CITATION:	*Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing & Anor (No 3)* [2022] NTSC 75
PARTIES:	LOTTOLAND (AUSTRALIA) PTY LTD v MINISTER FOR RACING, GAMING AND LICENSING and NORTHERN TERRITORY RACING COMMISSION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2020-03129-SC; 2021-00179-SC
DELIVERED:	15 September 2022
JUDGMENT OF:	Southwood J

CATCHWORDS:

PRACTICE AND PROCEDURE – Application to reopen judgment after judgment pronounced but before authenticated – Judge at first instance omitted to consider a ground of the plaintiff's application for judicial review – no fault of the parties – Judgment reopened

GAMING AND LICENSING – Minister's directions to the Commissioner under s 19 of the *Racing and Betting Act 1983* (NT) to impose additional conditions on sports bookmaker's licence under s 92(2) of the Act – Three directions – Two directions superseded – Whether the imposition of the

additional conditions in compliance with s 92(3), (4) and (5) of the Act – Compliance with statutory provisions

PROCEDURAL FAIRNESS – Extent of Minister's obligations to accord procedural fairness when making a direction under s 19 of the *Racing and Betting Act 1983* (NT) – Whether the Minister accorded the plaintiff procedural fairness – Procedural fairness accorded

Racing and Betting Act 1983 (NT) s 19, s 92

Bailey v Marinoff (1971) 125 CLR 529, *DJL v Central Authority* (2000) 201 CLR 226, *Gamser v Nominal Defendant* (1977) 136 CLR 145, *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA, *Lexcray Pty Ltd v Northern Territory of Australia* (2003) 13 NTLR 154, *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing & Anor (No 2)* [2022] NTSC 66, *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, *Spotlight Pty Ltd v NCON Australia Ltd* [2012] VSCA 232, *Taylor v Lawrence* [2002] 2 All ER 353, referred to

REPRESENTATION:

Counsel:

Plaintiff:	NC Hutley SC with him SH Hartford-Davis and DJ Reynolds
First and Second Defendants:	WJN Wells QC with him C Jacobi

Solicitors:

Plaintiff:	Addisons
First and Second Defendants:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing & Anor (No 3) [2022] NTSC 75
No. 2020-03129-SC; 2021-00179-SC

BETWEEN:

LOTTOLAND (AUSTRALIA) PTY LTD
Plaintiff

AND:

MINISTER FOR RACING, GAMING AND LICENSING
First Defendant

AND:

NORTHERN TERRITORY RACING COMMISSION
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 September 2022)

Introduction

[1] On 22 December 2015, the second defendant granted the plaintiff a sports bookmaker licence under s 90 of the *Racing and Betting Act 1983* (NT). The licence permitted the plaintiff to conduct a sports bookmaker business in the Northern Territory at specified premises in Darwin. The plaintiff's original licence was to expire on 30 June 2020, and on 18 June 2020, the second

defendant renewed the plaintiff's licence. The plaintiff's current licence expires in 2025.

[2] On 29 July 2020, under s 19 of the *Racing and Betting Act*, the first defendant directed the second defendant to impose the following additional conditions on all sports bookmakers' and betting exchange operators' licences, by no later than 31 October 2020.

First

(a) Except as set out in paragraph (b), the Sports Bookmaker and Betting Exchange Operator must not, in or through any format or media:

(i) describe, depict, or market its bet types in a manner that would lead a reasonable person to infer that the bet type constitutes or approximates a lottery; or

(ii) take any action to cause, or intended to cause, a person to believe that a bet type constitutes or approximates a lottery.

(b) Condition (a) does not apply to:

(i) a 'mystery bet' on races or sporting matches or competitions where the combination relates to direct outcomes of identified races or sporting matches or competitions; or

(ii) a 'fantasy sport' bet where the contingencies arise from the same identified type of sporting match or competition; or

(iii) a description, depiction or form of marketing approved by the Commission in writing for the purpose of this licence condition.

Second

(a) Except as set out in paragraph (b), the Sports Bookmaker and Betting Exchange Operator must not offer or accept a bet which is based on a combination of contingencies each of which form part of a sporting event or events (as defined in the Act) where:

(i) the selection of those contingencies:

(A) occurs in a way that does not allow the customer to make a specific evaluation of, or an informed decision about, the contingencies for the purpose of placing the specific bet; or

(B) arises from the extraction, matching or adaptation of data by the Sports Bookmaker from data sets generated by the relevant event or events; or

(C) involves a material element of chance or produces a jackpot; or

(ii) the bet relates to a proxy or surrogate for a part of the sporting event rather than relating directly to that part of the sporting event.

