HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

SKYCITY ADELAIDE PTY LTD
Appellant

and

TREASURER OF SOUTH AUSTRALIA
First Respondent

STATE OF SOUTH AUSTRALIA
Second Respondent

RESPONDENTS' SUBMISSIONS

Part I: ELECTRONIC PUBLICATION

1. This submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF ISSUE OR ISSUES

2. The Appellant, **SkyCity**, rewards customers for gambling by allowing them, through a process of further gambling, to convert loyalty points into Credits. Credits are the customer's stored monetary value and can be withdrawn by a customer as cash at any time. When, instead of withdrawing a Converted Credit as cash, a customer decides to stake the right to recover the debt represented by the Converted Credit by gambling in the casino premises, does SkyCity "receive" an "amount" as "consideration for gambling" within the meaning of "gross gambling revenue" in the Casino Duty Agreement (**CDA**) by virtue of the extinguishment of its liability to pay the monetary amount of the debt?

3. In respect of the cross appeal, when Parliament expressly provided in s 17 of the *Casino Act 1997* (SA) (***Casino Act***) that the CDA would provide for "interest and penalties" and in s 51 that SkyCity "must" pay duty, interest and penalties in accordance with the CDA, did Parliament thereby authorise the CDA to impose a rate of interest for late payment of duty

that went beyond being compensatory to being an amount that would be otherwise held unenforceable as a penalty at common law?

Part III: NOTICE

4. No notice is required under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: MATERIAL FACTS

5. The parties are agreed that "[o]nce Points have been converted to gaming credits, they do not expire".[1] The Court of Appeal so found.[2] SkyCity's references to a "three year forfeiture period"[3] must be seen in that light.[4] There are otherwise no material facts that are contested.

Part V: ARGUMENT ON APPEAL

The wagering of Credits in the Casino

6. The appeal concerns the taxation of electronic or cashless gaming credits (**Credits**) when used "as a stake for gambling on EGMs and ATGs".[5] The cashless gaming system in the Casino is carried out in accordance with the *Casino Act*, which provides in s 3:

> ***cashless gaming system*** means a system that enables the storage of monetary value for use in operating a gaming machine or automated table game equipment;

7. As the Court of Appeal observed, the relevance of this definition is that "Credits are the device created by the casino to meet the statutory necessity for the storage of **monetary value** in its cashless gaming system".[6] The monetary value represented by Credits is stored in the customer's cashless gaming account and accessed through a card issued to the customer by SkyCity.

8. Credits can come from a customer's own money which they deposit into their cashless gaming account, from gambling winnings, or from converting loyalty points. The last of these are referred to as **Converted Credits**, but only to denote their origin for the purposes of the dispute between the parties: they are otherwise "indistinguishable from credits

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1 Case Stated [45].
2 CA [13], [43], [84].
3 Which would never be reached so long as a customer gambled even once in a given three year period.
4 AS [27].
5 Court of Appeal judgment (**CA**) [11] (CAB pg 166).
6 CA [45] (CAB pg 173) (emphasis added).

derived from cash transfer or wins".[7]

9. Customers can access the credit balance on their cashless gaming account by "taking their Card to a casino cashier" and "redeem[ing] the value of [Credits] for cash or another form of monetary payment".[8] A customer who went through the process of converting a certain number of loyalty points to Credits "could redeem those newly converted Credits for cash".[9] They could do so immediately after conversion; there is no obligation that they continue to gamble with the Credits until the "conclusion of play".[10]

The question of construction posed by the CDA

10. SkyCity is obliged under the CDA to pay duty[11] on "net gambling revenue". Net gambling revenue comprises "gross gambling revenue" less the amount of the "monetary prizes"[12] that SkyCity becomes liable to pay by virtue of patrons winning at gambling. Other types of deduction from gross gambling revenue are available in respect of certain types of (high value) customers.[13] In respect of "gross gambling revenue", cl 1.1 of the CDA states:

> "**gross gambling revenue**" for a period means:
>
> (a) the gross amount received by the Licensee during the period for or in respect of consideration for gambling in the Casino premises;…[14]

11. The Court of Appeal found that, on the proper construction of the CDA, when a customer decides to wager a Converted Credit, the monetary value represented by the Converted Credit — which SkyCity would have otherwise been obliged to pay to the customer on demand — is part of the "gross amount received by the Licensee during the period for or in respect of consideration for gambling".

12. SkyCity contests this conclusion, while conceding that, if a customer were to **first** withdraw the monetary value of Converted Credits from their account and **then** immediately decide

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7 CA [17]; Case Stated [48(j)], CAB pg 31.
8 Case Stated [48(j)].
9 AS [18].
10 Cf AS [72].
11 Calculated at different percentages of net gambling revenue in respect of different types of gambling: CDA cl 5 (CAB pg 103-104.)
12 In its extended definition, including bad debts, being "any amount by way of the consideration to what the Licensee is entitled for or in respect of gambling that is due as a debt but has not been received" and which the Licensee has written off: CDA cl 1.1 (CAB pg 99).
13 Being commissions or other inducements paid to Premium Customers or to third parties in connection with Premium Customers: CDA cl 1.1, definition of "Approved Deductions (CAB pg 99).
14 As well as "any bad debt to the extent recovered by the Licensee during the period", reflecting the fact that bad debts are treated as a monetary prize once written off and so comprise a deduction in earlier periods.

to gamble the resulting cash, this would "appropriately be treated as involving incoming or exogenous revenue"[15] and so would contribute to SkyCity's gross gambling revenue.

