Ernst & Young
200 George Street
Sydney NSW 2000 Australia
GPO Box 2646 Sydney NSW 2001

Tel: +61 2 9248 5555
Fax: +61 2 9248 5959
ey.com/au

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

18 June 2021

Privileged and confidential

Crown Resorts Limited

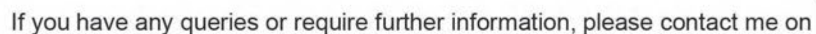
Dear Mark

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

Yours sincerely

Mark Tafft
Partner - Tax

Att.

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Supplementary Brief to Advise

In the matter of

Crown Resorts Limited

EY
200 George Street
Sydney NSW 2000

Contact: Mark Tafft
Direct Line:
Email:

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1. Background Facts and Instructions

1.1 Introduction

1. We act on behalf of Crown Resorts 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 $$272,616,021 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

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2. Facts and documentation

2.1 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 "Schedule detailing Bonus Jackpot Analysis dated 16 June 2021 w BJ Master.xlsx" ("BJ Master File").

The BJ Master File (on the first tab labelled "BJ Master (2021-6-16)") 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 (2021-6-16)" Tab). We have been instructed by Crown that confirmation of amounts set out in BJ Master File is the subject of a separate engagement between Crown and KPMG.

   Verification of the amounts in the BJ Master File is wholly outside the scope of our engagement and that of Counsel. EY and Counsel are here concerning ourselves only with the questions posed above.

   We note that a 9th category is mentioned on the spreadsheet ("Unexplained – Under Investigation"), which is not a Category at all, but is rather a relatively minor residual sum in Column C that is yet to be allocated to one or more of the 8 Categories by Crown/KPMG;

3. Description and Examples (Column D) for each Category as provided by Crown;

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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 a zip file. 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.

The information provided in the documents and other facts provided is being verified by Arnold Bloch Liebler, who are obtaining sworn testimonies from relevant parties.

Appendix D - I is the Crown confirmations and materials

Appendix J - zip file "Sundry Opinions – Table Games". We note that we have been instructed to brief you separately thereon, to assess the availability of state gaming tax refunds.

2.2 Additional facts

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

We are instructed that for Categories 1-6, the way Jackpot Bonuses are dealt with in Crown systems as follows[1]:

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;

[1] Refer to Appendix D for email confirmation from Crown

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- Variable prize jackpot increments;
- Fixed price jackpot increments ; and
- Bonus Jackpots.

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

Categories 7 and 8 are also dealt with as above, with the differences noted below.

In the case of Category 7: "Pokie Credit Tickets", steps 1 and 2 are as follows:

1. Patron (member or non-member) receives a physical Pokie Credit Ticket for no consideration (commonly upon filling out paperwork at the Casino to join the Crown Rewards Program)
2. Patron (member or non-member) inserts Pokie Credit Ticket into the EGM and
3. The Value of the credits is displayed on the bonus credit meter on the EGM screen
4. Steps 3 to 5 per above

In the case of Category 8: Dining, Accommodation and Parking Bonus Jackpots are processed in the following manner:

1. Bonus Jackpot is system generated at the EGM based on level of play but held dormant until redeemed
2. Rewards Member redeems the bonus jackpot at the corresponding outlet
3. The redemption amount is then automatically deducted as a Bonus Jackpot as per point 5 above

2.2.2 Financial and tax treatment of Dining Awards[2]

We are instructed that how a Dining voucher is used and recognised (from a revenue and income tax perspective) is as follows:

> Assume a Crown Rewards member has earned a Dining Reward Bonus Jackpot to the value of $100.
>
> Assume the member purchases a meal for $150 and applied the abovementioned Dining Reward Bonus Jackpot as an electronic 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 gaming machine business unit, $100 is deducted from EGM revenue as a cost to that business unit as described in 2.2.1 above. So, the full revenue value of the meal is returned as assessable income, whilst the value of the Bonus Jackpot benefit is an allowable deduction. That is, the Australian income tax treatment has followed the accounting treatment.

[2] Refer to Appendix E, E1, E2, E3 and E4 for email confirmation from Crown regarding Dining awards

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2.2.3 Financial and Tax Treatment of Accommodation Awards[3] [4]

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. The accounting treatment when the Bonus Jackpot is redeemed is as described above at 2.2.2.