(b) Condition (a) does not apply to:

(i) a 'mystery bet' on races or sporting matches or competitions where the combination relates to direct outcomes of identified races or sporting matches or competitions; or

(ii) a 'fantasy sport' bet where the contingencies arise from the same identified type of sporting match or competition; or

(iii) a bet type approved by the Commission in writing for the purpose of this licence condition.

[3] Accordingly, on 3 August 2020, under s 92(2) of the *Racing and Betting Act*, the second defendant resolved to impose the two additional licence conditions on all sports bookmakers' and betting exchange operators' licences in the Northern Territory; and on 7 August 2020, the second defendant notified the plaintiff that the two additional licence conditions were imposed on its licence.

[4] The plaintiff is opposed to the imposition of the two new conditions on its licence, and on 14 September 2020, the plaintiff commenced this proceeding for judicial review by originating motion. The originating motion was amended on two occasions. At the hearing, the plaintiff sought the relief claimed in the Further Amended Originating Motion filed on 4 November 2020, as follows:

(1) An interlocutory injunction, to remain in force until the final resolution of the proceedings, restraining the defendants from:

(a) varying the licence, or the conditions to the licence, issued to the plaintiff on 18 June 2020 to conduct the business of a sports bookmaker under Part IV, Division 2 of the *Racing and Betting Act* so as to include any or all of the two conditions annexed to the second defendant's letter to the plaintiff on 7 August 2020 (the First Condition and the Second Condition are together described as the Conditions); and

(b) otherwise enforcing or giving effect to the Conditions as against the plaintiff.

(2) An injunction permanently restraining the defendants from taking either of the steps referred to in paragraphs (a) and (b) of prayer 1.

(3) An order in the nature of prohibition, prohibiting the defendants from taking the steps referred to in paragraphs (a) and (b) of prayer 1.

(4) An order in the nature of certiorari quashing the first defendant's decision of 29 July 2020 to direct the second defendant to vary the plaintiff's licence so as to include the Conditions (the Direction).

(5) An order in the nature of certiorari quashing the second defendant's decision of 7 August 2020 to vary the plaintiff's licence so as to include the Conditions (the Decision).

[5] The pleaded grounds in support of the plaintiff's application were as follows:

(1) The Conditions exceed the power of the second defendant under s 92(2) of the *Racing and Betting Act* because, on its proper construction, the power conferred by s 92 is subject to the limitation expressed in s 90(5), such that s 92(2) may only be used to impose additional conditions that relate to "the structure and assets" of the plaintiff.

(1A) Further or alternatively, the First Condition is invalid because s 92 of the *Racing and Betting Act*, on its proper construction, authorises only conditions characterised by reasonable certainty of meaning and application, and the First Condition does not possess that certainty.

(2) Further or alternatively, the Conditions exceed the power of the second defendant under s 92 of the *Racing and Betting Act* because it is unlawful for the second defendant to use the power to impose or vary licence conditions in such a way as to effectively destroy the rights created by the licence.

(3) Further or alternatively, the Conditions exceed the power of the second defendant under s 92 of the *Racing and Betting Act* insofar as they seek to limit the permission granted by the licence by excluding kinds or types of "sporting event".

(3A) The Direction is invalid because it exceeds the power in s 19 of the *Racing and Betting Act*, in that it precluded the [second defendant] from giving genuine consideration to the representations of the plaintiff and/or dictated the outcome of that consideration, contrary to the requirement in s 92(5) of the *Racing and Betting Act*, and the objects in s 17(2) of the Act.

(3B) The Direction is invalid because the first defendant acted under the dictation of the Chief Minister in making it.

(4) The Direction is invalid because it was made for an improper purpose, and the Decision is invalid in turn because it was made in compliance with the Direction. The Direction was made for the purpose of suppressing lawful competition, i.e. to promote and prefer the business of newsagents to the detriment of sports bookmakers perceived to be encroaching on that business.

(4A) The Direction is invalid because it contravened s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth).

(5) *The Direction is invalid because the first defendant failed to afford procedural fairness to the plaintiff before making the Direction, and the Decision is invalid in turn because it was made in compliance with the Direction.*

(5A) The Direction and/or the Decision is invalid because the defendants failed to consider material submissions made by the plaintiff.

[6] On 18 August 2022, I delivered my judgment in this proceeding.[1] I made the following orders at the conclusion of my judgment:

(1) Declare that the first defendant's decision of 29 July 2020 to direct the second defendant to vary the plaintiff's licence by the imposition of the two additional conditions is *ultra vires* and invalid in so far as it includes the second limb ((a)(ii)) of the First Condition [see [2] above].

