

RE: Crown Melbourne Limited

SUPPLEMENTARY BRIEF TO ADVISE

14 June 2021

Mark Robertson
Ground Floor Wentworth Chambers
Ground Floor, 180 Phillip Street
Sydney NSW 2000

Crown Melbourne Limited

Dear Mark

Following our initial brief on this matter on 12 June and our subsequent correspondence and discussions, attached is our Supplementary Brief, incorporating a refined set of questions, additional facts per your requests, and our detailed observations and submissions.

For ease of reading, we have incorporated all the supplementary elements above into the Supplementary Brief, to give you a consolidated version.

Per the terms of our engagement with our client, the observations and analysis herein should not be regarded as an independent view and should not be referred to as such.

We look forward to receiving your written opinion.

If you have any queries or require further information, please contact me on

Personal
Information

Yours sincerely

Mark Tafft
Partner - Taxation

Encl

BACKGROUND FACTS AND INSTRUCTIONS

INTRODUCTION

1. We act on behalf of Crown Melbourne Limited ("Crown") in relation to a Victorian state gaming tax issue arising under the Casino (Management Agreement) Act 1993 (Vic) ('CMA Act').
2. Crown raised this matter with us through its advisors Arnold Bloch Liebler on 9 June as a matter requiring prompt but considered attention. Our engagement was scoped on 9/10 June and our engagement letter was executed by Crown on 11 June.
3. Crown operates Crown Melbourne Casino (the "Casino"), through which it has conducted gaming, hotel and entertainment operations since 1994.
4. Pursuant to the Victorian Budget Papers for 2021/22 (Budget Paper No.5 "Statement of Finances), total gambling taxes collected in Victoria in FY 2020/21 were \$1.503bn.
5. In FY 2020/21 Crown paid Victorian gaming taxes of \$255m. Crown's gaming taxes were thus 16.9% of all Victorian gaming taxes and over 1% of all Victorian taxes. In periods not impacted by Covid-19, Crown's contribution to Victorian gaming taxes would be even higher.
6. This matter concerns electronic gaming machines ("EGMs") and whether the Crown's gaming tax treatments for a number of EGM jackpot and bonus programs ("Programs") has been appropriate over the period FY 2013 to date ("the Period").
7. The tax treatments in question have a tax impact of some \$218.5m over the Period

Questions

Counsel is requested to address the following in Conference and advise subsequently in writing:

- a. Does each Jackpot in fact fall within the reach of the definition of "Gross Gaming Revenue" at all?
- b. If the Jackpot falls within the reach of "Gross Gaming Revenue", does it reduce or increase the amount thereof?
- c. Any other matter Counsel considers to be relevant

FACTS AND DOCUMENTATION

Documents

We have attached various documents describing the Programs. The documents set out:

1. The current "Crown Rewards Rules", being the overall terms and conditions governing the Programs:
2. The eight (8) jackpot and bonus categories at issue (the "Categories"):
3. A brief description of each Category (as provided by Crown)
4. The gaming tax amounts at issue for each Category over the Period:
5. The Terms and Conditions for each Category: and
6. Associated regulatory approvals / examples supplied by Crown regarding each Category

Appendix A is the current “Crown Rewards Rules”, being the overall terms and conditions governing the Programs. We will ascertain whether any prior versions of the Crown Rewards Rules are materially different and will advise on this as soon as possible. In the interim Counsel should assume these Rules governed the Period.

Appendix B is an Excel Spreadsheet File “Attachment C – Schedule detailing Bonus Jackpot Analysis dated 12 June 2021 w BJ Master w BJ Master(vMM) (003).xlsx” (“BJ Master File”).

