsistent with the methodology approved by the Treasurer, the approved methodology shall prevail. On the terms of the Standard itself, it is intended to sit lower in the hierarchy than the CDA and any methodology approved by the Treasurer, and operate upon those documents rather than influence their construction. Similarly, at CAB 144 it is stated that the term "Gross Gambling Revenue" is "The gross amount received by the Casino in respect of gambling during a period/month as defined by the Casino Duty Agreement". As this text indicates, the Standard clearly operates upon the concept of "gross gambling revenue" as defined in the CDA itself, rather than purporting to influence the meaning of that concept (further supported by the fact that the definition as stated in the Standard is in an incomplete form).[1]

10. The above demonstrates ample reasons why the Standard (and the Order of the Commissioner by which it was approved) is irrelevant to construction of the disputed clause in the CDA. It was issued by a person who was not a party to the CDA; never adopted by the parties to the CDA (the Treasurer and the Appellant); issued under a provision of the Casino Act not directed to the CDA; for a different purpose; 16 years after the disputed clause first took the form in issue in this case.

11. For the avoidance of doubt, the Appellant maintains its objection that this Court should not entertain argument on this Standard. This matter proceeded on a special case. The Standard was only referred to in the special case in the context of question 2 (defined as the

[1] See further as to the subsidiary nature of the Standard (a) the "Objectives" at CAB 145 that state that a purpose of the Standards is to "Ensure that the calculation and remittance of Casino Duty is in accordance with the Casino Duty Agreement"; the purpose of the standards is to support the application of the CDA rather than to affect its meaning, and (b) cl 3.5 which as a matter of hierarchy, emphasises that the standards follow the legislative requirements/CDA (not the other way around), and also emphasises the impermanent nature of the Standard.

"Monetary Prizes Issue" (CAB 34 [68(b)]), and not the subject of an appeal to this Court), under the heading "Monetary Prizes" (CAB 32), with the Appellant's contentions on that issue crystallised and recorded in the same section of the special case (CAB 33 [64).

12. At no point was the matter of why the Standard takes the form it does and any applicability to question 1 in issue, such that the Respondents' late reliance upon this matter in oral submissions has deprived the Appellant of the opportunity to agree facts, or otherwise prove by evidence, facts which might explain that matter. By way of illustration only, various standards referred to in cl 3.3(b) itself, including ACCS IC02, were not addressed in the case stated or otherwise before the Court of Appeal or this Court. The Standard was made in 2014, on application by the Appellant, at a time when cashless gambling was first introduced and when as is apparent from this appeal, the Appellant took the view that the conversion of points into Converted Credits and wagering of said Credits did not generate "gross gambling revenue". In these circumstances, why the Standard took the form it did, and admissible evidence bearing on its construction, are not permissible matters to explore for the first time in this Court given the orthodox strictures of s 73 of the Constitution.

13. The Respondents' argument based on the Standard should not be entertained and the additional costs of the Appellant incurred by the impermissible raising of the Standard by the Respondents should be paid by the Respondents in any event.

16 September 2024

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