

CASE NOTE
COMMERCIAL DEALINGS WITH
GOVERNMENT:
THE CAUTIONARY TALE OF *VICTORIA V*
TATTS

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I INTRODUCTION

Legislation has the potential to modify or extinguish rights conferred by contract. Contention arises when legislation undermines the rights of a private party to a commercial dealing with government, leaving the private party without adequate legal remedy in Australia. This is the ‘sovereign risk’ borne by private parties when striking bargains with government. *Victoria v Tatts Group Ltd* (*Tatts Case*)¹ involved the materialisation of a sovereign risk, whereby the unanimous High Court of Australia (‘High Court’) narrowly construed Tatts Group Ltd’s (‘Tatts’) right to compensation pursuant to a contract with the State of Victoria (‘Victoria’), after significant reform to the gambling and gaming industry. Along with the factually analogous *Tabcorp Holdings Ltd v Victoria* (*Tabcorp Case*),² which was concurrently heard, yet separately decided, by the High Court, the *Tatts Case* demonstrates the risks of private dealings with government. The case calls into question the inadequacy of the current remedial framework for sovereign risk and sheds light on important issues of contractual construction.

II FACTS

The *Gaming Machine Control Act 1991* (Vic) (‘1991 Act’) heralded the first legislated regulation of gambling activity involving the use of gaming machines in Victoria.³ The holder of a ‘gaming operator’s licence’, issued pursuant to s 33 of the 1991 Act, was entitled to facilitate gaming in approved Victorian venues.⁴ On 14 April 1992, gaming operator’s licences were exclusively issued to the then Totalisator Agency Board of Victoria (‘TAB’) and the then Trustees of the Will and Estate of the Late George Adams (now ‘Tatts’), creating a duopoly in the gaming market.

TAB was privatised in 1994 and became Tabcorp. The *Gaming and Betting Act 1994* (Vic) (‘1994 Act’)⁵ facilitated the privatisation scheme, and provided for the grant of a conjoined gaming and wagering licence to Tabcorp for an 18 year term.⁶ In order to

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¹ *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 (*Tatts Case*).

² *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 (*Tabcorp Case*).

³ *Gaming Machine Control Act 1991* (Vic) (‘1991 Act’).

⁴ *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376, 379 [11].

⁵ *Gaming and Betting Act 1994* (Vic) (‘1994 Act’).

⁶ *Ibid* ss 8, 12(1).

equalise the competitive footing of the duopolists, Victoria entered into an agreement with Tatts ('1995 Agreement') on terms that largely replicated those of the 1994 Act applicable to Tabcorp. Specifically, clause 7.1 of the 1995 Agreement entitled Tatts to a 'terminal payment' in the event that 'the Gaming Operator's Licence [granted to Tatts] expires without a new gaming operator's licence having [been] issued to [Tatts].'⁷

The gaming and gambling industry underwent significant regulatory change in 2008. Upon expiration of Tatts' and Tabcorp's licences, a new licensing regime took effect — resulting in the issuance of 'Gaming Machine Entitlements' ('GMEs') to approved venues — pursuant to amendments to the *Gambling Regulation Act 2003* (Vic) ('2003 Act'),⁸ a re-enactment of the 1994 Act. No new licences were issued. The duopoly had ended.

III LITIGATION HISTORY

Tatts commenced proceedings against Victoria in the Supreme Court of Victoria ('Supreme Court') to claim its terminal payment, owed under clause 7 of the 1995 Agreement. Hargrave J held that Tatts was entitled to the terminal payment. His Honour premised his judgment on the likelihood of a reasonable and honest businessperson understanding a 'new gaming operator's licence' after the expiry of the defined Gaming Operator's Licence as 'any licence or other authority of substantially the same kind as [Tatts'] existing gaming operator's licence.'⁹

The Court of Appeal upheld the decision of the primary judge.¹⁰

IV THE DECISION IN THE *TATTS* CASE

The High Court unanimously allowed Victoria's appeal. The High Court held that the phrase new gaming operator's licence was confined to a gaming operator's licence issued pursuant to the 1991 Act (as amended, re-enacted or replaced from time to time), and that the 1995 Agreement was predicated on the existence and continuation of the duopoly. This involved significant departure from the Supreme Court and Court of Appeal's findings that a new gaming operator's licence extended to substantially similar gaming authorities.¹¹ Consequently, Tatts was not entitled to compensation in accordance with the 1995 Agreement, because no new gaming operator's licence was issued.