The BJ Master File (on the first tab) sets out:

1. The 8 Categories (Column A)
2. Gaming tax at issue for the Period for each Category (Column C). Column C is colour coded to enable cross-referencing to the source information for the colour coded amount on the second Tab of the spreadsheet (labelled ‘Summary’ Tab)
3. Description and Examples (Column D) for each Category as provided by Crown
4. Associated Approval/s – examples for each Category as provided by Crown (Column E). This column contains references (e.g. 05-002). These references are document file names. The document files will be found in the Appendix C to this Brief (see below).
5. Terms and Conditions / Collateral for each Category (Column F). This column also contains references to files that will be found in Appendix C to this Brief

Appendix C is the zip file “RC-Alan.zip”. This zip file contains the 26 documents referred to in Columns E and F of the BJ Master File discussed above. It also contains

- “Technical Requirements for Gaming Machines and Electronic Monitoring Systems in the Melbourne Casino” – A Victorian Casino and Gaming Authority document – which includes various requirements for EGMs in respect of bonus jackpots.
- “The Technical Requirements Document for Melbourne Casino” – A Victorian Commission for Gambling and Liquor Regulation document – which includes segments on jackpots, bonus jackpots and player promotion / bonusing systems.

Additional Facts

You also requested clarification of how a Dining Reward voucher would operate and be treated.

We are instructed that how a Dining voucher is used and recognised (from a revenue and income tax perspective) is as follows (written confirmation of the precise process is being obtained from Crown):

Assume a Crown Rewards member purchased a meal for \$150 and had a \$100 dining voucher.

In this case, the customer would redeem the \$100 voucher and pay an additional \$50.

Revenue of \$150 would be recognised for the business unit containing the restaurant and be included as assessable income in respect of the meal. Meanwhile, in the relevant gaming business unit, \$100 is deducted from EGM revenue as a cost to that business unit.

How Jackpot Bonus Programs are processed in terms of the Gross Gaming Revenue Calculation

We are instructed that the way Jackpot Bonuses are dealt with in Crown's systems is as follows:

1. Rewards Member gets pokie credit credited to member card
2. Rewards Member uses card at EGM
3. Pokie credit is used to play
4. System automatically adds pokie credit value to turnover
5. System deducts:
 - Game wins;
 - Jackpot start outs;
 - Variable prize jackpot increments;
 - Fixed price jackpot increments ; and
 - Bonus Jackpots ;

The resulting figure is the "DACOM revenue" – which equals final Gross Gaming Revenue subject to Casino Tax.

Financial and tax treatment of Dining Awards

We are instructed that how a Dining voucher is used and recognised (from a revenue and income tax perspective) is as follows (written confirmation of the precise process is being obtained from Crown):

Assume a Crown Rewards member purchased a meal for \$150 and had a \$100 dining voucher.

In this case, the customer would redeem the \$100 voucher and pay an additional \$50.

Revenue of \$150 would be recognised for the business unit containing the restaurant and be included as assessable income in respect of the meal. Meanwhile, in the relevant gaming business unit, \$100 is deducted from EGM revenue as a cost to that business unit.

Financial and Tax Treatment of Accommodation awards

We are instructed that, like the Dining Rewards, upon redemption of the award, the value of the room is treated as revenue of the hotel operations department and deducted from EGM revenue as a cost to that gaming business unit.

Unlike Dining Rewards, we are instructed there is no inclusion in taxable income of accommodation awards. This results by virtue of the fact that the revenue amounts effectively net off, however, neither revenue account is adjusted for the Dining Rewards revenue when compiling the income tax return. Using the example below the Accommodation revenue will be \$150 higher and the Gaming Machine revenue will be \$150 lower.

The Crown Rewards member claims the Accommodation Award via an electronic coupon attached to the Crown Rewards card, which must be presented in order to claim the award.

The Crown Rewards member does not receive an invoice which shows the room charge and an offsetting claim of an accommodation award. The invoice that is presented to the Crown Rewards member will show only additional charges (such as minibar charges).

Although the hotel system may create two “windows” for a customer’s account that are visible to Crown staff – one being for the room charge that is to be treated as a bonus jackpot and the other being for the additional charges such as minibar charges, the customer will only be presented with an invoice with the latter details.

Here is an example of the Finance treatments for Accommodation Rewards redemption:

For 1 room of accommodation bonus jackpot equivalent to \$180 internal charge:

<i>DR Gaming Machine Revenue – EGM department</i>	<i>\$180</i>
<i>CR Accommodation Revenue – Hotel department</i>	<i>(\$180)</i>

Financial and Tax Treatment of Car Parking awards

We are instructed that, like dining and accommodation rewards, upon redemption of the award, the value of the car parking is treated as revenue of the hotel operations department and deducted from EGM revenue as a cost to that gaming business unit.