We are also instructed there is no inclusion in taxable income from the use of Accommodation Awards, by virtue of the revenue amounts being effectively “net off”. Using the example below the Accommodation revenue will be $180 higher and the Gaming Machine revenue will be $180 lower. That is, the Australian income tax treatment has followed the accounting treatment.

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).[5]

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:

DR Gaming Machine Revenue – EGM department	$180
CR Accommodation Revenue – Hotel department	($180)

2.2.4 Financial and Tax Treatment of Car Parking Awards[6] [7]

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 for valet or alternatively

[3] Refer to Appendix E, E1, E2, E3 and E4 for email confirmation from Crown regarding Accommodation awards

[4] Refer to:
- Appendix F1 for email confirmation from Crown regarding comp Accommodation accounting entries
- Appendix F2 for Gaming Comp Flow Chart

[5] Refer to:
- Appendix G1 – sample invoice showing the comp process for a bonus reward (this is not provided to the customer)
- Appendix G2 – Policy for hotel night redemption for Platinum members
- Appendix G3 – Policy for hotel night redemption for Black members
- Appendix G4 – Process for the hotel on how to make a gaming reservation

[6] Refer to Appendix E, E1, E2, E3 and E4 for email confirmation from Crown regarding Car Parking awards

[7] Refer to Appendix F1 for email confirmation from Crown regarding comp Car Parking accounting entries

the parking department in the case of self-park and deducted from EGM revenue as described in 2.2.1 above.

We are also instructed there is no inclusion in taxable income from the use of Car Parking Awards, by virtue of the revenue amounts being effectively “net off”. Using the example below the Car Park revenue will be $50 higher and the Gaming Machine revenue will be $50 lower. That is, the Australian income tax treatment has followed the accounting treatment.

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 – Hotel or Parking department	($50)

2.2.5 GST Treatment of Redemption of Bonus Jackpots Consisting of Room Nights, Car Parking and Dining[8]

We are instructed that:

- When the Bonus Jackpots are redeemed for Room Nights, Car Parking or Dining, there is an adjustment made to the Global GST Amount.
- Crown does not report GST in respect of Room Nights, Car Parking or Dining provided to the member.

2.2.6 Amount of Gaming Tax in question

We have been provided with the spreadsheet attached at Appendix B. It identifies a State Gaming Tax effect of $272,616,021. We have not verified the source of the numbers through the system. We are instructed that this is the subject of a separate KPMG engagement with Crown. However, we note that the tax effect amount equates to approximately 30% of the total value of jackpots. We are instructed that the $32,898,625 in question attributed to Bonus Jackpots is broken down as follows:[9]

- Dining/F&B - $24,823,207
- Hotel - $4,419,933
- Car Parking - $3,655,486

[8] Refer to Appendix H for two email confirmations from Crown regarding the GST treatment of room nights, car parking and dining.
[9] Refer to Appendix B, Tab “BJ Master (2021-6-16)”, cells B32, B33 and B34.

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2.3 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 therof?

“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 Act. Clause 22 of the CMA Act 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”.

The application of a gaming tax rate to a net amount like this is thus seeking to impose tax on the supply of gaming services by taxing a “gambling margin”. This is an economic “value-added” concept, rather than a straight turnover based tax.

Historically, the purpose of such an approach to taxation is to render the tax burden on a gaming industry predictable. This is very important for Revenue Authorities in the sense that imposing too much tax on gaming can actually cause the odds of winning to change adversely, to the point that increasing a tax rate will cause tax revenues to simply decline.

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A very similar method of taxation was super-imposed on the entire Australian gambling industry on 1 July 2000 with the introduction at the federal level of a Goods and Services Tax. The problem of over-taxing the racing and gambling industry by having both a GST and state-based gaming taxes was fully recognised, particularly given the fact that both racing and casinos were recognised as being major employers.

This background explains:

(a) Why the CMA Act contains a provision reducing Crown's Casino Tax liability via a mechanism based on Crown's declaration of its Division 126 amount to the ATO in its Business Activity Statement (refer Section 22C of the CMA Act – which references the Intergovernmental Agreement on the Reform of Commonwealth- State Financial Relations 1999): and

(b) Why case law and public rulings in relation to Australian GST and gaming are very helpful when it comes to the interpretation of Gross Gaming Revenue for Casino Tax purposes.

