

# MinterEllison

26 June 2019

Mr Scott May  
General Counsel  
Victorian Commission for Gambling and Liquor Regulation  
49 Elizabeth Street  
RICHMOND VIC

Dear Scott

## **VCGLR China Investigation**

Thank you for your letter of 24 June 2019.

We confirm that we act for Crown Melbourne Limited (**Crown**) and Crown Resorts Limited (**Crown Resorts**) and that this letter is sent on their behalf.

## **VCGLR staff submission**

1. We refer to the 'draft internal VCGLR investigation report into the imprisonment of Crown staff from October 2016 to August 2017' prepared by VCGLR Compliance Division staff, which we understand will be used as a submission to Commissioners (**Submission**) in relation to their consideration as to:
  - (a) whether to make a report to the Minister pursuant to s 24(3) of the *Casino Control Act 1991* (Vic) regarding any matters the subject of the Submission; and
  - (b) if so, what findings and recommendations the Commission should make.
2. We thank you for confirming that our clients will be afforded procedural fairness in respect of such findings and recommendations by the Commission, if any.
3. We confirm that a copy of the Submission has been provided confidentially to all directors of Crown and Crown Resorts.

## **No regulatory or disciplinary action**

4. Our clients support the view of VCGLR Compliance Division staff that no regulatory or disciplinary action is warranted in respect of the matter.

## **Recommendations**

5. Our clients also accept in principle the primary recommendations suggested in the Submission relating to their risk management framework and internal reporting going forward.
6. Whilst the risk of:
  - (a) a foreign government acting in an arbitrary or capricious manner, or
  - (b) the law being interpreted or applied in a foreign jurisdiction by a local authority in a manner contrary to reasonable expectations,



cannot be eliminated, our clients accept that their risk management framework could deal more directly with these risks and appropriate mitigation strategies.

7. As is apparent from the Submission, our clients do not now have staff in China engaged in gaming-related activities and will not in the future without consultation with its regulators. The risk of a repeat of the detentions of gaming staff in China has therefore been removed.
8. Our clients have also reviewed and reorganised their international operations, based on external legal advice (both Australian and in local Asian jurisdictions), which is in turn based on advice from external government risk advisory consultants. Our clients are therefore very confident that they are duly mitigating the legal risk associated with their international operations in Asia, but they have no issue with an external audit being done to satisfy the Commission.
9. We would like to discuss the final drafting of any recommendations the Commission is minded to make. Also, we respectfully suggest that the fourth recommendation proposed in the Submission is no longer needed, as the Submission has already been circulated to all directors of Crown and Crown Resorts.

#### **No further findings necessary**

10. Given that our clients agree with the conclusion that no regulatory or disciplinary action is warranted, and that our clients accept the thrust of the proposed recommendations, no purpose is served by the Commission making any further findings for the purposes of any report to the Minister.
11. This is particularly so, given the substantial shareholder class action currently being taken against Crown Resorts relating to the detentions. Any purported findings by the Commission, as the regulator which has investigated the background, could potentially prejudice the interests of Crown Resorts, its public shareholders and its insurers.
12. Our clients do not understand the Submission to be urging the Commission to make specific findings of fact, or to reach particular conclusions based on any such findings. If that was proposed, considerable further work would be required to accord procedural fairness (both to Crown and to individuals whose reputations, careers or other interests may be adversely affected by any such purported findings).
13. As the Commission knows from previous correspondence and from earlier submissions from us, our clients have different views to many of those expressed in the Submission. Whilst no practical purpose is served by repeating and developing our clients' views (given our clients' understanding that the Commission is not being urged to make specific findings), it is perhaps worthwhile commenting on the analysis of China law. The analysis lies at the foundation of the divergence of views.

#### **China law**

14. The Chinese authorities purported to justify enforcement action against the Crown group staff by alleging that an offence against Article 303 of the *Criminal Law of the People's Republic of China* was committed by:
  - (a) all 19 of them by their collective efforts;
  - (b) in organising a total of more than 10 PRC citizens;
  - (c) over the course of an indefinite period of time;
  - (d) to travel to Crown venues to gamble; and
  - (e) that their remuneration constituted a commission or referral fee.
15. This application/interpretation of Article 303 travels a long way beyond any reasonable interpretation of the wording of the Article or the guidance issued by the Supreme People's Court and the Supreme People's Procuratorate in 2005. A necessary corollary is that the staff or contractors of every other foreign casino or junket operator with operations in mainland China as at October 2016 were in breach, and those with continuing operations there now are committing ongoing breaches.