(2) Declare that the second defendant's decision of 7 August 2020 to vary the plaintiff's licence so as to include the two additional conditions is *ultra vires* and invalid in so far as it includes the second limb ((a)(ii)) of the First Condition.

(3) Order the second defendant to vary the plaintiff's licence by deleting the second limb ((a)(ii)) of the First Condition it imposed on the plaintiff's licence on 7 August 2020.

(4) Otherwise, the plaintiff's application is dismissed.

[7] As yet, the orders have not been authenticated in accordance with Order 60 of the *Supreme Court Rules*.

[8] On 18 August 2022, I also made the following orders:

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1 *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing & Anor (No 2)* [2022] NTSC 66.

(1) The matter is listed for mention at 9 am on 1 September 2022.

(2) The interlocutory injunction is extended to the close of business on 1 September 2022.

[9] The interlocutory injunction has since been extended to the close of business on 15 September 2022.

[10] In error, in my Reasons for Decision, I mistakenly failed to deal with ground 5 of the plaintiff's application. Instead, I dealt with ground 5A, which the plaintiff had abandoned. Consequently, on 26 August 2022, the plaintiff filed a summons seeking the following order:

> An order that the judgment of his Honour Justice Southwood delivered in the proceeding on 18 August 2022 be amended to correct an error, being his Honour's omission to consider ground 5 of the grounds advanced by the Plaintiff in its originating motion filed on 4 November 2020 and written submissions filed on 22 January 2021.

[11] In effect, the plaintiff's summons seeks orders that I reopen my judgment and deal with ground 5.

[12] The summons was listed for hearing at 9 am on 1 September 2022. On 30 August 2022, my Associate received an email from the solicitor for the defendants stating that the defendants did not object to the Court reopening its judgment to address ground 5. On 31 August 2022, my Associate wrote to the solicitors for each of the parties stating that, subject to anything the parties wished to say to the contrary, I proposed to reopen my judgment to deal with ground 5. On the same date, the solicitor for the defendants sent

an email to my Associate stating that the parties agreed to the course that I proposed.

[13] As the judgment delivered on 18 August 2022 has not been authenticated in accordance with Order 60 of the *Supreme Court Rules*, it has not been perfected. This is of obvious significance to the plaintiff's application. After a judgment has been perfected by being drawn up as a record of the Court, a proceeding is at an end and is beyond recall by the Court.[2] However, until a judgment has been perfected, the Court has an inherent jurisdiction to reopen its judgment.

[14] The circumstances must be exceptional before a court may allow a case where a judgment has been delivered, but not perfected, to be reopened.[3] The need for finality is one reason.[4] That the discipline which ought to attend the conduct of litigation by highly competent litigators would also inevitably decline is another.[5] The very strict rule that, subject to any applicable processes of appeal or review, the presentation of their cases by the parties to litigation must conclude with the end of the trial, is another important justification. Often, the boundaries of the reopened issues are hard to define and as difficult to protect.[6]

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2 *Bailey v Marinoff* (1971) 125 CLR 529 at 530 per Barwick CJ; *Gamser v Nominal Defendant* (1977) 136 CLR 145; *DJL v Central Authority* (2000) 201 CLR 226; *Lexcray Pty Ltd v Northern Territory of Australia* (2003) 13 NTLR 154 at [33] per Gallop AJ.

3 *Taylor v Lawrence* [2002] 2 All ER 353.

4 *Spotlight Pty Ltd v NCON Australia Ltd* [2012] VSCA 232 at [17].

5 Ibid.

6 Ibid at [18].

[15] None of the above considerations apply in this case. The issue sought to be dealt with is discrete and was pleaded and argued at the hearing. No further evidence is sought to be tendered by the parties. Nor do the parties ask to make any further submissions. The ground on which the plaintiff seeks to reopen this proceeding is an error of omission by the Judge at first instance, which is not the fault of either party. To refuse the plaintiff's application would result in a procedural unfairness as the plaintiff would have been deprived of an opportunity to have its case heard in full. The overriding principle in deciding to reopen a proceeding is that the Court consider whether, taken as a whole, the justice of the case favours the grant of leave to reopen.[7]

[16] In my opinion, this is an exceptional case. Justice requires the proceeding to be reopened. Accordingly, I reopen the proceeding to deal with ground 5 of the plaintiff's application for judicial review.

Ground 5
Plaintiff's submissions

[17] Ground 5 is that the final direction the first defendant gave to the second defendant on 29 July 2020 is invalid because the first defendant failed to accord the plaintiff procedural fairness; and the second defendant's decision to impose the two additional conditions on the plaintiff's license is invalid in turn because it was made in compliance with the first defendant's direction.