The High Court prefaced its reasoning by confirming that the proper construction of commercial contracts requires consideration of their text, context and purpose.¹² The text, context and purpose of clause 7 of the 1995 Agreement were analysed in turn.

⁷ *Tatts Case* (2016) 90 ALJR 392, 394 [3].

⁸ *Gambling Regulation Act 2003* (Vic) ('2003 Act'); *Gambling Regulation Amendment (Licensing) Act 2008* (Vic); *Gambling Regulation Amendment (Licensing) Act 2009* (Vic); *Gambling Regulation Amendment Act 2009* (Vic).

⁹ *Tatts Group Ltd v Victoria* [2014] VSC 302 (26 June 2014) [95].

¹⁰ *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [133]–[146].

¹¹ *Tatts Group Ltd v Victoria* [2014] VSC 302 (26 June 2014) [95]; *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [147].

¹² *Tatts Case* (2016) 90 ALJR 392, 401 [51], citing *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 [46]–[51].

Looking first to the language of the 1995 Agreement, the High Court held that clause 7 of the 1995 Agreement was confined to a licence granted in accordance with the 1991 Act,¹³ contrary to the broad interpretation given by the Court of Appeal. Similarly, insertion of the word ‘new’ into new gaming operator’s licence did not vary the presumption that the phrase should be used in a consistent manner with gaming operator’s licence.¹⁴

In addition to the language of the 1995 Agreement, the High Court found further support for its conclusion in the context and purpose of the 1995 Agreement.¹⁵

First, the High Court was particularly critical of the Court of Appeal’s framing of the central issue¹⁶ – what an honest and reasonable businessperson, in the position of the parties at the point of entry into the 1995 Agreement, would have understood a new gaming operator’s licence to mean.¹⁷ This was because the Court of Appeal’s formulation did not reflect the context and purpose of the 1995 Agreement, specifically that it was predicated upon the existence of the duopoly.¹⁸ That the continuation of the duopoly was at the core of the 1995 Agreement was reflected within numerous clauses, recitals and the Treasurer’s letter attached as Schedule 2.¹⁹ Consequently, the High Court rejected previous suggestions of the ‘commercial nonsense’ of Victoria’s promise to make the terminal payment to Tatts.²⁰

Second, the High Court sourced contextual support from the differing ‘businesses’ protected by the Gaming Operator’s Licence and GMEs respectively. The High Court held that Tatts’ gaming machine business (comprising the acquisition, supply, installation and operation of gaming machines) was far broader than the GME, which was limited in its ‘effect and value, both geographically and functionally.’²¹

The divergence of reasoning between the High Court and Court of Appeal highlights the complexities and difficulties associated with interpretation of commercial contracts. Though both the High Court and Court of Appeal approached their analysis of the key issue in the same manner, with reference to the text, context and purpose of clause 7 of the 1995 Agreement,²² the quest to ascertain the parties’ objective intention yielded conflicting conclusions. The commercial ramifications of such interpretive disparity are concerning. Commercial parties must now meticulously and thoroughly craft their bargains to ensure that their commercial position is protected from any bench.

¹³ *Tatts Case* (2016) 90 ALJR 392, 401 [49].

¹⁴ *Ibid* 401–2 [53]–[59].

¹⁵ *Ibid* 402 [61].

¹⁶ *Ibid* 402–3 [61]–[63].

¹⁷ *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [146].

¹⁸ *Tatts Case* (2016) 90 ALJR 392, 403 [64].

¹⁹ *Ibid* 396 [18].

²⁰ *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [157]–[158]; *Tatts Group Ltd v Victoria* [2014] VSC 302 (26 June 2014) [101]–[102].