13. The Respondents submit that there is no relevant distinction between SkyCity's concession and the circumstances posed by Question 1. In both cases, something of equivalent monetary value is received by SkyCity by way of consideration for gambling. There is no reason to distinguish between gambling where the stake is the extinguishment of a debt of a particular amount, as opposed to gambling where the stake is cash in that amount. The tax calculated under the CDA is a tax on the results of gambling transactions, and involves "taxing the difference between the monetary value gained by the casino and the monetary value paid out at the point of gambling".[16]

The approach to construction

14. The CDA is an agreement provided for by a statute, forming part of a broader legislative scheme for the regulation and taxation of gambling in the State, entered into between the State and a prospective licensee to set the tax payable for the grant of a monopoly[17] privilege to conduct certain types of gambling that would otherwise constitute an unlawful nuisance.[18] Its meaning is arrived at objectively, based on "what a reasonable person would understand by the language in which the parties have expressed their agreement",[19] examining the contract's "text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose".[20]

The approach of the Court of Appeal to the use of the word 'revenue' in the definition

15. SkyCity's appeal is based on a contention that the Court of Appeal erred in that it "rejected the appellant's reliance on the word 'revenue' as forming part of the context from which the meaning of 'gross gambling revenue' should be drawn", and instead "focused exclusively

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15 AS pg 19 fn 64.
16 CA [57].
17 *Casino Act* s 7: "there is not to be more than one casino licence in force".
18 *Casino Act* s 8(2): "[t]he operation of the casino in accordance with the licence does not, in itself, constitute a public or private nuisance"; *Gaming Offences Act 1936* s 90(2): "every house, office, room or place … used … for [the occupier betting with persons at the … place] is a common nuisance and unlawful".
19 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
20 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46] (French CJ, Nettle and Gordon JJ); *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, [18] (French CJ), [78] (Gageler, Nettle and Gordon JJ); *Amcor Ltd v Construction Forestry Mining and Energy Union* (2005) 222 CLR 241, 258.

on the words in the definitional provision".[21]

16. This is not a fair characterisation of the approach of the Court of Appeal. The Court of Appeal **did** consider the use of the word "revenue" as part of the relevant context. What the Court of Appeal rejected as "risking circularity" was the **logic** of the manner in which SkyCity had sought to deploy that context in support of its argument.

17. The Court of Appeal observed that SkyCity's submissions "commenced" with a submission that "on a plain reading, the reference to the gross 'amount received' can only 'sensibly' be understood as a reference to revenue and, therefore, to an amount of money".[22] SkyCity contended that "in circumstances where the word 'revenue' is not defined, its meaning is assumed" and it "supplies the connotation of the phrase 'amount received'".

18. It was this form of argument to which the Court of Appeal referred at CA [35] when it rejected SkyCity's submission as "heavily reliant on the somewhat stipulative assertion that the phrase 'amount received' must mean 'amount *of money* received'". The Court of Appeal accepted that this was "one possible reading", but also observed that the "word 'money' is not used". In considering the use of the word "revenue", the Court of Appeal referred back to SkyCity's submission it had already considered at CA [31]: that "amount received" could only **sensibly** be construed as a "reference to revenue", with the use of the word "revenue" necessarily supplying the connotation of the phrase. It was the taking of this approach as a constructional "starting point" — or as a "premise of the definitional exercise" — that the Court of Appeal observed "risks circularity".

19. That the Court of Appeal did not ignore the word "revenue" is apparent from the following sentence: "[a]t the very least, any such connotation" — that is, connotation that the word "revenue" supplied to the phrase "amount received" as referring to money from an exogenous source — "is subject to the ordinary constructional exercise".[23]

20. The Court of Appeal went on to conduct that ordinary constructional exercise. The Respondents submit that the Court of Appeal's construction of the CDA was correct, when regard is had to the text, context and purpose of the provision, including when considering

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[21] AS [39].
[22] CA [31].
[23] CA [35].

the CDA's use of the word "revenue" as part of the context.

Text

21. As with statutory construction, the "starting point and the ending point" of the construction of a contract is "the language chosen by the parties to record their bargain".[24] This reflects what Gibbs J described as the "primary duty" of a court to ascertain the meaning of the contract "from the words of the instrument in which the contract is embodied".[25] "Very often, nothing in the context will come close to displacing the ordinary grammatical meaning of the legal text".[26]

22. The importance of the actual language chosen by the parties is all the more in relation to a definition: a "definition is ordinarily framed in language chosen for the grammatical meaning it conveys", such that it is "of fundamental importance" that the language of a definition be given its "natural and ordinary meaning unless some other course is clearly required".[27] While these principles are expressed in terms of statutory construction, they are equally compelling in relation to contractual construction.[28]

23. It is apparent from the Court of Appeal's reasons that it did not focus "exclusively on the words of the definitional provision",[29] however the actual words used in the contract were — correctly — at the forefront of the Court of Appeal's approach.

24. The definition uses the word "means", not "includes". The orthodox starting point is that the words following "means" will exhaustively define the concept which the label will signify throughout the document in question. The word "revenue" does not appear anywhere in the operative terms of the definition.

25. The operative terms are a composite phrase: "the gross amount received by the Licensee

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[24] *Cherry v Steele-Park* (2017) 351 ALR 521, [72] (Leeming JA with whom Gleeson and White JJA agreed).
[25] *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109 (Gibbs J).
[26] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, [74] (Leeming JA with whom Ward and Emmett JJA agreed).
[27] *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, 310 (Brennan CJ, Gaudron and McHugh JJ).
[28] *AIG Australia Ltd v Kaboko Mining Ltd* [2019] FCAFC 96, [43] (Allsop CJ, Derrington and Colvin JJ); *Vincent Nominees Pty Ltd v Western Australian Planning Commission* [2012] WASC 28, [25] (Beech J); Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323, [127] (Beech J); *Thera Agri Capital No 2 Pty Ltd v BCC Trade Credit Pty Ltd (t/as Bond & Credit Co)* [2022] NSWSC 669, [145] (Rees J).
[29] Cf AS [40].

during the period for or in respect of consideration for gambling in the Casino premises".