We are instructed that there is no inclusion in taxable income of car parking awards. This results by virtue of the fact that the revenue amounts effectively net off, however, neither revenue account is adjusted for the Car Parking Rewards revenue when compiling the income tax return. Using the example below the Car Parking revenue will be \$50 higher and the Gaming Machine revenue will be \$50 lower.

The Crown Rewards member claims the parking award via an electronic coupon attached to the Crown Rewards card, which must be presented in order to claim the award.

There is no invoice issued relating to the claiming of car parking awards.

Here is an example of the Finance treatments for car parking rewards redemption:

For Car Park bonus jackpot of \$50:

DR Gaming Machine Revenue – EGM department	\$50
CR Car Park Revenue – Parking department	(\$50)

Observations and Submissions

The questions here in respect of each of the 8 Categories of Jackpot are:

1. Does the Jackpot in fact fall within the reach of the definition of “Gross Gaming Revenue” at all?
2. If the Jackpot falls within the reach of “Gross Gaming Revenue”, does it reduce or increase the amount thereof?

“Gross Gaming Revenue” is defined in Clause 2 of Schedule 1 to the CMA Act as follows:

"Gross Gaming Revenue" means the total of all sums, including cheques and other negotiable instruments whether collected or not, received in any period by the Company from the conduct or playing of games within the Temporary Casino or the Melbourne Casino (as the case may be) less the total of all sums paid out as winnings during that period in respect of such conduct or playing of games;"

None of the elements of the definition of Gross Gaming Revenue are further defined in the CMA Act.

Casino Tax is imposed with reference to the Gross Gaming Revenue calculation, for each monthly period (and certain other periods) pursuant to Clause 22 of Schedule 1 to the CMA. Clause 22 of the CMA has been varied as to the rate of Casino Tax over time, for example by Clause 3.2 (c) of Schedule 10 to the CMA Act, which is comprised of the "Ninth Deed of Variation to the Management Agreement".

There is no case law at the present time directly on Gross Gaming Revenue under the CMA Act. There are no public rulings available from the State Revenue Office of Victoria.

The CMA Act contains no provision that renders the assessment of Gross Gaming Revenue a matter to be determined in the discretion of the State Revenue Office of Victoria. Gross Gaming Revenue must be determined based on its actual words.

It must first be noted that the term "Gross Gaming Revenue" is a misnomer. Critically for the question at hand, while it is referred to as a "Gross" concept, it is in fact a "Net" concept.

That is, it is made up of two key components, being:

- (a) the "total of all sums..." that are "...received from the conduct of playing of games..." within the Melbourne Casino: **less**
- (b) "...the total of all sums paid out as winnings in respect of such conduct or playing of games".

Jackpots comprised of Pokie Credits (a) caused by play: or (b) given by way of promotion

As noted in the Facts, we are instructed that Bonus Jackpot pokie credits are processed by Crown EGM's in a particular way.

Irrespective of how the pokie credit was obtained by a Crown Rewards player, when the pokie credit is used to play a game, it is added to Gross Turnover as if that game was funded by actual cash.

We submit that where a pokie credit is being treated as if it had been paid for in cash (or negotiable instrument), but in fact had not been paid for, then Question 1 above is not met. There were no "... sums, including cheques and other negotiable instruments received in any period by the Company from the conduct or playing of ..." that game.

Deduction of this type of Bonus Jackpot pokie credit from the Gross Gaming Revenue should not be a matter of concluding that the Bonus Jackpot constituted some form of "winning" within the reduction limb of Gross Gaming Revenue. The amount simply does not belong within the Gross Gaming Revenue definition.

On this basis all Bonus Jackpots that were caused/generated by play or given by some form of promotion should in our view be excised from the Gross Gaming Revenue amount.

We assume that the fact these amounts are in the calculation at all is related to bet recognition or systems issues, rather than some conclusion related to the Casino tax provisions.