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7 *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 at [26] per Kenny J; *Taylor v Lawrence* [2002] 2 All ER 353.

[18] The plaintiff made the following submissions.

[19] The first defendant's power to give directions under s 19 of the *Racing and Betting Act*, as with any statutory power affecting the interest of individuals, is conditioned by a requirement to afford procedural fairness unless there is something in the Act to displace or exclude that requirement.[8] There is nothing in the Act that displaces the first defendant's obligation to afford procedural fairness in deciding whether to make a direction under s 19 of the Act. The first defendant was required to afford procedural fairness to the plaintiff. However, the plaintiff submits that the evidence establishes that the plaintiff was not afforded procedural fairness before the first defendant gave its first direction to the second defendant. This is said to be significant because the first direction was the genesis of the policy change that resulted in the final direction to impose the two additional conditions on the plaintiff's licence.

[20] The third and final direction, which is the direction that is subject to challenge, was made as part of a sequence. The first direction was issued on 11 November 2019. The second direction was issued on 20 December 2019, at the suggestion of the second defendant. The third direction was then made on 29 July 2020, again at the suggestion of the second defendant. The second direction was expressly stated to "amend" the first direction. In turn, the third direction was expressly stated to "supersede" the second direction.

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8 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [75].

While the first two directions do not have any continuing legal effect, the first direction led to the taking of some other action, including the second direction and the final direction that had consequences for the purported alteration of the plaintiff's legal rights. The plaintiff submitted that it was therefore critical that the plaintiff was afforded procedural fairness before the first defendant made the first direction.

[21] The failure of the first defendant to afford the plaintiff procedural fairness before the first direction infected the entire consultation process that was subsequently conducted. That entire process was predicated on the assumption that the only scope for consultation was how to best give effect to the policy intent in the first direction. It was not part of the consultation process to receive or make submissions as to whether that policy intent should have been adopted in the first place. The question about the need for the policy change was effectively a *fait accompli*, and the first defendant was indifferent to the second defendant's suggestion that an alternative approach be considered.

[22] The fact that the first defendant shut her mind to alternative approaches to making the directions was significant because Tabcorp's complaints about the plaintiff's betting products may have been capable of resolution by the plaintiff without the imposition of the two additional conditions.

[23] Procedural fairness required that the plaintiff be afforded an opportunity to make submissions on the fundamental question of whether the first

defendant should adopt the stated policy intent of prohibiting its business in the first place. The first defendant's failure to do so vitiated both the original direction, and the second and third directions that purported to update and give effect to it.

[24] The plaintiff's submissions are largely based on the first defendant's letters to the second defendant respectively dated 11 November 2019 and 20 December 2019. The letter dated 11 November 2019 stated the following:

> I write in relation to a number of growing concerns raised with my office regarding wagering products described as 'jackpot betting' which may give the impression of a lottery but are not in fact a lottery. It is essential that the Northern Territory Government ensure its licensed operators demonstrate social responsibility, in that their behaviour, and the events and outcomes upon which they offer betting are, at all times, within community expectation.
>
> In response to my previous letter, I understand that you have formed a working group to review the list of sporting events declared pursuant to section 4(2) of the *Racing and Betting Act 1983* (the Act) and I thank the Northern Territory Racing and Betting Commission (the Commission) for undertaking this important piece of work. Such a review is necessary to ensure the declared sporting events remain reflective of the objectives of the Act, particularly as they relate to integrity and fairness of betting activity, and to reduce the adverse social impacts of betting. Whilst this work remains an important part of improving the regulatory framework here in the Territory, I do not belive this alone will solve the issues consumers and stakeholders are raising in relation to jackpot betting.
>
> *The Hon Michael Gunner MLA, Chief Minister and I* would like to see stronger regulation around products which may cause confusion or otherwise potentially mislead consumers, and specifically *wish for the prohibition* of any products which are presented, marketed or otherwise displayed in a manner which could reasonably mislead consumers into believing they are purchasing a lottery product. Despite assurances from Lottoland to the contrary, I believe these products and operations in particular negatively affect local newsagencies across the Territory and potentially around the nation. We reiterate our support for local and national newsagencies as the major retailer in lotteries.