26. The word "gross" means "total" or "all". It is used in contradistinction to "net". These words (like "revenue") have particular meanings in accounting and other taxation contexts (for example, personal income tax) as terms of art which are not part of their ordinary core meaning. In any case, it is necessary to examine the terms of the instrument creating the tax to discern that which is being taxed, and the deductions that will be permitted. In the present context, the words merely connote "indiscriminate total" and "total after discrimination for a particular purpose" respectively.

27. The words "during the period" give effect to the requirement for the payment of interim monthly payments of Casino Duty under cl 6 of the CDA, as well as the overriding requirement to pay the annual amount imposed by cl 5. A "period" for the purposes of the definition might be either a month or a year.

28. The words "amount received by the Licensee… for or in respect of consideration for gambling" must be read as a whole, without recourse to an unduly "atomised analysis" of their individual words.[30] When read as a whole, these words direct attention to the results of the gambling transactions entered into between the Casino and its customers. The "amount[s]" to be totalled are those received by the Casino from ("for" or "in respect of" or in connection with) "consideration for gambling".

29. Gambling is, as the Court of Appeal recognised, a contractual exercise. It is defined within the *Casino Act* as "the playing of a game for monetary or other stakes and includes making or accepting a wager".[31] To take the example of a poker machine or EGM:

    29.1. the EGM constitutes the offer to the public at large;

    29.2. the conduct of the player by engaging with the machine and pressing the relevant button or pulling the relevant lever constitutes acceptance;

    29.3. the player putting money into the slot or utilising Credits as the wager is the consideration moving from the player; and

    29.4. both the provision of entertainment and the risk of paying out a prize are the

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[30] *Sea Shepherd Australia Limited v Commissioner of Taxation* (2013) 212 FCR 252, [35] (Gordon J with whom Besanko and Dodds-Streeton JJ agreed).

[31] CA [48].

consideration moving from SkyCity.

30. The words "consideration for gambling", in their natural meaning, refer to the stake or wager which the player places at risk in the gambling transaction entered into with SkyCity. The word "amount" has wide connotations. The *Macquarie Dictionary* gives its primary meaning as "quantity or extent". As the Court of Appeal concluded, when it is used as here in conjunction with "received", an "'amount', on its plain meaning, is a quantity of something capable of having monetary value".[32]

31. On the plain meaning of the language of the CDA as a whole, SkyCity's gross gambling revenue will increase whenever it receives something capable of having monetary value as the wager in a gambling transaction.

32. The use of the words "for or in respect of" do not, contrary to SkyCity's submissions, undermine the textual link between the two components of the composite phrase.[33] The CDA does not read as it is paraphrased by SkyCity "for or in respect of **the** consideration deployed in gambling",[34] such that textually the question "whether or not there was an amount received for or in respect of **that** consideration" simply does not arise.[35]

33. The phrase "for or in respect of" is a familiar form of broad connecting phrase, with the words "in respect of" having been described as "the widest possible meaning of any expression intended to convey some connexion or relation between two subject-matters".[36] The phrase is used throughout the CDA in that fashion.[37]

34. The purpose of including such words in the definition of "gross gambling revenue" is self-evidently to prevent the adoption of schemes to avoid the imposition of duty by rendering the connection between consideration and gambling less direct: such as the Casino selling a customer for $10 a voucher entitling them to ten "free spins" on a poker machine.

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[32] CA [45].
[33] Cf AS [66]-[67].
[34] AS [36]. The "the" does not appear in the clause.
[35] AS [67]. The "that" does not appear in the clause.
[36] *Powers v Maher* (1959) 103 CLR 478 at 484, 485 (Kitto J) citing *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110, 111 (Mann CJ).
[37] A monetary prize is any prize "provided by the Licensee **for or in respect of** gambling"; a prize by way of chattels must have been "provided **for**, **or in respect of**, a game": CDA cl 1.1 (CAB pg 100) the Courts of South Australia have jurisdiction "in respect of any dispute arising between the parties out of **or in respect of**" the CDA: CDA cl 13.4 (CAB pg 106).

Context and purpose

The use of the word 'revenue'

35. The difficulty with SkyCity's reliance on the use of the word "revenue" as part of the label assigned to the contractual definition, is that its meaning is itself ambiguous. Unlike using the word "pets" in distinguishing between tigers and house cats, "revenue" does not have an obvious meaning that sheds light on the distinction between the two constructions advanced. It is a word of "somewhat indefinite import".[38]

36. One ordinary meaning of "revenue" is simply a valuable receipt. This is perhaps the most obvious reading in circumstances where the plain text of the provision, as construed above, directs attention to whether an "amount" or quantity of something with monetary value has been "received".

37. The two connotations that SkyCity seeks to draw from "revenue" are the receipt of money or its equivalent "from an exogenous source", and the exclusion of receipts of sums themselves "created gratuitously".[39] Neither connotation is clearly apparent. Revenue in other statutory contexts has been held capable of extending to an increase in assets by virtue of the foregoing of a debt with no actual receipt of money from an exogenous source.[40] The word "revenue", when contrasted with "income", can have as one of its meaning the *gross* turnover of a company, as distinct from the *net* income when permissible expenses are deducted. The fact that the debt surrendered at the point of gambling was gratuitously created by way of some earlier transaction is irrelevant on this meaning of revenue.