²¹ *Tatts Case* (2016) 90 ALJR 392, 404 [73].

²² *Ibid* 401 [51], citing *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 [46]–[51]; *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [87]–[94], citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 (French CJ, Hayne, Crennan and Kiefel JJ).

V CRITIQUE

The significance of the *Tatts Case* extends beyond what was expressed in the High Court's judgment. Critically, the High Court elected to leave untouched two vexing legal issues. The first is whether ambiguity must be found within the text of the contract before a court may turn its attention to surrounding circumstances. Secondly, the Court did not determine whether private parties ought to be compensated for government default and sovereign risk. As will be demonstrated, the High Court's silence on these relevant matters can be heard just as loudly as their judgment against *Tatts*.

A *The Ambiguity Gateway*

Recent decisions of the High Court have clarified the proper construction of commercial contracts,²³ allowing for the consideration of the context and commercial reality of the contract at the time of drafting, in addition to the language of the contract. However, the *extent to which* surrounding circumstances may be considered to aid contractual interpretation remains an ongoing concern.²⁴ The controversy of opinion stems from Mason J's formulation of the 'true rule' of contractual interpretation in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* ('*Codelfa*'),²⁵ that evidence of surrounding circumstances is admissible so as to clarify ambiguous language, but not to contradict unambiguous language.²⁶ The contention peaked when in a refusal to grant special leave,²⁷ the High Court remarked that courts are bound to follow the precedent in *Codelfa* until it is otherwise reconsidered by the High Court.²⁸ Despite the uncertainty surrounding the precedential weight of special leave applications,²⁹ intermediate appellate courts were thrown into disarray by the conflicting lines of reasoning being simultaneously affirmed by the High Court.³⁰

It appears that the High Court is awaiting a case with factual surrounding circumstances that contradict unambiguous words in order to resolve this issue once and for all. Regardless, the High Court's reluctance to use the *Tatts Case* to revisit the 'true rule' will frustrate commercial contractors and academics alike.

²³ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 [46]–[51]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; see also *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1.

²⁴ Justice Robert McDougall, 'Construction of Contracts: The High Court's Approach' (Paper presented at the Commercial Law Association Judges' Series, Sydney, 26 June 2015) [5].

²⁵ (1982) 149 CLR 337 ('*Codelfa*').

²⁶ *Ibid* 352 (Mason J).

²⁷ See *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1.

²⁸ *Ibid* [3] (Gummow, Heydon and Bell JJ).

²⁹ Kevin Lindgren, 'The Ambiguity of 'Ambiguity' in the Construction of Contracts' (2014) 38(2) *Australian Bar Review* 153; Derek Wong and Michael Brent, 'Western Export Services v Jireh International: Ambiguity as the Gateway to Surrounding Circumstances?' (2012) 86(1) *Australian Law Journal* 57.

³⁰ See generally Troy Keily, 'High Court Declines to Clarify the *Codelfa* 'Ambiguity Principle' (2016) 44 *Australian Business Law Review* 61; Justice Robert McDougall, 'Construction of Contracts: The High Court's Approach' (2015) 4 *Journal of Civil Litigation and Practice* 141. The disparity of opinion in intermediate appellate courts is evidenced in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113, 130 [71]; *contra Technomin Australia Pty Ltd v Xstrata Nickel Australia Operations* (2014) 48 WAR 261.

B *Remedying Sovereign Risk*

The fact that private parties cannot and will not be remediated for the defaults of government is alarming. This is particularly so when the materialisation of a sovereign risk can be characterised as a private party acting to their detriment in reliance upon antecedent government conduct.³¹ Notably, the language of this characterisation closely resembles the modern concept of private law estoppel.³² Given the striking similarities, it is unsurprising that various academics and members of the judiciary have contemplated the possibility of administrative law courts applying an analogous ‘administrative estoppel’³³ in Australia. The Chief Justice of the High Court promisingly opined in 2003, that ‘the possibility that estoppels may apply in public law is *not* foreclosed by the current state of authority in Australia.’³⁴ Such a public law remedy would accord with the ‘manifest unfairness’ recognised by the Court of Appeal.³⁵