> […] The Commonwealth is also concerned about these issues and have sought advice from their agency as to what steps the Commonwealth can take to rectify the concerns of their constituents and stakeholders.
>
> As such I am requesting the Commission take steps to prohibit the offering of a product that is presented, marketed or otherwise displayed in such a way as to potentially, at least by look and feel of the presentation of the market/contingency, lead consumers into believing, or giving the impression that, they are purchasing a ticket in a lottery product. How this is best implemented, I will leave in the Commission's capable hands, however I would like to see swift implementation (either through licence conditions, the NT Code of Practice for Reasonable Gambling or otherwise).
>
> Accordingly, *pursuant to section 19 of the Act, I direct the Commission to take any necessary steps*, in accordance with the functions and powers granted to it under the Act, *to prohibit the offering or acceptance of a bet* on a sporting event, as declared under section 4(2) of the Act, *which is presented, marketed or displayed in such a way that a reasonable person might believe that they are purchasing a ticket in a lottery*.
>
> I request that this change take effect 1 January 2020; enabling bookmakers and betting exchange operators the opportunity to amend business systems and processes.
>
> These are important aspects of a strong regulatory framework and I have asked the Department of Attorney-General and Justice to consider these issues in the context of the rewrite of the Act, which I expect to commence early next year. In particular, I have asked that the intent of the above direction be enshrined in legislation to ensure the names of the wagering operators and their products are reflective of the industry and unable to be misconstrued by consumers.
>
> I will take this opportunity to pass on *thanks from the Chief Minister and myself* for the efforts of the Commission to date. We value the Commission's expertise in this area and look forward to continuing our collaborative approach to maintaining a strong regulatory framework here in the Territory.

[25] The plaintiff's case on ground 5 is that it was never afforded procedural fairness before the first defendant made her decision on 11 November 2019 to adopt the policy set out in the third paragraph of her letter of that date. It was submitted that from the point of the direction contained in the fifth paragraph of her letter onwards, the second defendant had no decision-

making function in relation to whether such steps could be taken or not. The second defendant was bound to obey the direction. Thus, there was no scope and no utility in making submissions to the second defendant, and the plaintiff was not given any real opportunity to make submissions to the first defendant.

[26] The letter dated 20 December 2019 stated:

> I refer to my letter dated 11 November 2019 containing a direction under section 19 of the *Racing and Betting Act 1983* (the Act), and to subsequent discussions between you and the Department of Attorney-General and Justice, specifically your advice about the best implementation *of the policy intent* of the direction contained in my letter.
>
> Having considered your advice, I now amend my direction to more specifically direct the Northern Territory Racing Commission (the Commission) to vary the licences of sports bookmakers and betting exchange operators (collectively known as 'operators') to impose the two new conditions enclosed (*) as additional conditions on licences.
>
> Of course you will need to follow the statutory procedure for variations in section 92 and 109H of the Act. I request that you confer with me about any representations received from operators through that process. This will enable me to consider whether to make an adjustment of my direction if the Commission or I consider that any of those representations *raise an issue relevant to the efficacy of the implementation of the policy direction*.
>
> [...]

[27] The plaintiff submitted that the penultimate paragraph in the letter dated 20 December 2019 suggests that the first defendant was only prepared to consider (so far as any representations by sports bookmakers or betting exchange operators were concerned) representations relevant to the efficacy of the implementation of the policy direction.

[28] A consultation process that assumes that the central issue of whether an adverse decision should be made is non-negotiable, but entertains submissions on the specifics of how that adverse decision will be given effect, is not a consultation process that affords procedural fairness.

Defendants' submissions

[29] The defendants submitted that there were four propositions relevant to ground 5. *First*, when a direction is made by the first defendant under s 19 of the *Racing and Betting Act* to impose additional conditions on licences of sports bookmakers, s 19 is the source of the obligation to accord procedural fairness. *Second*, the obligation to accord procedural fairness in s 19 does not have any freestanding content and depends upon the power to which any direction to the second defendant relates. *Third*, where a direction under s 19 of the Act is a direction to consider how to implement a policy, it will only be at the point at which the second defendant has made a decision as to how to implement the policy that there will be an obligation to accord procedural fairness. *Four*, there was no obligation to accord procedural fairness to the plaintiff at the time of the first direction, and prior to the final direction being implemented, the plaintiff was accorded procedural fairness.

[30] While the second defendant was thinking about how to implement the policy intent of the first defendant, there was no obligation to accord the plaintiff procedural fairness. It is only at the time that the second defendant sought to affect rights that it has an obligation to accord procedural fairness.

Likewise, no parallel obligation for the first defendant to accord procedural fairness under s 19 of the Act arises until it is sought to affect rights.

[31] Once it was determined how the rights of sports bookmakers' and betting exchange operators' licences were to be affected, the plaintiff was accorded extensive procedural fairness, including the opportunity to make extensive representations about the proposed additional conditions. The plaintiff was not prevented in any way from making representations about policy matters.