38. SkyCity's approach of assuming a particular accounting or an "income tax" meaning of revenue risks the inappropriate transposition of concepts from more familiar statutory schemes to the unique regime under the *Casino Act*. The parties to the CDA could have, but did not, expressly discriminated in favour of the exclusion of "self-generated incoming

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[38] *London, Midland & Scottish Railway Co v Anglo-Scottish Railways Assessment Authority* (1934) 1 TLR 130, 136 (Lord Tomlin with whom Lord Russell of Killowen agreed).

[39] AS [68].

[40] In *Warner Music Australia v Commissioner of Taxation* (1996) 70 FCR 197, Hill J concluded that when the appellant received by way of settlement of a dispute a "release of an indebtedness" to the Commissioner in respect of sales tax, this constituted a "gain" that was "on revenue account" and so constituted income. Hill J noted that the statutory liability to pay the original tax assessment "operated to reduce the actual assets" of the Appellant from the moment it was issued, and that the corresponding increase in assets when it was freed from the liability constituted a gain (at 210).

funds" when defining the terms of the tax and those deductions that would be permitted.

39. It can be accepted that sometimes "circular reasoning … is not illogical … or indeed inappropriate",[41] such as where a word has sufficient explanatory potency to readily assist the construction exercise. But where it is necessary to **construe** the word that is being deployed to assist in construing the substantive terms of the contract, due to its own inherent ambiguity, the resultant circular reasoning is unlikely to assist the construction exercise. The exercise of construing "revenue" is all the more unhelpful here, where the defined terms in the CDA are not "revenue" *simpliciter*, but "gross gambling revenue" and "net gambling revenue". Gross and net gambling revenue are concepts that recur regularly in the taxation of various forms of gambling in South Australia.[42]

40. Of particular relevance, the *Gaming Machines Act 1992* (SA) (**GM Act**) from 1 July 1996 provided for a tax calculated on the "net gambling revenue derived in respect of the licensed premises in the financial year", with that concept being defined as "the total amount of all bets made on the gaming machines on the licensed premises during the year less the total amount of all prizes won on the machines during the year".[43]

41. SkyCity concedes that the language in s 72 of the GM Act "would clearly have captured the use of Converted Credits on EGMs and ATGs".[44] In doing so, it sought to rely on the different use of language in s 72 as a "ready model, available to the government in 1999" to achieve the same result in the CDA. However, this context also reflects the obvious proposition that the selection of the terms gross and net "gambling revenue" may simply have been as a useful label having the benefit of consistency with other schemes for the taxation of gambling proceeds (including schemes that, on SkyCity's own concession, do **not** use "revenue" as SkyCity says it should be construed here).

42. There is not a binary choice between deploying a label because it is descriptive of the

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41 *Commissioner of Taxation v Auctus Resources Pty Ltd* (2021) 284 FCR 294, [68] (Thawley J with whom McKerracher and Davies JJ agreed).

42 The *Statutes Amendment (Lotteries and Racing – GST) Act 2000* (SA), assented to on 29 June 2000, amended both the *State Lotteries Act 1966* (SA) and the *Racing Act 1976* (SA) to require the Lotteries Fund and the TAB to make payments in respect of "net gambling revenue"; the *Authorised Betting Operations Act 2000* which came into effect on 25 January 2001 required payments of tax by reference to a defined concept of "net gambling revenue" in respect of racing and football totaliser bets: Sch 1 cl 4(1)(b)(vii), cl 4(4), and cl 5(1)(a)(iv), cl 5(2). See also *Gaming Machines Act 1992* (SA) s 72 and 72A and *Casino Act* s 20(3).

43 GM Act s 72.

44 CA [59]; Appellant's Submissions before the Court of Appeal, 15 September 2023, FDN 8, pg 11 [40].

concept and deciding to pick a word at random as an "arbitrary or a meaningless label, having no 'potency'".[45] Convenience and consistency are equally plausible reasons for the selection of a given label.

43. After all, it is generally accepted that the proper course is to "read the words of the definition into the substantive enactment and then construe the substantive enactment" as so substituted in the ordinary way.[46] When this is done, the label used to signify the defined term will disappear from the text to be construed. In light of this well-established principle, sophisticated contracting parties in commercial contracts are more likely to focus attention on the operative provisions of their bargain than in the selection of labels.

10 *The charge of uncommerciality*

44. The Court of Appeal correctly concluded that "the charge of uncommerciality would require considerable exploration that has not been undertaken" by SkyCity.[47] Whether a construction would lead to "commercial nonsense" or an "uncommercial" outcome requires consideration of the results of the competing constructions, from "both parties' perspective",[48] noting that uncommerciality may be "a topic upon which minds may differ"[49] and that business common sense is "an objectively ascertained matter and thus referable to the evidence".[50] Caution is required before applying the label of uncommerciality to a particular construction.[51]

45. SkyCity did not adduce evidence explaining why it allowed the creation of enforceable
20 debts against it by customers, as opposed to allowing customers to generate non-cashable gaming credits using loyalty points. That SkyCity derived an additional commercial benefit from allowing the creation of such debts is relevant to whether it would make "commercial sense"[52] for it to accede to a contractual term imposing duty on the increase in assets reflected by the surrender of a debt.

