Subject to legal professional privilege

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# Crown Resorts Limited

Casino Gaming Tax

Opinion of Mark Robertson QC dated 19 June 2021 & Next Steps

21 June 2021

# Introduction

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- This matter concerns electronic gaming machines (**EGMs** or **pokies**) and whether Crown's gaming tax treatments for eight different categories of EGM jackpot and bonus programs (**Programs**) has been appropriate over the period FY 2013 to date (the **Period**).
- 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 Bonus Jackpot Programs. ABL did so by letter dated 9 June 2021.
- On 12 June 2021, EY briefed Mr Robertson QC to provide his opinion.
- On 16 June 2021, ABL briefed independent counsel Chris Archibald QC and Chris Carr SC to review the opinions of EY and Mark Robertson QC and advise on related issues.
- On 18 June 2021, EY finalised its Brief to Mark Robertson QC.
- On 19 June 2021, Mark Robertson QC issued his opinion.

# Introduction



- Presently, EY identify the approximate total amount in question during the Period as between approximately $271.8 million and $272.6 million (the $800,000 variance requires further investigation). This means that the Gaming Tax was reduced by approximately $272m as a result of Crown having claimed deductions from Gross Gaming Revenue for jackpot and bonus amounts under the Programs.
- Senior Counsel was asked to provide his opinion on two questions, being:
  - **Question 1**: Does each Jackpot in fact fall within the reach of the definition of "Gross Gaming Revenue" at all?
  - **Question 2**: If the Jackpot falls within the reach of "Gross Gaming Revenue", does it reduce or increase the amount thereof?

# Summary



- Senior Counsel considers that there has been an under-reporting of actual casino tax liability in relation to the eight Categories of approximately 2.6% of the $272.6 million suggested to be under-reported in the Period. The 2.6% relates only to two subcategories within Category 8 – being:
  - **free accommodation** ($4,419,933) **and**
  - **free parking** ($3,655,486).

  In respect of these amounts, Crown:

  (i) under-reported Gross Gaming Revenue by $8,075,419 (ie. the total of the above amounts); and

  (ii) also made the same errors for accommodation and parking in what it declared to be its Global GST amount in relation to gambling supplies under s 126-10 of the GST Act. Crown has underpaid GST by approximately $917,661. However, if the ATO amends Crown's GST assessments to increase the Global GST amounts (and GST payable), Crown should get a corresponding reduction (in the form of a State Tax Credit) to its casino tax liability.
- In summary, Crown's correct State taxes liability in relation to the 8 Categories is (after amendment of Crown's GST assessments for the past four years) $7,157,757 more than reported in the Period ($8,075,418 less $917,661), not $272.6 million more (as has been suggested).

# Summary

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- In Mark Robertson QC's opinion, Crown also under-reported its consideration for or in connection with its taxable supplies of food and beverages within Category 8 under Division 9 of Chapter 2 GST Act. It ought to have included as consideration received for those taxable supplies the amount of the Dining Rewards redeemed as part payment of those taxation supplies. The estimated GST payable is $2,820,818. This error does not affect Crown's casino tax liability.

# The 8 Jackpot Programs

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| Jackpot category | Jackpot name | Does the Jackpot in fact fall within the reach of the definition of "Gross Gaming Revenue" at all? |
|---|---|---|
| 1 | Pokie Credit Rewards (Welcome Back / Free Credits / Seniors promotion) | No |
| 2 | Mail Outs | No |
| 3 | Pokie Credits (Matchplay) | No |
| 4 | Random Riches (Carded Lucky Rewards) | No |
| 5 | Jackpot Payments | No |
| 6 | Pokie Credit Tickets | No |
| 7 | Consolation prizes | Yes |
| 8 | Bonus Jackpots | Yes |

# Categories 1 - 7

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**In relation to Categories 1 – 6, Robertson QC concluded:**

- For the six categories of jackpots and bonuses involving “free” bets as represented by non-redeemable Pokie Credits, Crown’s EGM and accounting systems have, by including the free bet of a Pokie Credit as both actual turnover received by Crown and winnings paid by Crown, created a wholly illusory issue. Those nonredeemable Pokie Credits were neither sums of money received by Crown nor sums of money paid by Crown within the definition of Gross Gaming Revenue; One error has merely corrected the other. Crown’s systems treatment produced the correct end result. Crown’s net calculation of Gross Gaming Revenue was, to that extent, correct and there was no underpaid casino tax relating to Pokie Credits. Accordingly, for these six categories, the Second Question does not arise.

