IN THE MATTER OF ENTRY FEES FOR POKER TOURNAMENTS

and

IN THE MATTER OF CLAUSE 22 OF THE MANAGEMENT AGREEMENT RATIFIED UNDER THE *CASINO (MANAGEMENT AGREEMENT) ACT 1993*

JOINT MEMORANDUM OF ADVICE

A. INTRODUCTION

1. We are asked to advise Crown Melbourne Limited **(Crown)** about the liability to casino tax of "entry fees" charged by Crown to participants in poker tournaments. Casino tax is levied on sums received "from the conduct or playing of games." The "entry fee" is charged for the right to participate in the tournament.

2. Broadly speaking, the issue is whether those "entry fees" are sums received by Crown from the "conduct" of poker pursuant to the definition of Gross Gaming Revenue **(GGR)**, for the purposes of cl 22 of the Management Agreement (as varied) (the **Agreement)** that is ratified by the *Casino (Management Agreement) Act 1993* (the **Management Agreement Act**).[1]

3. In our opinion, the better view is that "entry fees" form part of Gross Gaming Revenue and Crown is liable to pay casino tax on them.

4. There are two arguments that Crown might make against the imposition of casino tax on "entry fees".

   (1) First, between 1997 and 2003 the rules of poker (which had been approved by the Victorian Commission for Gambling and Liquor Regulation (the **Commission)** under s 60 of the *Casino Control Act 1991* (the **Control Act)** expressly provided that "entry fees" for tournaments did not form part of GGR. Upon the substitution of those rules in 2003 and the omission of

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1 Sections 6 to 6I of the Management Agreement Act provide that the Agreement as amended by each of the deed of variations "is ratified and takes effect as if it had been enacted in this Act."

that rule, there was no indication that position was to change. The difficulty with that argument is the legislative basis for a rule that dispenses with casino tax, as part of the rules of a game, is not apparent and the rule may well have had no effect in any event.

(2) Secondly, it might be argued that an "entry fee" is not received by Crown "from the conduct" of poker but as part of the "management" of the conduct of the game. The difficulty with this argument is that it is gainsaid by s 64(1)(j) of the Control Act which evinces a statutory intention that charges to take part in a game are part of the conduct of the game.

5. We make three points about the recovery of casino tax.

(1) First, there are no limitations on the Commission's ability to recover casino tax. Neither the *Limitation of Actions Act 1958*[2] nor the *Taxation Administration Act 1997* applies.[3] Further, the Commission cannot be estopped from recovering casino tax levied by statute.[4]

(2) Secondly, interest on casino tax accrues in accordance with cl 22C of the Management Agreement. Casino tax was payable within 7 days of the end of each relevant month. Interest is imposed at the "Default Rate", being the rate set under the *Penalty Interest Rates Act 1983*. Interest accrues daily and is calculated on a compound basis.

(3) Thirdly, there is a power in the chief finance and accounting officer of the Commission, and the Minister responsible for the Commission, to write off an amount of revenue.[5] Crown might seek an exercise of that power in its negotiations with the Commission.

6. Our reasons for reaching these conclusions are set out below.

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2 *Limitation of Actions Act 1958*, s 32.

3 Casino tax is not levied by one of the Acts defined to be a "taxation law" for the purposes of the *Taxation Administration Act 1997*.

4 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 214-215; *Stewart v Deputy Commissioner of Taxation* (2010) 267 ALR 637 at [14].

5 *Financial Management Act 1994*, s 55.

B. BACKGROUND

7. Crown operates the Melbourne Casino pursuant to a licence issued under the Control Act.

8. We are instructed that Crown "holds and conducts" poker tournaments[6] at the casino. A tournament player must register to play and must pay an "entry fee" and a "buy-in" amount. We are briefed with the General Poker Tournament Terms and Conditions (dated 10 June 2011). Those terms and conditions state that tournaments will be conducted in accordance with the "Rules of Poker" (rule 7.10). We return to the rules of poker below.

9. We are instructed that the "entry fee" is a non-refundable charge to cover the incidental costs Crown incurs in hosting the event. The "entry fee" does not form part of the prize pool. Crown considers the "entry fee" is paid for the right to participate in the event and is not directly related to the actual conduct, playing or outcome of the game. We are instructed that the monies raised from the "entry fees" defray administration costs such as marketing, food, beverage and other incidental costs.

10. The "buy-in" amount is a separate payment. On paying the "buy-in", a certain number of chips will be allocated to the player. The player then uses those chips to gamble against other players. The money from the buy-ins forms the prize pool. The "buy-in" is refundable to the player in the event he or she withdraws from the tournament.

11. The rules of poker provide for Crown to levy a "commission" on players, calculated by reference to amounts wagered or on a "per-table", "per-player" or "per-hand" basis. It is not clear to us whether or not a "commission" is levied by Crown under the tournament rules.[7] The "commission" is not expressly provided

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6 Poker is a card "game". It is an approved game under s 60 of the Control Act.

7 We note the "Tournament Accounting Procedure" describes the "entry fee" as the total amount a player needs to pay to participate in a tournament, which includes the "buy-in" amount and the "admin fee" amount. The "Admin Fee", "also referred to as Commission" is said to be a pre-determined portion of the entry fee which is retained to cover administration costs. Those procedures suggest the "entry fee" takes the place of the "Commission" levied under the Poker Rules.

for in those rules, but nor is it expressly excluded and the tournament is otherwise conducted in accordance with the rules of poker.

12. The Commission has asserted that "tournament entry fees collected from tournaments conducted at Crown form part of the Gross Gaming Revenue … and therefore state gaming tax is payable on those entry fees."[8] The Commission has asserted that in the period from 2005 to 2013, Crown received $16,018,893.38 in "commission" or "entry fees", on which $3,564,203.78 of tax is payable.

