

MinterEllison

MEMO

CONFIDENTIAL & PRIVILEGED

To Joshua Preston
Chief Legal Officer – Australian Resorts
Crown Resorts Ltd

From MinterEllison

Subject Gaming Machines Bonus Jackpot Program Initiative – GGR treatment

Date 18 November 2019

Context

1. We refer to our 14 November 2018 note to Crown in relation its Gaming Machines Bonus Jackpot Program Initiative (**Earlier Advice**).
2. We are instructed that, in July 2019, Crown was provided with a draft of a new Technical Requirements Document (**Proposed TRD**). We have subsequently had the opportunity to discuss the terms of the Proposed TRD with Crown.
3. Crown has sought our updated observations on the Gaming Machines Bonus Jackpot Program Initiative, having regard to the terms of the Proposed TRD.

Gaming Machines Food Bonus Jackpot Program

4. Crown Melbourne has had in place a gaming loyalty food program (referred to below as the Gaming Machine Bonus Jackpot Program, but described in Crown's internal documents as the Gaming Machine Food Program), in a number of forms, since at least 2000.
5. In or around 2012, Crown Melbourne instituted changes to the way it implemented and classified its Gaming Machine Bonus Jackpot Program, with the effect that Gaming Machine Bonus Jackpot Program costs were, from that point on, classified as a 'Bonus Jackpot' and, therefore, a deduction for the purposes of the Gross Gaming Revenue calculation.
6. Our Earlier Advice made a number of observations about the Gaming Machine Bonus Jackpot Program, including that:
 - (a) determining the amounts to be included in this calculation is, strictly, a matter of statutory construction;
 - (b) Gross Gaming Revenue is defined to mean *'the total of all sums ... received in any period by the Company, from the conduct of or playing of games ... less the total of all sums paid out as winnings during that period in respect of such conduct or playing of games ...'*;
 - (c) for Crown Melbourne to be entitled, under the Act, to deduct sums for the purpose of the Gross Gaming Revenue calculation, those sums must have been 'paid out as winnings';¹
 - (d) on a strict interpretation of Gross Gaming Revenue, to constitute a deductible, the amounts must be 'won' by the player or otherwise paid out as winnings. On its terms, this definition would not seem to capture credits earned simply by repeat play, which is what the Gaming Machine Bonus Jackpot Program involves;
 - (e) the concept of loyalty credits accruing based on level of play does not logically fit within the concept of a jackpot, either as that term is commonly understood, or as it is defined in the CCA (which is a very narrow, technical definition);
 - (f) Crown Melbourne has, since inception, treated a number of types of jackpots, including 'Bonus Jackpots', as 'sums paid out as winnings' (ie. as a deductible for the purposes of

¹ There is no definition of winnings in the CCA or in any of the casino agreements.

the Gross Gaming Revenue calculation). Typically, this has been done with the knowledge and approval of the VCGLR;

- (g) the VCGLR:
 - (i) was not advised of this change in the treatment of the Gaming Machine Bonus Jackpot Program costs; and
 - (ii) has not specifically approved the Gaming Machine Bonus Jackpot as a 'Bonus Jackpot'.
- (h) the VCGLR has historically been very prescriptive about approvals for bonus jackpots and related bonuses.

The previous Technical Requirements Document

7. The previous Technical Requirements Document approved by the VCGLR (**Previous TRD**) presented particular challenges with respect to Crown's approach to and treatment of its Gaming Machine Bonus Jackpot Program psot-2012.
8. In particular, the Previous TRD:
 - (a) defines a 'Bonus Jackpot' as being one where *'an EGM is instructed by an external device to pay additional bonus prizes where the amount/multiplier, bonus eligibility criteria and time period are specified by the external device.'*
 - (b) provides that all Bonus Jackpots need to be approved. Paragraph 7.7.1 provides that 'All Bonus Jackpot parameters are to receive the approval of the Director.'
9. In these respects, Crown's approach to the Gaming Machine Bonus Jackpot Program was arguably at odds with the Previous TRD. As we noted in our Earlier Advice:
 - (a) there is an argument that, based on the TRD, the Gaming Machine Bonus Jackpot Program does not fall within the definition of a Bonus Jackpot. This turns on whether the EMS (ie DACOM) can be regarded as an external device for the purposes of the definition in paragraph 7.1 of the Technical Criteria;
 - (b) , if the Gaming Machine Bonus Jackpot Program is not a Bonus Jackpot, then the case for deductibility by reference to that term, and the way such jackpots have been treated historically, would be weakened accordingly.

