

MEMORANDUM TO COUNSEL

Chris Archibald QC, Chris Carr SC and Anna Dixon

Counsel's instructing solicitors (ABL) act for the Board of Crown Resorts Limited (**Crown Resorts**).

Engagement by the Board of Crown Resorts

- 1 Crown Resorts, Crown Melbourne Limited (**Crown**) and Crown Perth are currently the subjects of Royal Commissions in Victoria (**Royal Commission**) and Western Australia regarding whether Crown Melbourne and Crown Perth are suitable to hold a casino licence. A copy of the Letters Patent for the Royal Commission is at **Tab 1**. As Counsel will appreciate from the prior brief in relation to China Union Pay, Crown was previously the subject of an inquiry in NSW conducted by the Honourable PA Bergin QC (**the Bergin Report**) in which (loosely described) Crown Sydney was found to be unsuitable to hold a casino licence in NSW and that Crown Resorts was not a suitable person to be a close associate of Crown Sydney in February 2021. The Bergin Report is available at **Tab 2**.
- 2 As you know ABL acts for the Board of Crown Resorts in connection with the Victorian and Western Australian Commissions. Allens acts for Crown Resorts. Crown Resorts has undergone significant board and management changes since the Bergin Report and is undertaking a major remediation program to demonstrate that it is suitable to hold a casino licence.

Background

- 3 On 10 March 2021, the Royal Commission requested by letter (RFI-002) (**Tab 3**) that Crown produce documents and information relating to whether:
 - 1 *Since 1 January 2010, has Crown Melbourne engaged in conduct that would, or might, breach any provision of:*

.....

(b) *the Casino (Management Agreement) Act 1993 (Vic);*

.....
 - 2 *If yes to any part of Question 1:*
 - (a) *identify the particular provision(s) that has been or may have been breached;*
 - (b) *set out the acts or things that constituted the breach or potential breach;*
 - (c) *state what steps (if any) were taken to remedy the breach; and*
 - (d) *identify what steps (if any) have been taken to ensure that the act or thing will not be repeated.*
- 4 On 19 March 2021, senior Crown executives met with Allens regarding what should be disclosed in response to RFI-002. The Allens file note of that meeting is enclosed at **Tab 4**. Crown raised the issue of potential underpayment of gaming taxes (refer below at paragraph 6). Allens asked for documents so that it could advise on the response to RFI-002. Following receipt of these documents from Crown, Allens inadvertently overlooked the need for advice and as a result this matter was not disclosed to the Commission as

part of Crown's response to the RFI-002. On 8 June 2021, Andrew Maher (Allens) emailed Helen Coonan and other Crown directors to apologise for the oversight (**Tab 5**).

- 5 Crown provided responses to RFI-002 to the Commission on 24 March 2021, 21 April 2021, and 18 June 2021. We will provide you with copies of these responses by email later today.

Gaming Tax

- 6 The Agreement between Crown and the Victorian Government (the **State**) regarding the management of Crown's Melbourne casino is given statutory force by the *Casino (Management Agreement) Act 1993* (Vic) (**Casino Management Act**).

- 7 Crown is required to pay the State a gaming tax (**Gaming Tax**) calculated and payable under clause 22 of the Agreement in schedule 1 to the Casino Management Act. Gaming tax under the Casino Management Act is paid in lieu of amounts that may otherwise be payable under sections 112A, 113 and 114 of the *Casino Control Act 1991* (Vic) (**Casino Control Act**).

- 8 Under the Casino Management Act, Gaming Tax is payable by Crown to the State based on its "Gross Gaming Revenue", which is defined as (emphasis added):

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 ... 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 games.

- 9 "Sums... received" operate to increase Gross Gaming Revenue and sums "paid out as winnings" operate as deductions from Gross Gaming Revenue (and therefore reduces the amount of Gaming Tax payable by Crown).

- 10 In addition, under clause 22C of the Agreement, the amount of Gaming Tax is reduced by a "State Tax Credit" equal to the "global GST amount" under s 126-10 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). In simple terms, that amount is one eleventh of the difference between total consideration for gambling supplies and monetary prizes paid out.

- 11 In 2020, Justice Davies granted judgment in Crown's favour against the Commissioner of Taxation regarding the treatment of certain commissions and rebates related to "junket" operations and providers and the effect of those expenses on its global GST amount. Judgment of Davies J is at **Tab 6**. The Commissioner appealed to the Full Court of the Federal Court and the hearing was held on 17 May 2021.

- 12 Section 120 of the Casino Control Act makes it an offence to:

- (a) wilfully evade the payment of any fee, premium payment, charge, tax or levy payable by the person under this Act; or
- (b) furnish a return, or make a statement or report, to the Commission or an inspector in respect of any fee, premium payment, charge, tax or levy payable under this Act knowing that the return, statement or report is false or misleading in a material particular.