[32] The defendants submitted that the essence of the plaintiff's submissions about ground 5 is that the plaintiff was deprived of an opportunity to make representations about the first defendant's policy intent before the policy was formulated and set in motion. The defendants submitted that the plaintiff's submissions in this regard had no basis in fact. The submissions were contrary to the opportunity to make representations that was afforded to the plaintiff, and the representations the plaintiff made to the second defendant. The plaintiff was afforded an open-ended opportunity to make representations.

[33] The defendants submitted that the key events that demonstrate the opportunity granted to the plaintiff to make representations are:

(a) the second defendant's letter to the plaintiff dated 23 December 2019, which offered the plaintiff an entirely open-ended opportunity to respond to the proposed licence conditions;

(b) the plaintiff's detailed representation dated 14 February 2020, which did not suggest that the plaintiff saw any limitation of the kind contended for in its submissions to the Court, and covered all of the matters the plaintiff sought to raise with the defendants;

(c) the response made by the representatives of the plaintiff at a meeting of the second defendant [presumably this was at the special meeting of the second defendant held on 26 March 2020];

(d) the second defendant's further letter to the plaintiff of 13 May 2020 offering a further open-ended opportunity to respond to the proposed further amended licence conditions; and

(e) the plaintiff's further representation of 9 June 2020, which does not confine itself solely to the proposed conditions.

[34] The defendants submitted that the result was that the plaintiff was not prevented from making, and did make, representations in opposition to the content of the policy before the final direction (which is the direction that is subject to challenge) was made.

Consideration of ground 5

[35] Ground 5 cannot be sustained. The plaintiff was accorded procedural fairness.

[36] I accept the defendants' submissions about when the obligation for the first defendant to accord procedural fairness arose. It arose at the time the

plaintiff was given notice of the *second* direction. The fact that the policy intent arose at the time of the first direction that was made under s 19 of the Act and persisted at the time of the third direction is of no consequence. It is unlikely that there was a greater chance of the first defendant accepting the plaintiff's representations if they had been made before the first direction. The opportunity for the plaintiff to persuade the first defendant to adopt a different course remained the same. The suggestion by the plaintiff that there was a material difference in the circumstances it faced at the time of the first direction because Tabcorp increased its lobbying of Government after the first direction is not made out. The Government may well have consulted with lottery operators and newagents and their representatives about any proposals that the plaintiff may have made at that earlier time.

[37] The plaintiff's submissions misapprehend the nature and extent of the consulation that did take place and the obligations of the first defendant.

[38] The defendants determined that the first defendant would accord the plaintiff procedural fairness via the second defendant, who was to proceed and did proceed in accordance with the hearing provisions of s 92 of the Act.

[39] Section 92 of the *Racing and Betting Act* specifies the procedural fairness that the second defendant must afford licensees before imposing any additional conditions on a licence under s 92(2). The section states:

(1) *A sports bookmaker may apply* to the Commission for a variation of his licence or the conditions to which it is subject and the Commission may, or may refuse to, vary the licence or the conditions, *as it thinks fit*.

(2) *Subject to this section, the Commission may*, from time to time, vary the licence of a sports bookmaker or the conditions to which it is subject *or impose additional conditions on the licence*.

(3) Before exercising its powers under subsection (2), the Commission shall, by notice in writing to the sports bookmaker, notify the sports bookmaker of the variation of the licence or the conditions or of the conditions to be imposed on the licence.

(4) The Commission may, not earlier than 28 days after a notice is sent to a sports bookmaker under subsection (3), vary the licence or the conditions to which it is subject or impose additional conditions on the licence.

(5) The Commission shall, in exercising its powers under subsection (4), consider the representations, if any, of the sports bookmaker.

(6) This section does not permit the Commission to vary the effect of a prescribed condition to which the licence is subject.

[40] It is apparent from the text of s 92(3) of the *Racing and Betting Act* that all the second defendant is required to do by way of procedural fairness before exercising its powers under s 92 is notify the licensee/s of the conditions to be imposed. The second defendant is not required to notify the licensee/s that it is considering the development of a new policy that will result in the imposition of additional licence conditions under s 92(2) of the Act. However, the second defendant is, in exercising its powers, required to consider any representations made by the sports bookmaker whose licence is to be affected. If the second defendant fails to consider the representations of the sports bookmaker, then it may fail to provide the procedural fairness mandated by s 92(5) prior to the imposition of any additional conditions. The relevant ground for a failure to consider the plaintiff's respresentations

in this proceeding was that pleaded in ground 5A, which was confined to certain material submissions only. Ground 5A was abandoned by the plaintiff, and, in any event, is dealt with in my earlier Reasons for Decision.