**In relation to Category 7 (Consolation prize), Robertson QC concluded:**

- This category accounts for approximately 0.35% of the total amount in question. Here Crown actually doubled the cash-redeemable credit prizes payable to the patron over a short period of EGM/pokie gaming time. So what would be an actual EGM payout for $100 of winnings becomes an actual EGM payout of $200 of winnings. The additional $100 would have been deductible in the calculation of Gross Gaming Revenue as the payment of a sum of money as winnings in respect of gaming.

# Category 8 (General)

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**In relation to Category 8, Robertson QC concluded:**

- The remaining category is "Bonus Jackpots" for Reward Members. This category accounts for approximately 12% of the total amount in question. The dollar amount is $32,898,625, sub-categorised as follows:
  - Dining Rewards $24,823,207 (9%)
  - Accommodation $4,419,933 (1.7%)
  - Car Parking $3,655,486 (1.3%)
- This category, unlike the six Pokie Credit categories, did not involve Crown incorrectly crediting an amount as if it were EGM turnover received by it in cash from the patron and simultaneously debiting that same amount as cash winnings paid to the patron.
- Crown recorded Bonus Jackpots only when redeemed. It recorded the patrons' redemptions in exchange for Crown's provision of accommodation, car-parking and food and beverage as (i) additional non-gaming revenue earned by it from the patrons as a result of providing those other goods and services to the patrons and (ii) a deduction from Gross Gaming Revenue by treating the redeemed Bonus Jackpots as sums paid out as winnings which the patrons used to "pay" Crown for those other goods and services.
- In short, Crown characterised the patrons' redemptions of Bonus Jackpots as increasing its non-gaming revenue not subject to State casino taxes and reducing its Gross Gaming Revenue (and casino tax payable).

# Cat 8 (Hotel + Parking)

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**In relation to Category 8 (Hotel accommodation and car parking benefit), Robertson QC concluded:**

- Crown incorrectly included as its non-gaming revenue what it recorded as the "payments" by the patrons of the notional value of hotel accommodation and car parking in fact provided for free. The patrons paid nothing to Crown, in fact or in law.
- Conversely, Crown incorrectly claimed what it recorded as offsetting payments by it of Bonus Rewards when redeemed by the patrons in discharge of what Crown recorded to be their notional payment obligations to Crown for free hotel accommodation and free car parking as a deduction in the calculation of its Gross Gaming Revenue. Crown paid nothing to the patrons, in fact or in law.
- In short, Crown's accounting entries recording debits and credits for Bonus Rewards were not receipts and payments of sums and did not record an underlying agreement between Crown and the patrons for the mutual offsetting of monetary obligations between them.
- For GST purposes Crown correctly excluded from accommodation and car parking revenue the amounts referable to Bonus Rewards.

# Cat 8 (Hotel + Parking)

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**In relation to Category 8 (Hotel accommodation and car parking benefit), Robertson QC concluded:**

- However, Crown Resort's declaration of its Global GST amount each month in relation to free accommodation and car parking was incorrect. It incorrectly included the notional value of those perquisites as amounts it was liable to pay as monetary prizes in the Global GST amount formula. That is, Crown under-reported its Global GST amount under s 126-10 and consequently its net amount under s126-5 GST Act each month.
- Crown ought consider requesting amendments to its GST assessments. The Commissioner's power to amend is limited to four years from the date that Crown Resorts lodged its GST return for the relevant period. If the Commissioner amends Crown's GST assessments by altering the particular "Global GST amount", then clause 22C.5 of the Management Agreement will be triggered to increase Crown's State Tax Credit for each month in the Period.

# Cat 8 (Hotel + Parking)

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**In relation to Category 8 (Hotel accommodation and car parking benefit), Robertson QC concluded:**

- In summary, in relation to this sub-category:

  (a) during the Period Crown's casino taxes, by reason of incorrectly deducting Bonus Rewards redeemed in the calculation of Gross Gaming Revenue, should have been higher than reported by, on the figures set out above, $4,419,933 for Accommodation and $3,655,486 for Car Parking.

  (b) for the past four years Crown's GST assessments are subject to reassessment by the Commissioner of Taxation. Crown would, as a result, have a higher Global GST amount than declared and its casino taxes would be reduced in the same amount by a State Tax Credit adjustment. EY have estimated this reduction to be $917,661.

# Cat 8 – Dining Rewards

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**In relation to Category 8 (Dining rewards), Robertson QC concluded:**

- The position with Dining Rewards when redeemed is one upon which reasonable minds may differ.
- However, in Senior Counsel's opinion Crown correctly claimed the amounts of Dining Awards earned on the pokies when redeemed as a deduction of sums paid out as winnings in the calculation of its Gross Gaming Revenue.
- The reason for the difference in Senior Counsel's conclusions between these sub-categories is that in the case of free accommodation and free car-parking, the patron is truly receiving a mere perquisite in respect of gambling. A perquisite may be characterised as a Reward Member's winning in respect of gaming on the pokies, for it is just as much a part of the consideration he or she agrees to receive for risking his or her money in gambling transactions with Crown. But, critically, it is not a sum paid out by Crown and cannot be treated as the equivalent of a sum paid out as winnings within the definition of Gross Gaming Revenue.