Division 126 of the A New Tax System (Goods and Services Tax) Act 1999 ("the GST Act") deals with the taxation of gambling. It sits within Chapter 4 of the GST Act, meaning that to the extent it is in conflict with the normal provisions of the GST Act, Division 126 prevails. This is by no means unique in the GST Act. The treatment of general insurance for instance also sits within Chapter 4 and is also based around an economic margin concept.

Division 126 of the GST Act has a number of cases and ATO public rulings that are helpful when it comes to the questions at hand.

In TAB Ltd v Commissioner of Taxation [2005] NSWSC, Gzell J stated:

> *"54. Section 126-1 of the GST Act provides that the global accounting system for GST on gambling is an alternative to the usual system. The provision is as follows:*
>
> *"Gambling is dealt with under the GST by using a **global accounting system that provides for an alternative way of working out your net amounts by incorporating your net profits from taxable supplies involving gambling."***
>
> *55. Consistent with the notion that the GST Act, **Div 126 is an exclusive code**, are the exclusions of key provisions in the ordinary way in which GST is calculated. Thus s 126-5(3) provides that that section has effect despite s 17-5 relating to net amounts. Section 126-20(1) and s 126-20(4) exclude the operation of Div 21 dealing with bad debts and s 126-20(2) and s 126-20(3) contain specific provisions with respect to bad debts of consideration for gambling supplies. Section 126-25 excludes the operation of Subdiv 9-C. It deals with the amount of GST payable on taxable supplies. Section 126-30 provides that gambling supplies do not give rise to creditable acquisitions despite s 11-5 that deals with creditable acquisitions. Section 126-32 provides that repayments of gambling losses do not constitute consideration despite s 9-15 that defines the concept of consideration. Section 126-33 provides that a tax invoice for a gambling supply is unnecessary, despite s 29-70 that deals with the requirement to issue a tax invoice." **(our emphasis added)***

Section 126 of the GST Act provides the taxable value for GST purposes in relation to gaming, in the same way as "Gross Gaming Revenue" serves that purpose under the CMA:

> *"SECTION 126-10 Global GST amounts*
>
> ***(1)** Your **global GST amount** for a tax period is as follows:*
>
> *(Total amount wagered – Total Monetary prizes) X 1/11*
>
> *where:*

total amounts wagered *is the sum of the *consideration for all of your *gambling supplies that are attributable to that tax period.*

total monetary prizes *is the sum of:*

*(a) the *monetary prizes you are liable to pay, during the tax period, on the outcome of gambling events (whether or not any of those gambling events, or the *gambling supplies to which the monetary prizes relate, take place during the tax period); and*

*(b) any amounts of *money or *digital currency you are liable to pay, during the tax period, under agreements between you and *recipients of your gambling supplies, to repay to them a proportion of their losses relating to those supplies (whether or not the supplies take place during the tax period).*

"monetary prize" *means:*

*(a) any prize, or part of a prize, in the form of * money or * digital currency; or*

(b) if the prize is given at a casino--any prize, or part of a prize, in the form of:

(i) money or digital currency; or

(ii) gambling chips that may be redeemed for money or digital currency.

"Consideration" is defined for GST purposes in Section 9.15 of the GST Act

Consideration

*(1) **Consideration** includes:*

(a) any payment, or any act or forbearance, in connection with a supply of anything; and

(b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

*(2) It does not matter whether the payment, act or forbearance was voluntary, or whether it was by the * recipient of the supply.*

(2A) It does not matter:

(a) whether the payment, act or forbearance was in compliance with an order of a court, or of a tribunal or other body that has the power to make orders; or

(b) whether the payment, act or forbearance was in compliance with a settlement relating to proceedings before a court, or before a tribunal or other body that has the power to make orders.