In spite of the well reasoned views in support of the integration of a public law estoppel, the weight of Australian case law indicates otherwise. The decisions of *Attorney-General (NSW) v Quin* (‘*Quin*’)³⁶ and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (‘*Lam*’)³⁷ traced the development and demise of the ‘legitimate expectations’ remedy — a former public law remedy akin to public law estoppel. However, Justice Perram acknowledges that, despite constitutional differences, many other comparable administrative law systems (such as France, the European Union and the United Kingdom) habitually relieve private parties in similar estoppel-type circumstances involving government dealings.³⁸

Regardless of whether administrative estoppel will weave its way into the fabric of public law, the *Tatts Case* does not appear to be suitable for its application for two reasons. First, implicit in the High Court’s reasoning was the fact that Tatts was not susceptible to government default. The 1995 Agreement contemplated the change in duopoly status that ultimately precluded Tatts from receiving its terminal payment. Secondly and finally, the 1995 Agreement would have been an inappropriate contract to enforce. The analogy between private law estoppel and a public law counterpart ceases in relation to the parties affected. Whilst private law estoppel concerns a bilateral legal relationship, a public law equivalent would have to additionally account for the interests of the general

³¹ Justice Nye Perram, ‘General Principles of Law in Civilian Legal Systems: What Lessons for Australian Administrative Law?’ (Speech delivered at the AGS Administrative Law Symposium, Canberra, 21 June 2013) <http://www.fedcourt.gov.au/publications/judges-speeches/justice-perram/perram-j-201#_ftn7>.

³² See generally Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013) ch 12; see generally *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

³³ See, eg, G T Pagone, ‘Estoppel in Public Law: Theory, Fact and Fiction’ (1984) 7 *University of New South Wales Law Journal* 267; Justice Duncan Kerr, ‘Administrative Law in an Interconnected World: Where to from Here?’ (2013) 74 *Australian Institute of Administrative Law Forum* 36; see especially Perram, above n 31.

³⁴ Justice Robert French, ‘The Equitable Geist in the Machinery of Administrative Justice’ (2003) 39 *Australian Institute of Administrative Law Forum* 1, 11.

³⁵ *Victoria v Tatts Group Ltd* [VSCA] 311 (4 December 2014) [61]–[62].

³⁶ *A-G (NSW) v Quin* (1990) 170 CLR 1 (‘*Quin*’).

³⁷ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 215 CLR 1 (‘*Lam*’).

³⁸ Perram, above n 31.

public.³⁹ Accordingly, Justice Perram's species of administrative estoppel would unlikely apply in the context of the *Tatts Case* for want of public interest in the perpetuation of a socially and economically damaging industry duopoly. As eluded to in the *Tatts Case*,⁴⁰ the 'socio-economic issues attending gambling' and anti-competitive contracts, arrangements and understandings are generally contrary to the public interest.⁴¹ This would have inevitably led to Tatts' preclusion from pleading administrative estoppel.

VI CONCLUSION

The *Tatts Case* will be remembered as a cautionary tale in the context of commercial dealings with government. Without any adequate protection from unforeseeable adverse government conduct, private parties may only rely on careful and precise drafting to mitigate sovereign risk, particularly in regulated and volatile industries. This cautious approach to contractual drafting is also suitable in light of the uncertainty throughout Australia surrounding the 'true rule' of objective contractual interpretation. Whether a proactive High Court or legislature will resolve these issues is yet to be seen.

³⁹ *R v East Sussex County Council; Ex Parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58, 66 [34] (Lord Hoffman); Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 490.

⁴⁰ *Tatts Case* (2016) 90 ALJR 392, 404 [72].

⁴¹ Sir William Searle Holdsworth, *A History of English Law* (Sweet & Maxwell, 2nd ed, 1937) vol 8, 65–62; see also *Competition and Consumer Act 2010* (Cth) s 45.

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