16. Specifically:
- (a) whatever English translation of Article 303 is used, the key elements of the offence it establishes are:
    - (i) 'organising gambling parties' or 'assembling a crowd to engage in gambling'; and
    - (ii) doing so for personal profit;
  - (b) an English translation of the interpretation of 'gathering people to engage in gambling' in Article 303 includes, relevantly, 'organising for more than 10 citizens of PRC to gamble abroad and to extract a commission and referral fee in doing so' (see paragraph 188 of the Submission);
  - (c) in other words, a person must not organise a 'gambling party' or assemble a 'crowd' of more than 10 PRC citizens to gamble abroad and to extract a commission/referral fee; and
  - (d) an English translation of Article 25 is that a joint crime is an intentional one committed by two or more persons jointly.
17. Two or more persons acting jointly is fundamentally different from one person committing one element of an offence and another person committing another element.
18. Further, given the context of the guideline referred to in paragraph 16(b) above, it should be reasonably understood to refer to a 'party' or 'crowd' of more than 10 PRC citizens at one time or in one trip, rather than one patron at a time over an open-ended period.
19. Moreover, a commission or referral fee is reasonably understood to be 'extracted' from a member of the 'gambling party' or 'crowd'. It is to be distinguished from remuneration paid regularly and voluntarily by a person's employer, even bonus remuneration referable to regional financial results (not the organising of particular trips for specific patrons).
20. As VCGLR Compliance Division staff know from their interviews of Jason O'Connor and Jane Pan, and from our earlier submissions, the guilty pleas of Crown group staff did not reflect an acceptance that the authorities were correctly applying the law. The pleas were based on an understanding that they would (and in fact did) facilitate their release from detention.
21. So there is in fact no evidence that Crown staff were breaching Article 303 as it can reasonably be understood from (English translations of) the wording of the Article and the official guidance, or as it was reasonably understood by Crown prior to the detentions.
22. The conflation of the two separate notions of how the law was reasonably understood before the detentions occurred, and how it was purportedly applied to justify the detentions, colours the assessment of the so-called 'escalating risk' seen in hindsight in the Submission. To put the point rhetorically, why would a casino operator be too concerned about an enforcement crackdown if it reasonably believed that its staff or contractors were operating in accordance with the law? And why should our clients have been particularly concerned about a crackdown said to be directed at casino operators in neighbouring countries (such as South Korea) who had established offices in China (which Crown had not done) [see paragraph 222 of the Submission]?
23. We observe, in passing, that there is no evidence that other casino operators or junket operators understood Article 303 any differently to Crown or responded differently to the alleged 'escalating risk'. VCGLR Compliance Division staff ascertained in the course of the investigation that casinos licensed in Nevada are required to satisfy the regulator there that their international operations are being conducted in accordance with relevant local laws, based on local legal advice. They would not have been able to do so if their legal advice had been that Article 303 should be interpreted as set out in paragraph 14 above.
24. In any event, for the reasons articulated above, it is unnecessary for the Commission to form a view about whether Crown group staff did in fact breach Article 303, or whether Crown's understanding that its staff were operating in conformity with Article 303 was sound and reasonable at the time.

25. Our clients would also like us to again stress that our comments, like those in earlier submissions and correspondence, are not intended as criticism of any of the Compliance Division staff involved in the investigation. Our clients consider that the investigators conducted themselves at all times in a respectful and non-adversarial manner, and our clients were particularly appreciative that, when Jason O'Connor and Jane Pan were interviewed, due consideration was given to the trauma they had suffered in the course of their detentions.

### Summary

26. In summary, on the above basis, Crown has no objection to the Commission reporting to the Minister under s 24(3) that it has completed an extensive investigation into the detentions, and that the results of the investigation are that:
- (a) the Commission has concluded that Crown remains suitable to hold a casino operator's licence and that no regulatory or disciplinary action is warranted;
  - (b) the Commission has made recommendations to our clients regarding future internal reporting and an audit of their risk management processes in relation to their Asian operations;
  - (c) our clients have accepted in principle that their risk management framework could deal more directly with the risk of adverse legal action in a foreign jurisdiction, and appropriate mitigation strategies; and
  - (d) on this basis, our clients have accepted the Commission's recommendations.
27. If you would like us or our clients to amplify or clarify any aspect, or to meet further with Commissioners, officers or staff, please let us know.

Yours faithfully  
**MinterEllison**



**Richard Murphy**  
**Partner**

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OUR REF: RDM 1147099