*(2B) For the avoidance of doubt, the fact that the supplier is an entity of which the * recipient of the supply is a member, or that the supplier is an entity that only makes supplies to its members, does not prevent the payment, act or forbearance from being consideration.*

It can be seen from the above that there is a strong symmetry between these two provisions from different Acts, not just in scope:

- Both refer to "sum" in respect of both bets and wins.
- Both use a mathematical margin approach
- Both require a nexus to the gaming activities

A notable difference is that Gross Gaming Revenue refers to "winnings" whereas "Global GST amount" refers to "monetary prizes".

We submit this difference is **not** interpretatively significant for the Casino Tax concept of "winnings". The GST Act has to deal with a much broader canvass. It needs to deal with not just the gaming sector, but the entire economy. It seeks to effectively tax the point of final private consumption in the same way that all Value Added Taxes / Good and Services Taxes do. That is, it imposes tax on all (non-exempt) transactions of enterprises with sufficient locus, purpose and scale. Many of those transactions are business to business and are not the point of final private consumption. In that case, GST provides an input tax credit allowing the purchaser to claw back from the government the tax that was just paid on the acquisition. The point of final private consumption is effectively reached in the supply chain when there is a purchaser who is not entitled to an input tax credit.

This is the real reason we submit, that in the definition of Global GST amount reference is made only to "monetary prizes". It is to prevent an effective double dip.

If for instance a Car was posted in a Casino as the jackpot prize for an EGM program where the winner can select the colour of the car, we submit that the subsequent expenditure to acquire that car should be "sums paid out as winnings" for Gross Gaming Revenue purposes.

From a GST perspective however, it could not be said that there is a "monetary prize" here. If the expenditure on the car was allowed into the Global GST amount calculation, it would effectively provide a recovery of 1/11th of the purchase price for GST. At the same time an input tax credit would be available. Hence the prevention of a double dip scenario for GST by imposing a limitation that prizes be non-monetary.

2.3.1 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 (see 2.2.1).

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. The information from that file is 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 (paragraph198). 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.

2.3.2 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.

2.3.3 Bonus Jackpots consisting of Casino Dining Rewards

Casino Dining Rewards occur when a Crown Rewards Member plays EGMs and earns enough Pokie 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. It is quite clear that the Dining Reward was seen as part of the gambling terms. The terms and conditions refer to 'Members must use their Crown Rewards card whenever they play gaming machines or table games and earn the required amount of points to qualify for Casino Dining Rewards’. So it is only when the member is gambling that he or she will receive the reward. Clearly, it is an inducement offered by the Casino for members to play as the greater the play or participation, the higher the value of the Dining Reward.

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 it 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.[10]

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.

[10] Refer to Appendix I for email confirmation from Crown.

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”.*

However, a person cannot unilaterally create a transaction of payment and receipt by way of accounting entries: Barwick CJ in *Manzi v Smith* [1975] HCA 35 at [8]. Even where two persons might agree between themselves that payments between them should occur by way of journal entries, or even the crossing of cheques, that will not necessarily mean that an underlying transaction that affects the rights and obligations of the parties has occurred: *Re Associated Electronic Services Pty Ltd* [1965] Qd R 36. Furthermore, in the context of a salary sacrifice arrangement, the House of Lords was divided as to whether an arrangement involving the employer lending a car to the employee and receiving a reduced wage was the payment of the original wage to the employee and the payment of the difference by the employee to the employer, or whether it was the payment of a reduced wage by the employer and the free provision of the car by the employer: *Heaton v Bell* [1970] AC 728. Isaac J’s dissenting judgement in *J C Williamson's Tivoli Vaudeville Pty Ltd v Federal Commissioner of Taxation* [1929] HCA 33 is also noted.

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 hit 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).

It is also worth addressing the question as to the timing of the reward and whether it is necessary that the 'winning' needs to be an immediate payment following completion of the game. Here, the decision in **Crown Melbourne Limited v Commissioner of Taxation** [2020] FCA 1295 is relevant. In that case, the Federal Court considered the issue of whether commissions paid in respect of junket tours served to reduce the calculation of Global GST Amount. Davies J focussed on the contract between the house and the gamblers (in respect of which payments to tour operators served to reduce the consideration from gambling that was earned by the house). Davies J considered that the calculation of the Global GST Amount did not require the matching of a particular monetary prize with the corresponding bet. In the case of the junket tour, it was necessary to total all the wagers made by the junket players and all the prizes won by the junket players over the period – the individual amounts were not separately identified.