The impact of the new Technical Requirements Document

10. Crown seeks our observations about the effect of the new Technical Requirements Document (version 4.05) (**New TRD**), once in force.
11. Ultimately, the question of whether deductions made in respect of the Gaming Machine Bonus Jackpot Program meet the statutory definition of sums 'paid out as winnings' is a question of statutory construction, and not to be resolved by reference to other documents.
12. Paragraph 1.1.2 of the New TRD reinforces this point (*'the Requirements specified in this document are supplementary and do not take the place of any requirements in the prevailing legislation, licence, and related agreement(s), rules and directions'*). Paragraph 1.1.5 also expressly provides that legislation prevails over the New TRD to the extent of any inconsistency.
13. Nevertheless, there are a number of helpful aspects to the New TRD, which Crown could point to in the event any issues are raised going forward with the Gaming Machine Bonus Jackpot Program and the way GGR is calculated.
14. Among other things:
 - (a) the previous requirement (at paragraph 7.7.1 of the Previous TRD) for all bonus jackpots to be approved by the VCGLR has been removed;

- (b) in general terms, we are instructed that section 5 ('Player Promotion / Bonusing System') aligns almost entirely with the way that the Gaming Machine Bonus Jackpot Program operates in practice. For example, the Gaming Machine Bonus Jackpot Program is implemented in a manner consistent with the 'Player Promotion Systems' requirements in section 5.2;²
 - (c) helpfully, section 5.1 of the New TRD contains specific indication of how Player Promotional/Bonusing systems will affect revenue and related calculations – for example:
 - (i) *'The following requirements shall only apply to Player Promotional/Bonusing systems that can affect the financial settlement such as e.g. redemption of player loyalty points as credits to the player account...'*
 - (ii) *'All promotional/bonusing credits given to the player have no impact on the calculation of theoretical payback percentage for a gaming machine. Provisions must be made to ensure that these awards are metered unioely by the electronic gamign machine, so they can be reported correctly to the CMS for calculation of revenue and promotional/bonus awards reconciliation purposes.'*
 - (d) specifically, the New TRD introduces the concept of deductions for redemption of player loyalty points, which is a key feature of the Gaming Machine Bonus Jackpot Program.
15. All of these are helpful developments for Crown and allow it to argue, with real force, that the Gaming Machine Bonus Jackpot Program:
- (a) is a form of bonusing system expressly contemplated in the New TRD; and
 - (b) can be factored into the calculation of GGR in ways envisaged in the New TRD, including by deducting redeemed player loyalty points as amounts 'paid out as winnings'.
16. In this respect, we note further that the New TRD also indicates that, at paragraph 1.1.5, that the *'document will be used by the VCGLR to evaluate compliance by the licensee with the Casino licence and related agreement(s)...*'. Crown can in this way use the terms of the New TRD to argue that it is a relevant consideration in assessing Crown's compliance with legislative requirements, including in relation to payment of taxes by reference to the definition of GGR, that its operations are compliant with the New TRD.
17. We understand in this respect that the VCGLR has made certain enquiries during the course of 2018 in relation to Crown Melbourne's treatment of Bonus Jackpots, but to date the VCGLR has not raised any specific issue about the composition of Bonus Jackpots or the treatment of Gaming Machine Bonus Jackpot Program costs as a deductible. Helpfully, under the New TRD, there is less scope for the VCGLR to raise issues with Crown's treatment of the Gaming Machine Bonus Jackpot Program

We trust this assists. Please feel free to contact us if you would like to discuss.

MinterEllison
18 November 2019

² We note that there are certain respects in which, at the margins, Crown's operations of the Gaming Machine Bonus Jackpot Program may be at odds with the New TRD. One example of this, which we have discussed with Crown, is whether or not it complies with the requirement in paragraph 5.5.2 for prescr bed information to be *'provided on the gaming device and/or the interface display element.'*