Royal Commission Evidence

- 13 The Commission was announced on 22 February 2021.
- 14 On 7 June 2021, Mark Mackay, Crown's Executive General Manager Gaming Machines, gave evidence before the Commission. Mr Mackay was questioned regarding expenses relating to Crown's electronic gaming machine jackpots and bonus programs treated as sums paid out as winnings and deducted from Gross Gaming Revenue. The transcript of proceedings is enclosed at **Tab 7** (the **Transcript**). We have highlighted in yellow the evidence in relation to the Gaming Tax issue.
- 15 Mr Mackay was questioned about an Excel spreadsheet (**Spreadsheet**) (**Tab 8**) prepared by Mr Mackay on the instructions of Xavier Walsh, Crown Melbourne's CEO. The spreadsheet was prepared on 26 February 2021 (a few days after the Commission was announced).
- 16 The Spreadsheet provides details relating to the jackpot and bonus programs operated by Crown (**Programs**) which are treated as winnings deducted from Gross Gaming Revenue. The tax treatments in question in the Spreadsheet were estimated, at that time, to have had a tax impact of approximately \$167m, meaning that the Gaming Tax was reduced by \$167 million as a result of these deductions. The updated spreadsheet provided by EY to Mark Robertson QC on 14 June 2021 as part of a Supplementary Brief to senior counsel (refer **Tab 23** below) showed that the potential tax impact was \$271m meaning that the Gaming Tax was reduced by \$271 million as a result of these deductions..
- 17 At P-1620 of the Transcript, Counsel Assisting questioned Mr Mackay about Crown's failure to identify documents relating to its treatment of bonus jackpots in response to the RFI-002 in the following terms:
- Q. And so by -- so that on -- before that letter was sent on 10 March, Mr Xavier Walsh was both a director of Crown Melbourne and knew that there was a potential issue about underpayment of tax?*
- A. Correct.*
- Q. And you agree that when the Commissioner issued a request for information, Crown was duty-bound to take all possible steps to provide all relevant information?*
- A. Yes, I do.*
- Q. So you agree, by not providing the advices it had received from its external lawyers about this issue, Crown failed to discharge that duty?*
- A. If they didn't provide it under the assumptions that you specified to me, then, yes, that would not be in line with that quote.*
- Q. Yes, and you agree that if that assumption is right, the advices from MinterEllison were not provided, there is no acceptable excuse or explanation for that failure; there is [sic]?*
- A. I couldn't think of one, no.*
- 18 On 7 June 2021, Allens wrote to the Commission regarding its failure to disclose information relating to Gaming Tax (**Tab 9**). That letter enclosed the file note at Tab 4.

Historical Advice

- 19 ABL has not completed all of its inquiries in relation to the legal advice received by Crown concerning the Gaming Tax. Set out below are the preliminary instructions we have obtained concerning the Gaming Tax. (We have by email dated 18 June 2021 sent you a copy of other legal advice recently received by Crown in relation to the WA and Victorian Casino taxes.)
- 20 On 6 November 2006, the VCGLR (**the Regulator**) approved changes to Crown's systems relating to issuing pokie credits as part of its "Welcome Back" incentive for loyalty program members (**the 2006 Approval**). A copy of the 2006 Approval, including highlighting and hand-written annotations by an unknown author, is enclosed at **Tab 10**.
- 21 On 28 March 2012, Debra Tegoni, Crown's Executive General Manager Legal and Regulatory Services, provided internal legal advice regarding the proposed treatment of certain bonus jackpot amounts (**Tegoni Advice**) A copy of the advice is at **Tab 11**. (You may recall Debra Tegoni was also involved in the China Union Pay internal legal advice.)
- 22 Following the Tegoni Advice, from 1 July 2012, Crown made changes to the way in which it classified its 'bonus jackpot' program. Those changes resulted in Crown starting to treat certain rewards program costs, such as food, hotel and car parking benefits, as 'bonus jackpots', with those amounts being claimed as deductions in the calculation of Gross Gaming Revenue. We have not ascertained what if any disclosures were made by Crown to the Regulator in relation to the changed treatment in the calculation of the Gaming Tax. (Noting again section 120 of the Casino Control Act in relation to offences relating to revenue.) We seek to undertake these additional investigations with Counsel and like China Union Pay propose for Counsel to interview key Crown personnel in relation to the disclosures).
- 23 In or around 2014 and 2015 Crown sought advice from Senior Counsel on whether certain vouchers and promotional incentives were relevant to the calculation of Gross Gaming Revenue. The Regulator obtained an opinion from Leslie Glick QC. ABL became aware of these advices as a result of a telephone conversation with Richard Murphy of MinterEllison on 16 June 2021. Copies of the advices are at **Tabs 12, 13, 14, 15 and 16**. (As stated above we now have identified further joint advice which we obtained on 18 June 2021 from Minters and forwarded to you by email on 18 June 2021. Please let us know if you would like a further hard copy of this additional joint advice.)
- 24 In or around May and June 2018, the Regulator made enquiries of Crown regarding Crown's Bonus Jackpot Programs. Correspondence exchanged between Crown and the Regulator on 31 May to 6 June 2018 is enclosed at **Tab 17**.
- 25 On 14 November 2018, MinterEllison provided a draft memorandum of advice regarding the treatment of bonus jackpot amounts (**Tab 18**). (We have not been provided with a final version of this draft Minters advice although it is referred to in later Minters advice to Crown.)
- 26 On 18 November 2019, MinterEllison provided a further memorandum (**Tab 19**) updating their (presumably final) advice of 14 November 2018 in light of a new Technical Requirements Document (**TRD**) agreed with the Regulator in 2019.
- 27 We have been told, but do not know, that the Regulator may have audited Crown's returns from time to time. Again, we will conduct further inquiries in relation to this issue with Counsel to ascertain whether the audits fully disclosed the Crown calculations of the Gaming Tax.