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45 AS [60].
46 *Kelly v R* (2004) 218 CLR 216, [103] (McHugh J).
47 CA [56].
48 *Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd* [2021] WASCA 130, [456] (Murphy, Beech and Vaughan JJA).
49 *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, [43] (Gleeson, Gummow and Hayne JJ).
50 *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, [19] (Allsop P).
51 *Fitzwood v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566 [47] (Finkelstein J); *Binningup Nominees Pty Ltd v Mirvac (WA) Pty Ltd* [2021] WASCA 130, [456] (Murphy, Beech and Vaughan JJA).
52 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 54, [17], [26] (Kiefel, Bell and Gordon JJ).

46. The Court of Appeal then went on to observe "in any event" that the CDA was not a contract with a "purely commercial" object, but had purposes of harm minimisation and revenue protection. This was simply to observe that the specific applications of the more general contractual principles that have developed in relation to the construction of "commercial contracts" were not necessarily directly, nor exclusively, applicable. The question is not whether the construction was "commercial" but whether it was consistent with the background, object and purposes of the contract.[53] The fact of SkyCity's statutory monopoly underscores the risk of considering uncommerciality in the absence of any evidentiary foundation.

10 *The value obtained by SkyCity from the wagering of Converted Credits*

47. When a customer deposits funds with a bank, the relationship between the customer and the bank is one of creditor and debtor. A decrease in the balance of the account is reflected in a *pro tanto* reduction in the *chose in action* reflecting the value of the bank's liability to the account holder.[54]

48. Customers with cashless gaming accounts enabling storage of "monetary value" as required by s 3 of the *Casino Act* are likewise in a relationship of creditor and debtor with SkyCity. When a customer deposits their funds in the cashless gaming account, to be represented by Credits, the indebtedness of SkyCity to the customer increases and there is a *pro tanto* increase in the *chose in action* reflecting that debt. When SkyCity allows customers to
20 convert loyalty points to Credits, the same thing happens. This might be represented in accounting terms by an increase in the customer's assets and a corresponding increase in SkyCity's liabilities. But if the customer chooses to wager and loses the monetary value represented by a Converted Credit, SkyCity's indebtedness to the customer decreases by that amount, and its assets correspondingly increase. As a matter of practical business reality, SkyCity has received that amount for consideration for gambling.

49. SkyCity argues that "the conversion of Points … and the wagering of credits derived from those Points, involved the appellant conferring a benefit on a customer, not the receipt by the appellant of something of monetary value from the customer" (AS [70]). In other

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53 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ): *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8] (Gleeson CJ); *Bejawn v Sikh Association of Western Australia Inc* [2023] WASC 152, [27] (Seaward J).

54 *R v Preddy; R v Slade; R v Dhillon* [1996] 3 All ER 481, 490 (Lord Goff of Chieveley).

words, a gift.

50. But in downplaying the significance of the distinction between Points and Credits, SkyCity conflates two legally distinct transactions. The conversion of Points to Credits involves SkyCity conferring a benefit on a customer. SkyCity (presumably to encourage further gambling) allows the gratuitous creation of an enforceable debt, by increasing the customer's store of monetary value in their cashless gaming account. But the subsequent "wagering" does **not** involve the conferral of a unilateral benefit. It involves the customer deciding to wager something valuable to him or her in exchange for the chance to win a prize.

10 51. This is quite different from the "appellant permitting a customer a turn at gambling that is provided gratuitously by it", or the "equivalent of the provision of a free travel ticket or coffee voucher".[55] Permitting a customer a "free spin" or free turn at gambling is all downside for SkyCity. It runs the risk of paying out winnings, while receiving nothing in return. SkyCity is correct that "if the Casino simply allowed a customer to play at roulette by placing a chip on the colour requested by the customer (but without receiving any money or its equivalent from the customer), there would be no 'gross gambling revenue'".[56]

52. Where a customer wagers with Converted Credits, on the other hand, SkyCity does receive something. It increases its assets by virtue of the extinguishment of an enforceable debt. Such a transaction is one in which "the receipt of actual value by"[57] SkyCity is obvious.
20 The customer choosing voluntarily to surrender their legal right to recover a monetary amount leads to an "economic benefit being derived from an exogenous source".[58] The fact that the debt may have been previously created gratuitously is not to the point.

53. To conclude that such amounts fall within "gross gambling revenue" is consistent with the evident purpose of the *Casino Act* and the CDA in ensuring that public revenue obtains a share of **all** value obtained by SkyCity from the exercise of its monopoly privilege.

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[55] AS [71].
[56] Cf AS [36].
[57] AS [60].
[58] AS [35].

Part VI: ARGUMENT ON CROSS APPEAL

The approach of the Court of Appeal and the question for special leave

54. The third question reserved concerned whether the common law or equitable principles concerning penalty clauses applied to clause 11 of the CDA.

55. Clause 11 of the CDA provides that the Treasurer may on default of payment, by written notice, require SkyCity to make good the default and "pay interest at 20% per annum of the outstanding amount calculated from the due date of payment daily on a cumulative basis".

56. Section 17 of the *Casino Act* provides:

> **17-Casino Duty Agreement**
>
> (1) There is to be an agreement (the ***casino duty agreement***) between the licensee and the Treasurer-
> (a) fixing the amount, or basis of calculation, of casino duty; and
> (b) providing for the payment of casino duty; and
> (c) dealing with interest and penalties to be paid for late payment or non-payment of casino duty.