On this basis, in our view the following Bonus Jackpot types are correctly being excluded from Gross Gaming Revenue by Crown's systems:

- **Pokie Credit Rewards (Welcome Back / Free Credits / Seniors promotion)** - These programs provide pokie credits to players based upon the player's previous play.
- **Mail Outs** - Mail outs are Bonus pokie credit offers mailed to Crown Reward members. The credits are issued to the player at the Casino.
- **Random Riches (Carded Lucky Rewards)** - In this program, the player is provided with a chance to win pokie credits. Bonus pokie credits are obtained based on player participation. The number of chances the player has to win pokie credits depends upon the level of play by the player.
- **Jackpot Payments (Lucky Time)** - Jackpot payments are additional jackpots of additional pokie credits. The player must be playing an EGM in order to win the jackpot. The win is based on play at a randomly chosen EGM at a randomly chosen time during the promotion period.
- **Pokie Credit Tickets** - Pokie Credit tickets are promotional tickets issued to players to provide pokie credits. The ticket is inserted into the EGM to receive the pokie credits

All pokie credits are not redeemable and must be used in an EGM machine.

Additional information on these programs are contained in the zip file 'RC -Alan' which was provided to you in an email dated 10 June 2021. It is attached again for your convenience.

In relation to Pokie Credits (**Matchplay**), we note that the pokie credit is obtained by Crown Rewards member after exchanging Crown Rewards points for Pokie Points at any EGM. We submit that this makes no difference. Firstly, we submit that this exchange does not involve "*... sums, including cheques and other negotiable instruments received in any period by the Company from the conduct or playing of ...*" that game. Indeed, we submit it does not involve "sums" being received at all. In GSTR 2012/1 for instance, the Commissioner of Taxation takes the following view (paragraph 24): "The redemption of points by a member is not consideration for the supply of a reward to the member". Further, in GSTR 2002/3, the Commissioner takes the view that points redeemed for non-monetary prizes are not consideration for a supply (paragraph 198). Conversely, points redeemed for a money or redeemable gambling chips, are a monetary prize (paragraph 192) and deducted from the calculation of the Global GST Amount. In either case, the redemption serves to reduce the Global GST Amount

On this basis we submit that Pokie Credits (Matchplay) Jackpots are also being correctly excised from Crown's Gross Gaming Revenue for Casino Tax purposes.

Jackpots comprised of additional win payouts

The "Consolation" program involves consolation payments whereby a Crown Rewards member playing during particular time sessions has the opportunity to have their win payments increased. For example, during a pre-advertised 2 hour window, a randomly selected player may have their wins doubled during a 2 minute period.

We submit these payments should be regarded as sums paid out as winnings for Gross Gaming Revenue purposes.

Bonus Jackpots consisting of Casino Dining Rewards

Casino Dining Rewards occur when a Crown Rewards Member plays EGMs and earns enough Crown Rewards points from that gaming activity. Earning 150 points on EGMs in a day generates a \$7.50 Dining Reward. Earning 650 points on EGMs in a day generates a \$17.50 Dining Reward.

The Terms and Conditions of this program state that upon redemption of the Dining Reward, the Member will "Receive \$7.50 off any purchase at participating outlets....", or will "Receive \$17.50 off any purchase at participating outlets..."

The Dining Reward is not redeemable for cash and is valid for 14 days. Redemption is via presentation of the Crown Rewards card when paying for the dining. Any amount in excess of the Dining Reward value is to be paid by the redeeming Member.

The Bonus Jackpot Dining Reward is only deducted from Gross Gaming Revenue when the reward is redeemed.

This brings us to the expression within the definition of Gross Gaming Revenue : "*less the total of all sums paid out as winnings during that period in respect of such conduct or playing of games*".

The elements required for this type of bonus jackpot to effect a reduction in Gross Gaming Revenue are:

- A sum paid out as winnings
- During that period
- In respect of such conduct or playing of games

There is nothing in this definition to suggest that a sum can only be "paid out as winnings" if is paid out in cash from an EGM.