Recent events

- 28 On 7 June 2021, Crown's approach to Gross Gaming Revenue was first raised by the Royal Commission as a matter of interest.
- 29 On 8 June 2021, the Royal Commission issued further Notices to Produce documents to the Royal Commission addressed to each of the directors of Crown (the **8 June Notices**) (**Tab 20**). A similar Notice to Produce was issued to Crown Resorts (**Crown Notice**). The documents requested in the 8 June Notices and Crown Notice were originally required to be provided to the Royal Commission by 15 June 2021. An extension was granted by the Commissioner.

Engagement of EY and Mark Robertson QC

- 30 On 9 June 2021, ABL was instructed by the Crown board to brief Ernst & Young (EY) – Crown's general tax advisor – to provide its opinion on the proper tax treatment of the Programs. ABL did so by letter dated 9 June 2021 (**Tab 21**).
- 31 On 12 June 2021, EY briefed Mr Robertson QC to provide his opinion (**Tab 22**).
- 32 On 14 June 2021, EY briefed Mark Robertson QC a Supplementary Brief which was further supplemented on 17 June 2021. EY issued its final Brief on 18 June 2021. The consolidated Supplementary Brief is provided in **Tab 23**.
- 33 Mark Robertson QC issued his opinion on 19 June 2021. (As you may have observed we provided EY and Mark Robertson QC the additional advices Crown received in relation to state casino tax albeit without the necessary background.) We have forwarded to Senior Counsel a copy of the final EY Brief and a copy of Mark Robertson QC's opinion.

Instructions

- 34 **Attached** are hard copies of the documents referred to in this Memorandum.
- 35 The board of Crown Resorts has instructed ABL to retain Senior Counsel to conduct a robust legal review of the Gaming Tax issues. The board seeks for the advice of EY and Senior Counsel retained by EY to be reviewed by you. If you would like to speak to either EY or Senior Counsel, please let us know. The EY and Senior Counsel advice is in part based on verbal instructions.
- 36 Out of an abundance of caution we have requested statutory declarations from those Crown executives who have provided EY instructions to verify the truthfulness and accuracy of those verbal instructions. The board also seeks advice as to whether the Gaming Tax has been underpaid and if so by how much. Crown intends to pay any amount that it has underpaid.
- 37 The Crown board also seeks for Crown to fully comply with RFI-002 and seeks advice from Counsel as to whether the disclosures made to date to the Commission in relation to the Gaming Tax issues are appropriate. The board's riding instruction is to err in favour of disclosure. The board also seeks advice as to whether any of its officers or executives have engaged in misleading the Regulator or breached any other laws arising from the Gaming Tax issues. Counsel is also requested to consider whether there are any other matters or things that the board ought to undertake to fully discharge their duties as officers.
- 38 As stated above Counsel is also instructed to interview Crown executives to procure any further or other information or instructions required to complete these instructions. We have also been in communication with Mike Johnston's lawyers who have indicate that he may be willing to assist. If Counsel requires any further information, please telephone Leon Zwier, Elyse Hilton or Shaun Cartoon.

Dated: 21 June 2021

A handwritten signature in blue ink, appearing to read "Arnold Bloch Leibler", written over a horizontal line.

Arnold Bloch Leibler