57. The Court of Appeal accepted that the reference in s 17 to "penalties" meant that it was open to the parties under the CDA "to agree penalties".[59] However, "interest" "would ordinarily be understood as dealing with interest that is enforceable in a contractual setting" not "interest that would ordinarily be unenforceable as a penalty".[60]

58. The Court of Appeal held that to conclude that the imposition of penalties had been authorised by the *Casino Act,* was to conclude that the jurisdiction of the court had been ousted, such that any "ouster by implication would have to appear clearly and unmistakeably".[61] This was an application of the principle of legality,[62] or of a principle of equivalent strength.[63]

59. Applying this presumption, the Court of Appeal held that despite Parliament having provided it was open to the parties to agree penalties, and despite the ordinary meaning of "penalties", it was "not satisfied that" the facility to agree penalties "**so clearly** permits the

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[59] CA [109].
[60] CA [101].
[61] CA [104], applying *Shergold v Tanner* (2002) 209 CLR 126, [34].
[62] *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J).
[63] *Coco v The Queen* (1994) 179 CLR 427, 437 [12] (Mason CJ, Brennan, Gaudron and McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15], [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

parties to agree on a rate of interest, a concept understood in the general law to be compensatory, that would operate as a penalty".[64]

60. The Court of Appeal reached this conclusion notwithstanding that revenue statutes commonly provide for the imposition of interest on unpaid amounts,[65] comprising the reserve bank rate plus an uplift percentage.[66] Such an interest rate is often recognised within the statute as a "penalty".[67]

61. The interest exacted by revenue statutes has a number of purposes. A component compensates the government for the direct financial loss sustained from the inability to invest the unpaid tax. However, the high rate of interest exacted by the uplift percentage also recognises that the government has unique interests in fostering a culture of timely payment of taxation by deterring late payments, and in ensuring fairness and equality between taxpayers, such that one taxpayer who pays on time is not disadvantaged compared to another who pays late.

62. The effect of the Court of Appeal's construction was to apply the penalties doctrine, a controversial principle[68] amounting to a "blatant interference with freedom of contract",[69] to the unsuitable terrain of the revenue context, where "deterrence by threat of

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64 CA, [109] (emphasis added).

65 Revenue statutes also commonly provide for the imposition of additional tax in certain circumstances. In South Australia, additional tax is not payable for mere late payment, but late payments that are either deliberate or result from a lack of reasonable care on the part of the taxpayer or their representative: *Taxation Administration Act 1996* (SA) s 30(2).

66 Both the Commonwealth and South Australia impose interest rates calculated as the sum of the Reserve Bank rate plus an uplift percentage of 7 or 8% respectively, compounding daily: *Taxation Administration Act 1996* (SA) s 26(1); *Taxation Administration Act 1953* (Cth) s 8AAD. The current Commonwealth General Interest Charge is 11.36%, and the State interest rate is 12.36%.

67 See eg *Renewable Energy (Electricity) Act 2000* (Cth) s 70: if an amount … is not paid … the liable entity is liable to pay, by way of penalty, interest charge on the whole of the unpaid amount"; *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth) s 25, heading: "Penalty for non-payment of surcharge or advance instalment"; *Child Support (Registration and Collection) Act 1988* (Cth) s 67 "if a child support debt … remains unpaid… the person liable to pay the debt is liable to pay to the Registrar, by way of penalty" an amount of interest calculated by reference to the general interest charge; *Safety Rehabilitation and Compensation Act 1988* (Cth) s 97P "interest is payable, by way of penalty". The implementation of the Commonwealth General Interest Charge had the purpose of "replace[ing]the existing late payment **penalties** in various taxation laws with a uniform tax deductible general interest charge", and was accompanied by a "reduction of between 3 and 23 percentage points in the existing penalty rates" across a range of Commonwealth taxation laws: *Taxation Laws Amendment Bill (No 5) 1998* (Cth) – Explanatory Memorandum.

68 The UK Supreme Court described the doctrine as ""an ancient, haphazardly constructed edifice which has not weathered well, and which in the opinion of some should simply be demolished" in *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67, [3] (Lords Neuberger and Sumption with whom Lord Carnwath agreed).

69 *Esanda Finance v Plessnig (*1989) 166 CLR 131, 140 (Wilson and Toohey JJ) citing *Elsley v J.G. Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1, 15.

punishment"[70] including by imposition of high rates of interest is an important means of revenue protection and ensuring equality between taxpayers. This approach gave insufficient recognition to the fact that "[t]he law of contract has been fashioned primarily to deal with the interests of private parties, not those of the Executive Government" and the corresponding need to apply "different spectacles" in such circumstances.[71]

63. The "question of a special nature requiring the attention" of this Court[72] and in relation to which the Respondents seek special leave to cross-appeal concerns the correct approach to interpretation of a statute in determining whether Parliament has excluded a common law principle from a statutory contract. The Court of Appeal, applying a presumption the equivalent of the principle of legality, in effect held that Parliament needed to use even clearer and even more unmistakable language that it did, not merely so as to authorise the imposition of a penalty, but so as to authorise **the specific type of penalty** in issue (namely a penalty exacted by way of interest rather than a lump sum).

The correct approach to construction of the *Casino Act*

64. On the proper construction of the *Casino Act,* the Court of Appeal ought to have concluded that the common law and equitable principles concerning penalty clauses did not apply to cl 11 of the CDA.