If for instance a jackpot prize was to be a new car in your colour of choice, we submit that sums expended to purchase the winner's car would clearly be a "sum paid out as winnings". Indeed, we are instructed that from time to time Crown has in fact had such jackpots with the approval of the Regulator.

There can also be no doubt that such a sum was paid out "in respect of such conduct or playing of games". The terms of the game of chance would have been fully understood by the players and formed a part of the contract between them and the house. Paying out the sum on the acquisition of a suitable vehicle would be a core condition of that contract.

In this situation the sums are paid out upon redemption of the Dining Award to get "\$7.50 off" or "\$15 off" the price of the dining.

Thus, we have 2 supplies being made by Crown. A gambling supply and a supply of a dining service. The dining service is separately contracted for and separately payable irrespective of the gambling supply.

The long-standing principle in Spargo's case (in re Harmony and Montague Tin and Copper Mining Company (1873) 8 LR Ch App 407 deals with such situations:

"Nothing is clearer than if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those

accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards”.

We submit that by setting off the \$7.50 Dining Award against a liability of a patron (e.g. a restaurant bill), Crown is paying out an amount as a winning.

In this respect, we note that in TD 2005/52 the Commissioner determined that an amount “set off” against an existing liability constitutes money paid in respect of the acquisition of an asset for the purposes of the first element of cost base in the context of CGT.

The decision in **Commissioner of Taxation v Rozman [2010] FCA 324** provides further support for the doctrine of “set-off” in an income tax context. Put briefly, this case involved Rozman (the taxpayer) arguing she had not received a deemed dividend under Div 7A as it was not Tredex (being the private company in which Rozman was a shareholder) that paid the sum to her. Rather, the sum was paid by a customer of Tredex at Tredex’s request (i.e. the customer owed Tredex a debt, and Tredex instructed the monies be paid to Rozman).

Relevantly, the Court stated at [22]:

“In truth, there is no reason to construe “pay” as requiring a direct flow of money from payer to payee. Only in a world in which the concept of money was confined to cash and coin could such a notion even begin to work, for once it be accepted that the concept includes debts and other choses of action, it becomes nonsensical to speak about money literally moving from the payer to the payee. Ms Rozman’s construction of the word “pay” is, therefore, to be rejected”.

The decision in **Re East Finchley Pty Limited v Commissioner of Taxation 89 ATC 5280** is also relevant and held; per [50]:

*“The rule in Spargo’s case is not a principle confined merely to the company law context in which it was decided. At its heart is the undeniable futility of two parties, **each obligated to the other**, passing cheques backwards and forwards to accomplish a transaction”* (emphasis added).

We submit that the payment of the \$7.50 by Crown (i.e. in the form of the Dining Reward) partly extinguishes the debt owed by the Patron (being the restaurant bill). We submit that the payment of \$7.50 by Crown is in satisfaction of the obligation pay that sum of money as winnings to the Patron in relation to the game play.

We note that this construction is not only consistent with the case law and a sensible scope for the term “paid out as winnings”. It is also consistent with the commercial recognition of the two transactions in Crown’s accounts (refer Facts Section).

On this basis we submit that there is a very reasonable argument the Dining Rewards Bonus Jackpot is deductible from Gross Gaming Revenue. The nature of “set off” arguments renders it difficult to be more definitive than this.

Bonus Jackpots consisting of Car Parking or Room Nights

While these jackpots do derive from the use of EGMs to generate the reward, the fact patterns for both Jackpots suggest that the argument is unlikely to succeed, for the reasons set out below:

- Room nights and Car parking benefits do not employ a fixed dollar amount the way that the Dining Rewards do. Therefore, helpful expressions in the T's and C's like "\$7.50 off the price" of your dining are not present
- Room nights rewards do not involve the presentation of an account to the Guest upon checkout that sets off the Room fee versus the Room nights Reward, which does not assist in delineating a debt that is extinguished by the Reward. Parking rewards suffer a similar problem
- Parking rewards has a brochure explaining how to get your "Free Parking", which is unhelpful
- The financial treatments do not assist in the presentation of the arguments

Mark Tafft, Tax Partner, EY 14 June 2021