# Cat 8 – Dining Rewards

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**In relation to Category 8 (Dining rewards), Robertson QC concluded:**

- In contrast, under the Dining Awards redemption arrangement, a patron has won, by conducting gaming on EGMs, a contractual right, albeit contingent and limited in recourse, against Crown to have certain of his or her monetary debts (for food and beverage) discharged. The patron is not receiving as a perquisite the right to a "free" meal. Rather, the patron must incur a genuine monetary obligation to Crown for food and beverage services as offered in Crown's restaurants at fixed prices. He or she might, or might not, choose to use Dining Rewards on that or any other dining occasion in full or partial discharge of that separate obligation to pay for food and beverage. That is not an illusory option, which might be said of a mere percentage discount voucher given solely to encourage the purchase of goods, not as one of the agreed rewards from playing the pokies.
- Moreover, Senior Counsel considered that despite the temporal delay in offsetting being made by Crown to the patrons until the Dining Rewards are redeemed (i.e. when the debt to Crown is incurred), Crown's payments (by way of offset) are to be characterised as winnings paid out "in respect of" the patrons' EGM play. They form part of the terms and conditions of Pokie play and are just as much a monetary liability to Crown as any cash prize that might be payable at a later time.

# Cat 8 – Dining Rewards

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**In relation to Category 8 (Dining rewards), Robertson QC concluded:**

- Conversely, this analysis necessarily means that Crown was required to treat the redemption of Dining Rewards as the actual receipt of sums of money by it in cash for its taxable supplies of food and beverage services for the full price as charged. It correctly returned the full amount as assessable income for income tax purposes (and correctly deducted the Dining Rewards component as an outgoing incurred). But it did not follow this treatment through for GST purposes.
- The correct operation of the GST Act is that:
  - The full charge for food and beverage should have been treated as consideration for Crown's taxable supplies of food and beverages (which Crown did not do – it only included the actual cash receipt (net of the Dining Rewards redemption)); and
  - the Dining Rewards component should have been treated as being within "total monetary prizes" in the calculation of Crown Resort's Global GST amount under Division 126 GST Act (which Crown did correctly).
- Accordingly, Crown under-reported its GST liability. The ATO will be entitled to amend Crown's GST assessments for the four years from the date that its GST returns were lodged. EY have calculated the underpaid GST to be approximately $2,820,818.

# Cat 8 – Dining Rewards

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**In relation to Category 8 (Dining rewards), Robertson QC concluded:**

- Crown's error in the under-reporting declaration of its net amount under s126-5 was not an error in the declaration of its Global GST amount under s126-5, but an error in reporting its "other amounts". Accordingly, Crown's State Tax Credit in the Period, which depends only on the Global GST amount, is not subject to adjustment.
- Accordingly, in respect of Dining Rewards, the State casino tax liability for the Period was reported by Crown correctly. It is not subject of potential adjustment by way of amended GST assessments to alter the Global GST amount and trigger adjustments.

# Next steps

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*Verification of facts*

- The facts contained in EY's Brief and Mark Robertson QC's opinion are largely based on instructions received directly from Crown.
- Arnold Bloch Leibler is undertaking the process of having this information fully sourced and verified, which will include obtaining sworn testimonies from relevant Crown employees.
- Chris Archibald QC and Chris Carr SC are reviewing the opinions of EY and Mark Robertson QC and will assist with the factual verification process.

*Opinions of Neil Young QC*

- In or around 2014 and 2015 Crown sought advice from Neil Young QC and Chris Young 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. ABL provided copies of these opinions (without any background) to EY and Mark Robertson QC on 18 June 2021.
- Mark Robertson QC is reviewing these opinions and will comment on their relevance (if any) in an addendum to his opinion.

# Next steps

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*Recalculation of Gaming Tax*

- According to Mark Robertson QC:
  - There must be re-calculations of Victorian gaming tax over the Period only in relation to Bonus Rewards referable to accommodation and car-parking (a subcategory of Category 8). This recalculation will also depend on Crown obtaining reassessments of GST for accommodation and car-parking for the last four years, which reassessments of the Global GST amount will trigger the adjustment mechanism (to provide a bigger State Tax Credit).
  - The recent decision of the Federal Court in *Crown Melbourne Limited v Commissioner of Taxation [2020] FCA 1295* (if upheld on appeal) will require further adjustments to Crown's GST assessments and casino tax calculations.

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