The liability to pay duty does not rely on the common law enforceability of the CDA

65. In *Sankey v Whitlam,*[73] this Court approved a statement of Lord Cairns LC in *Caledonian Railway Co v Greenock and Wemyss Bay Railway Co* that:

> when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections.[74]

66. This is the effect of s 51(1) of the *Casino Act,* which states that "[t]he licensee **must** pay casino duty (and interest and penalties for late payment or non-payment of casino duty) in accordance with the casino duty agreement". Section 51 takes the matters recorded in the

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[70] *Paciocco v ANZ Banking Group Ltd* [164] (Gageler J); [33], [42]-[47] (Kiefel J), [216], [283] (Keane J).
[71] *Williams v Commonwealth* (2012) 248 CLR 156, [151] (Gummow and Bell JJ) citing *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J).
[72] *DPP v United Telecasters Sydney Ltd* (1990) 168 CLR 594.
[73] *Sankey v Whitlam* (1978) 142 CLR 1, 77 (Stephen J) and 89 (Mason J).
[74] *Caledonian Railway Co v Greenock and Wemyes Bay Railway Co* (1874) L.R. 2 Sc. & Div. 347, 349 (Lord Cairns LC).

CDA as a *factum* that triggers the imposition of a separate statutory liability to pay duty, interest and penalties.[75]

67. The words "in accordance with the casino duty agreement" simply direct attention to the terms of the CDA that s 17 requires be negotiated. On their plain meaning, read with the mandatory "must", the words of the statute do not direct an enquiry into whether, on a hypothetical action in contract, a court would refuse to enforce any term of the CDA.

68. This is reinforced by s 51(4), which provides that "Casino duty (and interest and penalties) may be recovered as a debt due to the State". The proceedings provided for by s 51(4) are not proceedings to "recover a stipulated sum" under a contract or for contractual damages.[76] The effect of s 51(4) is to create a separate, statutory cause of action in debt,[77] that does not rely upon the State suing on the underlying contract.

69. That s 51 creates the liability to pay is consistent with its heading: "Liability to casino duty". It is also consistent with the identical language in s 51(3) creating an obligation to "pay casino duty (and interest and penalties…) on a basis fixed under the regulations".

70. The fact that the CDA operates as a deed under s 17(4) does not undermine the necessary implication from the plain words of s 51. Section 51 creates a freestanding obligation to **pay**; it does not touch any other ancillary promises which may be in the CDA, such as reporting obligations or financial returns, nor deal with termination rights, which would be enforced or exercised in accordance with the law of contract.

71. While describing it as having "some rhetorical force", the Court of Appeal rejected this construction of s 51. It did so on the basis that there was nothing in s 51 that "expressly" ousted the jurisdiction of the Court "to declare an interest provision to be unenforceable as a penalty". It considered any ouster of jurisdiction would need to appear "clearly and unmistakeably", and that s 51(4) was capable of being construed as merely "provid[ing] a statutory basis for enforcement of the CDA".

72. This reasoning was erroneous in two respects. First, it was inappropriate to invoke the

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[75] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 378 (Kitto J); *Baker v the Queen* (2004) 223 CLR 513, [43] (McHugh, Gummow, Hayne and Heydon JJ).

[76] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, [35] (Deane J).

[77] *Malek Fahd Islamic School Ltd v Minister for Education and Early Learning* (2023) 111 NSWLR 585, [55] (Basten AJA, Ward P and Meagher JA agreeing); *Edenden v Bignell* [2007] NSWSC 1122, [30] (Barrett J); *Bennie v Grace* (2018) 28 DCLR (NSW) 375, [33] (Dicker SC DCJ).

principle of statutory construction derived from *Shergold v Tanner*.[78] The question was not whether the *Casino Act* was limiting or withdrawing the jurisdiction of a Court. It was whether the *Casino Act* was giving statutory force to the obligation to pay under the CDA such that the question whether cl 11 would be enforced by a Court in an action on the contract was entirely irrelevant. No presumption was applicable.

73. Secondly, and in any event, it was necessary for the Court of Appeal to adopt a construction of the *Casino Act* that gave all of its provisions work to do.[79] There would be no need to provide for a "statutory basis for enforcement of the CDA" if enforcement of the CDA **as a contract** would suffice: the common law would provide such a basis. The purpose for the enactment of s 51 and s 51(4) in particular must have been ensuring that the obligation to pay duty as agreed under the CDA was enforceable irrespective of the validity or enforceability of the CDA as a contract.

74. Indeed, as Edelman J observed in *Mineralogy Pty Ltd v Western Australia,* even where legislation adopts the "first approach" of merely approving, authorising or ratifying an agreement while leaving it to have contractual force, the effect of such authorisation is "the removal of any common law or statutory obstacles to enforceability of the agreement, such as a lack of power of a contracting party or the illegality of any of the contractual provision".[80] The unenforceability of a clause as a penalty is a classic example of such an obstacle to enforcement.

In the alternative, the Casino Act authorises the imposition of penalties

75. Accordingly, even if contrary to the Respondents' primary submission the liability to pay duty arose from the CDA, the clear statutory language of the *Casino Act* authorised the CDA to contain penalties. The word "penalties" can only be read in that fashion.

76. The Court of Appeal erred by reasoning that s 17(1)(c) refers to "penalties" separately from "interest" meaning the word "penalties" could not authorise the imposition of a penalty by way of interest. This was to read down the word "penalties", ignoring its usual meaning. Contractual penalties commonly take the form of imposing (or increasing) a rate of interest

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78 (2002) 209 CLR 126, [34].
79 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ).
80 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, [124] (Edelman J).

payable on an outstanding sum.[81]

77. The correct approach was to recognise that "interest" meant a rate of interest that was compensatory, but that "penalties" provided flexibility to the sophisticated parties to the CDA to agree upon any form of penalty for late or non-payment. This might be by a compensatory interest rate and a lump sum by way of penalty, or by a compensatory interest rate and a penalty interest rate, **or** negotiating a single clause dealing with compensatory and penal interest. There is nothing special about penal interest to support the view that Parliament would have treated it differently.[82]

78. This textual analysis is supported by context and purpose. As to context, the very same words "interest and penalties" are used in s 51(2) to describe that which can be imposed by regulation in default of agreement. The Court of Appeal's construction involved a conclusion that the word "penalties" in ss 51(1) and 51(2) meant two different things.