[41] The history of the second defendant's consultation with the plaintiff is set out at [42] to [62] below.

[42] On 11 November 2019, the second defendant received the letter referred to at [24] above.

[43] On 27 November 2019, the Chairperson of the second defendant spoke to the Chief Executive Officer of the plaintiff and advised him that the second defendant had received a direction from the first defendant. The Chairperson of the second defendant foreshadowed that, as a result of the direction, the second defendant would be writing to all licensees to propose a new licence condition that would effectively prohibit the type of betting product that the plaintiff was offering. So within 16 days of the first direction being received by the second defendant, the plaintiff was in a position to start making representations to the first defendant about whether there was an alternative resolution to the first defendant's concerns and the prohibition of the betting products that the plaintiff was offering.

[44] On 11 December 2019, the Chairperson of the second defendant spoke to the Chief Executive Officer of the plaintiff and advised him that a letter about the proposed conditions would most likely be sent to the plaintiff the following week. The Chief Executive Officer of the plaintiff asked for more

than 28 days in which to respond and the plaintiff was granted until 14 February 2020 to make any representations it wished to make.

[45] On 19 December 2019, the Chairperson of the second defendant responded in writing to the direction from the first defendant, inviting her to consider varying her direction to the second defendant. The letter stated:

> The proposed method of complying with your direction is to follow the process under the *Racing and Betting Act* to propose the insertion of a new licence condition prohibiting the behaviour described in your letter. [..]

The letter went on to raise concerns about the effectiveness of prohibiting certain misleading conduct and recommended a further condition that prohibited particular kinds of bets. The latter condition was amended and, as amended, became the second condition set out at [2] above.

[46] On 20 December 2019, the first defendant sent the second defendant the second direction, which is contained in the letter set out at [26] above. It is at this point in time that the first defendant accepted the advice of the second defendant about how the policy should be implemented, the manner in which the plaintiff's rights were to be affected was determined, and a direction was given.

[47] On 23 December 2019, the Chairperson of the second defendant wrote to the Chief Executive Officer of the plaintiff. The letter stated:

> The Commission hereby provides notice, in accordance with section 92(3) of the *Racing and Betting Act* (the Act), and subject to section 92

> of the Act, of a proposal to insert two (2) additional licence conditions into your sports bookmaker's licences.
>
> The additional licence conditions are set out in attachment A to this letter.
>
> If you wish to make any representations concerning the proposed variation (including representations concerning the timing for commencement of the new requirements) for the Commission to consider, please do so within 28 days of this letter, [...].
>
> I advise that I am writing in similar terms to all Northern Territory licensed sports bookmakers and betting exchange operators.

[48] The letter imposed no restrictions on the kind or extent of representations that could be made by the plaintiff. The letter is in conformity with the manner in which the policy was to be implemented and with the provisions of s 92(3), (4) and (5) of the *Racing and Betting Act*, which set out the manner that the legislature has determined that procedural fairness should be accorded.

[49] On 28 January 2020, the plaintiff wrote to the first defendant. The letter is four pages long and deals in detail with the policy intent, the direction, the conditions, the impact on the plaintiff, consumer concerns, newsagent concerns, competitor actions, the role of federal authorities, and requested a meeting with the first defendant to discuss a list of issues set out in the penultimate paragraph of the letter.

[50] On 14 February 2020, the plaintiff provided detailed written representations to the second defendant in response to the second defendant's letter dated 23 December 2019. The letter is 18 pages long and deals with the following issues:

(a) the notice provided in accordance with s 92(3) of the *Racing and Betting Act*;

(b) the basis for the notice;

(c) directions from the first defendant;

(d) the lack of evidence in support of the policy intent;

(e) the impact of the conditions on the plaintiff, its staff and its customers;

(f) the impact of the conditions on other operators;

(g) general comments on the drafting of the conditions;

(h) the definition of “lottery”;

(i) the definition of “jackpot”;

(j) “proxy or surrogate” bets;

(k) exemptions;

(l) the ability to exempt by way of the second defendant’s approval;

(m) misleading conduct and confusion;

(n) competitor involvement;

(o) the plaintiff’s submissions; and

(p) the timeframe for implementation.

[51] It is apparent that the plaintiff's representations cover all of the plaintiff's concerns, including the rationale and validity of the implementation of the proposed policy.

[52] On 12 March 2020, the second defendant sent an email to the plaintiff in response to its representations, inviting the plaintiff to attend before the second defendant and expand upon its submissions.

[53] On 26 March 2020, the second defendant convened a special meeting at which the plaintiff made further submissions concerning the proposed new licence conditions.