In the Dining Rewards sub-Category, the fact that a meal is provided some time after the wager giving rise to that award does not, it is submitted, detract from it being a monetary prize (in the GST context) or a winning (in the State gaming tax context).

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

Following on from the above analysis, it follows that the Dining Reward Jackpot should also have been treated as a monetary prize for the purposes of calculating the GST liability under Division 126 of the GST Act. We are instructed that this is in fact what occurred.

A taxable supply of the food and beverages also occurred for the purposes of the concept of "other GST" in Section 126.5(1) of the GST Act.

In our view, Crown's current GST treatment of the supply of the food and beverages, results in an underpayment of GST in relation to the provision of the food and beverages supplied in relation to the

Dining reward. The GST liability in our view should be based on the full charge for the food and beverage supplied. To the extent that Crown has not accounted for and paid GST on these charges, it will have an outstanding GST liability. For example, in the case where a meal has been purchased for $150, and where $100 of the resultant debt has been paid by cash and $50 of that debt extinguished by set off of the Dining Rewards Jackpot, the GST liability is based on $150. In our view, Crown has underpaid GST,

The Commissioner's ability to amend GST assessments is, under Section 155-35 in Schedule 1 to the Taxation Administration Act 1953, limited to 4 years. As such, we would generally expect Crown's liability should be limited to 4 years on this issue. We address quantification later in this Brief.

2.3.4 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 to us that the argument for these Jackpots to be deducted from the Gross Gaming Revenue calculation 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. There was nothing in the way in which Crown accounted for Car Parking or Room Nights which evidences a debt by the Guest and an offset of that debt by Crown by way of some form of monetary obligation. Crown simply recorded the Car Parking or Room Night as hotel or parking revenue, as applicable (incorrectly) and offset that against gaming revenue account. There was nothing to suggest any monetary obligation between the Hotel and Guest.

Given our view that Crown has treated the Car Parking and Room Nights incorrectly as a reduction in its Gross Gaming Revenue calculation, we consider there is an underpayment of State Gaming Taxes.

There are also two aspects which need to be considered for GST purposes:

- GST treatment of the provision by Crown of Car Parking and Room Nights;
- The calculation of the Global GST Amount.

In relation to the Car Parking and Room Nights, we submit that there is no GST payable in respect of their supply by Crown. One of the things necessary for there to be a taxable supply within the meaning of Section 9-5 of the GST Act is that you 'make the supply for consideration'. In this case, the guest has not provided consideration for the supply – it has merely redeemed a bonus jackpot from Crown, a perquisite. It is to be noted here that the Commissioner of Taxation also accepts this position. In GST Ruling GSTR 2002/3 the Commissioner says at paragraph 196, in relation to the redemption of points for a non-monetary prize, " In these circumstances, the giving of the non-monetary prize by the gambling supply provider is not a taxable supply, as there is no further consideration provided by the winner of the prize"

In relation to the impact on the Global GST Amount, for Car Parking and Room Nights in our view the redemption is not a monetary prize and should not be deducted. As Crown has deducted these amounts from the Global GST Amount it would have an additional GST liability in respect of its gambling supplies.

It is then necessary to consider the “State Tax Credit” and the impact that the increase in the Global GST Amount has on Crown’s payments of State Gaming tax. Since Crown reported a lower Global GST Amount than required, this meant it under-reported GST and therefore the State Tax Credit claimed should have been higher. To that extent then, State gaming tax was overpaid by the same amount that GST was underpaid. In practical terms, Crown’s GST liability here is effectively rebated via a lower level of State gaming tax.

We note that the definition of ‘State Tax Credit’, is (relevantly) ‘an amount equivalent to the amount determined under Division 126 of the GST Act, declared by the Company to the Commissioner as the Global GST Amount…’ . Clause 22C.5 of Schedule 7 of the Management Agreement between Crown and the Victorian State, and ratified by the CMA Act (‘Management Agreement’), provides that an adjustment to the State Tax Credit is required when the Commissioner makes an adjustment to Crown’s Global GST Amount. This will mean that when the Commissioner makes an adjustment to increase Crown’s Global GST Amount there will be an adjustment to increase the State Tax Credit and decrease the State Gaming Tax Liability

We understand that Crown will pay the underpaid GST amounts to the Australian Taxation Office. As mentioned above, the Commissioner’s ability to amend assessments is limited to 4 years. As such, we would generally expect that the impact that Crown’s treatment of Accommodation and Car Parking in the Global GST Amount will have on the State Gaming Tax liability should be limited to four years.