79. As to purpose, as observed above, the penalties doctrine is ill-suited to the taxation context, where states need to threaten late payment with punishment exceeding its own commercial losses in order to ensure fairness and equality between taxpayers. The interest of the State in the taxation of gambling revenue arising from the operation of the Casino is best given effect by a construction that "penalties" means "penalties".

80. The Court of Appeal's conclusion to the contrary appears to have been based on its identification of the need for any ouster of jurisdiction to appear "clearly and unmistakably".[83] This was incorrect to treat the penalties doctrine as akin to the sort of "fundamental right" protected by the doctrine of legality.

81. It may be accepted that, the *Casino Act* having provided for a contract that operated as a deed, the common law concerning contracts would apply, but as modified expressly or by necessary implication by the statutory context. But discerning any contrary intention merely required construing the *Casino Act* in the ordinary way, without resort to any presumption or threshold. Moreover, the principle of legality does not operate to "contradict the natural

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[81] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1; *Kellas-Sharpe v PSAL Ltd* [2013] 2 Qd R 233; *Summer Hill Business Estate Pty Ltd v Equititrust Ltd* [2011] NSWCA 149, [47] (Young JA).

[82] Under the *Taxation Administration Act 1996* (SA), penalty tax can be up to 75% of the unpaid tax – the equivalent of almost 3 years interest at 20% per annum.

[83] CA [104], [107], [109].

and ordinary meaning of the text, nor justify disregarding otherwise relevant context, statutory history or extrinsic material".[84]

82. The Court of Appeal, in concluding that the word "penalties" did not "so clearly" authorise the imposition of penal interest as to displace the presumption, ignored the ordinary meaning of the word penalties. Equally, in rejecting any significance to be attributed to the terms of s 51(2), on the basis that any implication did not appear "clearly and unmistakeably", the Court of Appeal adopted a construction of that provision that was strained and inconsistent with the terms of the *Casino Act* read as a whole.

83. The alternative purpose that the Court of Appeal attributed to s 51(2) as permitting the Treasurer "to refuse to agree to any interest regime that complies with the demands of the general law with respect to penalties", such that "penal interest could then be imposed by regulation" is unlikely.[85] More importantly, it ignored the statutory command of s 17 that there "**is** to be" an agreement, which "**is** to be entered into with a prospective licensee **before** the licence is granted or with a licensee **before** the renewal of the licence". [86]

Part VII: TIME REQUIRED

84. The Respondents estimate that up to 2 hours will be required for oral argument, including any reply on the cross appeal.

Dated: 8 August 2024

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[84] *Secretary, Dept of Family and Community Services v Hayward (a pseudonym)* (2018) 98 NSWLR 599, [25] (Bathurst CJ, Beazley P, Basten, Gleeson & Payne JJA);

[85] CA [109].

[86] In accordance with this statutory command, the CDA was entered into on 27 October 1999, a month before the first Casino Licence was granted on 25 November 1999: Case Stated, [7] (CAB 22); Case Stated, [1(c)] (CAB 21).

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

SKYCITY ADELAIDE PTY LTD
Appellant

and

TREASURER OF SOUTH AUSTRALIA
First Respondent

STATE OF SOUTH AUSTRALIA
Second Respondent

ANNEXURE TO THE RESPONDENTS' SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2019,* the Respondents' set out below a list of the constitutional provisions, statues and statutory instruments referred to in these submissions.

No	Description	Version	Provisions
	Commonwealth Statutory Provisions		
1.	*Child Support (Registration and Collection) Act 1988* (Cth)	Current (Compilation No. 72, 1 January 2024 – present)	s 67
2.	*Renewable Energy (Electricity) Act 2000* (Cth)	Current (Compilation No. 30, 20 Match 2024 – present)	s 70
3.	*Safety Rehabilitation and Compensation Act 1988* (Cth)	Current (Compilation No. 79, 14 June 2024 – present)	s 97P
4.	*Superannuation Contributions Tax (Assessment and Collection) Act 1997* (Cth)	Current (Compilation No. 28, 20 October 2023 – present)	s 25
5.	*Taxation Administration Act 1953* (Cth)	Current (Compilation No. 209, 1 July 2024 – present)	s 8AAD

	South Australian Statutory provisions		
6.	*Authorised Betting Operations Act 2000* (SA)	As at 25 January 2001	Sch 1 cl 4(1)(b)(vii), cl 4(4) and cl 5(1)(a)(iv), cl 5(2)
7.	*Casino Act 1997* (SA)	Current (Reprinted as at 3 December 2020)	ss 3, 7, 8(2), 17, 51
8.	*Gaming Machines Act 1992* (SA)	Current (Reprinted as at 9 December 2021)	ss 72 and 72A
9.	*Gaming Offences Act 1936* (SA)	Current (Reprinted as at 10 December 2021)	s 92
10.	*Racing Act 1976* (SA)	As at 1 July 2000 (Reprint No. 15, 1 July 2000 – 30 September 2001)	s 69
11.	*State Lotteries Act 1966* (SA)	As at 1 July 2000 (Reprint No. 9, 1 July 2000 – 30 September 2001)	s 16
12.	*Statutes Amendment (Lotteries and Racing – GST) Act 2000* (SA)	As at 29 June 2000	ss 4 and 6
13.	*Taxation Administration Act 1996* (SA)	Current (Reprinted as at 3 October 2019)	ss 26(1) and 30(2)