[54] On 13 May 2020, the Chairperson of the second defendant wrote to the plaintiff, enclosing proposed amendments to the draft proposed licence conditions that were attached to the letter dated 23 December 2019, and inviting the plaintiff to provide any comments on the proposed revisions.

[55] On 18 May 2020, the Chairperson of the second defendant wrote to the first defendant outlining the outcomes of the statutory consultation processes with licenced sports bookmakers and betting exchange operators. The letter enclosed the plaintiff's letter of 28 January 2020 and its detailed representations dated 14 February 2020.

[56] On 4 June 2020, the Chairperson of the second defendant met with the first defendant to discuss the proposed new licence conditions. At the conclusion of the meeting, the first defendant indicated that she would wait until she

received the further correspondence from the second defendant before making a final decision on the proposed additional licence conditions.

[57] On 9 June 2020, the second defendant received a response from the plaintiff to its letter dated 13 May 2020. The letter reiterated the plaintiff's opposition to the proposed second additional licence condition, and, in addition to other matters, provided further comments on both of the revised proposed additional licence conditions.

[58] On 12 June 2020, the second defendant wrote to the first defendant, enclosing the plaintiff's letter of 9 June 2020, and advising her that there was nothing in the plaintiff's letter that changed the recommendation from the second defendant in its letter dated 18 May 2020. By 12 June 2020, the first defendant had received all of the plaintiff's representations, the minutes of the meeting of 26 March 2020 and the second defendant's views about the plaintiff's representations.

[59] On 30 June 2020, the first defendant received a Ministerial from her Department. The Ministerial also attached all of the written representations made by the plaintiff and the letters from the second defendant to the first defendant. Among other things, the Ministerial stated:

> In considering your final position on whether to confirm or amend your direction under section 19 of the Act, you need to satisfy yourself that you have given due consideration to the objects of the Act and taken into account all relevant considerations.
>
> As set out earlier in this brief, the objects of the Act centre on ensuring the probity and integrity of racing and betting in the Territory, and of persons engaged in racing and betting in the Territory. The objects of

the Act also promote fairness, integrity and efficiency in the operations of persons engaged in racing and betting in the Territory.

Considerations that are relevant to giving a direction under section 19 of the Act and which you should take into account, are:

- ensuring the proper regulation and control of sports bookmakers;
- the interests of the public betting by, and with, bookmakers;
- whether products offered by sports bookmakers potentially mislead a consumer and may therefore result in an unfair betting activity;
- whether products which mislead consumers jeopardise the integrity of wagering in the Territory;
- the impact of the proposed new licence conditions on all sports bookmakers, including those set out by Lottoland in its submissions; and
- that you have afforded procedural fairness to Lottoland and the other sports bookmakers.

[60] On 2 July 2020, the first defendant sent a Cabinet memorandum in confidence to her Cabinet colleagues. In it she stated, among other things, the following:

> In exercising my power under section 19 of the Act, I am confident that I have given due consideration to the objects of the Act, taken into account all relevant considerations and afforded procedural fairness to Lottoland and other sports bookmakers. There is sufficient concern that the products offered by Lottoland may risk jeopardising the integrity of wagering in Australia and therefore could be considered inconsistent with the objects of the Act.
>
> […]
>
> Notwithstanding the likely legal action, I consider that my direction pursuant to section 19 of the Act, and the implementation of the two new proposed licence conditions sits within my power under the Act and is consistent with the objects of the Act (specifically promote probity and integrity in racing and betting in the Territory and to reduce any social impact of betting). I'm also confident that the implementation of the proposed licence conditions accords with the powers of the Commission and that I have had due regard for the issues raised by Lottoland in response to this proposed direction.

[61] On 29 July 2020, the second defendant received the final direction from the first defendant, and on 3 August 2020, the second defendant resolved to impose the two new licence conditions on all sports bookmakers' and betting exchange operators' licenses in the Northern Territory.

[62] On 7 August 2020, the second defendant wrote to the plaintiff and stated:

> The Racing Commission has carefully considered all of the responses received, has received further direction from the Minister with responsibility for the Act, and in accordance with that direction will proceed to amend your licence conditions by inserting two new licence conditions as set out in the attachment to this letter.
>
> Revised licences will be issued to all licensees in due course, however the amended licence condition will be effective from 31 October 2020.

[63] In the circumstances, as I have stated at [35], I find that the plaintiff was accorded procedural fairness. In so doing, I repeat what I stated at [340] of my Reasons for Decision delivered on 18 August 2022, namely, I am not satisfied that the first defendant shut her eyes and ears to the concerns raised by the plaintiff.

Conclusion

[64] Accordingly, I confirm the judgment and orders I made on 18 August 2022.