It would seem that any impact beyond the 4-year period may be limited, if the Commissioner is, as a matter of law, unable to amend the assessments beyond then. There are two points to consider here. The first is whether Crown is in fact able (for the purposes of the definition of “State Tax Credit” in Schedule 7 of the Management Agreement) to “declare” an amount to the Commissioner as to the Global GST Amount other than by way of through its Business Activity Statement. The second is in relation to the Crown Melbourne case which the Commissioner has appealed in the Full Federal Court. If Crown is successful then the ATO will need to process refunds of GST to Crown over a period longer than the Period in question here. It is conceivable that the ATO could attempt to reduce those refunds by the amount of any GST liabilities from this current matter that lay outside the normal 4-year window. Given this issue is somewhat contingent we have not examined it further at this stage.

In our view, Crown can only declare a GST amount to the Commissioner in respect a period that is not already statute barred. Thus, we submit the GST amounts in question here are limited to a 4-year period.

Concluding Submission - Overall State Gaming Tax and GST Effects

As mentioned earlier, we have been provided with a spreadsheet (attached at Appendix B) which identifies a State Gaming Tax effect of $272,616,021. We have not verified the source of the numbers through the system and are expecting the numbers to be confirmed and verified through enquiries by Arnold Bloch Liebler and KPMG.

On the assumption that each of the numbers in the spreadsheet is correct, and given the above analysis, in our view:

- the amounts per Categories 1-7 should be seen as correctly treated ($238,930,978):
- there is a very respectable argument that amounts for Dining Rewards are correctly treated ($24,823, 207):

- $8,075,418, comprised of Accommodation Rewards ($4,419,933) and Parking Rewards($3,655,486) is unlikely to have been correctly treated: and
- Crown is yet to allocate $786,418 to any of the 8 Categories.

In relation to the underpaid GST on supplies of meals and beverages noted above, Crown/KPMG will need to calculate the amount owed. In approximate terms that amount can be calculated as follows:

1. "Tax Impacted Dining / F&B" = $24, 823,207
2. Divide by State Gaming Tax rate (which is our approximation from spreadsheet @ 0.32) = 77, 572,522
3. Divide by 11 to approximate GST over the whole Period = $7,052,047
4. Multiply by 0.4 to reflect statutory 4-year GST period = $2,820,818

In addition, the impact of the increased GST in respect of Accommodation and Parking Rewards incorrectly excluded from the Global GST Amount will also result in decreased in State Gaming Tax of a corresponding amount. To get an approximation of the elements of this "net nil" effect, we have made an assumption that the State Gaming Tax rate applies uniformly to the whole of the tax effect identified by Crown for Accommodation and Parking, On this basis, the impact is an additional $2,294,152 for the ten year period set out in the spreadsheet attached at Appendix B. However, on the basis mentioned above, the impact may be limited to four years. To provide a broad indication of this impact, using a simple pro rata basis (multiplying by 0.4 as in above calculation), the additional GST impact may be approximately $917,661 (plus any penalties). However, from a Crown P&L perspective, the primary tax GST amount should result in a corresponding State Gaming tax reduction, with a resultant primary tax net nil for Crown.

In summary, in our view, of the amounts at issue of some $272m in State Gaming Tax for the Period, we consider that only $8m is unlikely to succeed. In respect of $24.8m there is a very respectable argument, and $238m should be seen as correctly treated. There is also an additional amount of (approximately) $2.8m in underpaid (primary) GST with a P&L impact (assuming a 4-year period).

Mark Tafft,
Tax Partner, EY

18 June 2021

Appendix A – Crown Resort Rules

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Appendix B – Schedule Detailing Jackpot Analysis

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Appendix C – Crown Materials Zip File

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Appendices D-I – Crown Confirmation and Materials.

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Appendix J – Zip file “Sundry Opinions – Table Games”.