B-1 THE AGREEMENT

13. The Agreement was made on 20 September 1993 between the Minister responsible for administration of the Control Act and Crown.

14. Clause 22 of the Agreement[9] relevantly provides as follows:

> 22.1 While the Casino Licence remains in force, the Company must pay – …
>
> (b) to the State, in respect of each month in which gaming is conducted in … the Melbourne Casino, casino tax in an amount equal to – …
>
> (ii) on and from 1 July 1997 [until the day before the Ninth Variation Commencement Date],[10] 21.25% of the Gross Gaming Revenue for the month in question; and
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> [(iii) on and from the Ninth Variation Commencement Date –
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> (A) 21.25% of the Gross Gaming Revenue attributable to the operation of Table Games; plus
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> (B) 22.97% of the Gross Gaming Revenue attributable to the operation of gaming machines.][11]
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> payable in each case within 7 days following the end of each month …
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> 22.2 In addition to the casino tax payable under clause 22.1(b), while the Casino Licence remains in force the Company must pay to the State in respect of each

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8 Letter from the Commission to Crown dated 22 May 2013. See also letters from the Commission to Crown dated 1 September 2008 and 12 February 2009.

9 See also s 11(1) of the Management Agreement Act.

10 The words in square brackets were inserted by the Ninth Deed of Variation to the Management Agreement.

11 This clause in square brackets was inserted by the Ninth Deed of Variation to the Management Agreement.

> Financial Year in which Gross Gaming Revenue exceeds the Base Amount, additional casino tax calculated in accordance with clause 22.3.

15. The definition of "Gross Gaming Revenue" is as follows.[12]

> "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 …

16. The definition of "Table Game" is as follows.

> "Table Game" means a game (including a game that is substantially similar to an already approved game and including, for the removal of doubt, any semi-automated, fully automated, electronic or animated versions of such games) that has, at the date of this Deed, been approved under section 60 of the *Casino Control Act* as a "table game" or at any time in the future is so approved.

17. Clause 22C of the Agreement provides for defaults in payment.

> 22C. If the Company fails to make any payment required under clauses 22, 22A or 22B on the due date, without prejudice to any other right or remedy arising because of that failure, the Company must pay to the State interest (calculated daily) on the amount in default (including accrued interest) at the Default Rate for the period from the due date until payment is made (including all interest due under this clause).

B-2 POKER

18. Poker is a card "game". Section 60(1) provides that the Commission may approve games that may be played in a casino and the rules for those games. Section 60(2)(c) provides that a casino must not permit a game to be conducted or played except in accordance with the approved rules for the game.

19. On 20 March 1997, the Commission resolved that the game of poker be approved to be played at Melbourne Casino pursuant to s 60(1) of the Control Act. The approved rules for Poker were first gazetted on 24 April 1997.[13]

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12 The definition of GGR was amended by the Second Deed of Variation to the Management Agreement (see sch 3 of the Management Agreement Act) to exclude "Commission Based Players' Gaming Revenue". That revenue was, however, subjected to taxation in a new cl 22A of the Management Agreement.

13 Victoria Government Gazette, No S44 (24 April 1997).

20. Rule 23 provided for the "Tournament Rules". The conditions of entry in rule 23.4.1 provided that the Casino Operator may charge applicants a fee to enter a tournament. Rule 23.4.2 provided that the Casino Operator may retain up to 10% of the total of entry fees for administrative purposes or other related prize pools.

21. Rule 23.9 provided as follows.

> Entry fees and prizes paid in a tournament pursuant to these Rules shall not form part of the calculation of Gross Gaming Revenue.

22. Those rules were substituted by new rules by notice dated 17 December 2003 (S241) (amended by notice dated 30 November 2004) (S254).

23. Rule 10 of the new rules provided for tournament rules. Under those rules, it was stated that the tournament conditions must include the amount of any entry fee. There is no equivalent of rule 23.9 in the new rules. There is nothing to indicate why the rule was removed or whether its removal was considered to reverse the position as to liability to casino tax of "entry fees".

24. *Prima facie*, rule 23.9 of the 1997 rules supports Crown's position. We point out, however, that it is not clear to us whether that rule validly takes "entry fees" outside the definition of "Gross Gaming Revenue". It is not apparent to us that Parliament intended that the rules of a game would expressly constrain the reach of the taxing provisions. That is, if "entry fees" do form part of "Gross Gaming Revenue", does rule 23.9 validly take those fees outside "Gross Gaming Revenue" and make them exempt from casino tax? Does s 60(1) of the Control Act empower the making of rules that expressly constrain the reach of casino tax?

25. On the other hand, we acknowledge that there is an intersection between the concept of approved games (which includes the requirement that games be conducted in accordance with approved rules) and the derivation of revenue from the conduct or playing of games within the casino within the meaning of Clause 22 and the definition of Gross Gaming Revenue. More specifically the games referred to in the definition of Gross Gaming Revenue must be approved games conducted in accordance with the approved rules.

26. On the whole, we doubt that Rule 23.9 takes entry fees outside the definition of Gross Gaming Revenue. However, it is unnecessary for us to reach a concluded view on the matter because the rule was only in force until 17 December 2003. The Commission does not seek to recover casino tax before 2005.

B-3 THE CONTROL ACT

27. The Control Act establishes a legislative scheme for the licensing of casinos. That the Agreement is intended to be construed with the Control Act is affirmed by s 7 of the Management Agreement Act.

28. There are a series of provisions in that Act that provide some indication about the meaning of the phrase "from the conduct or playing of games".

29. First, there are a series of provisions that indicate the regulatory reach of the Act. Section 23 provides that the Commission may give to a casino operator a written direction that relates to the conduct, supervision or control of operations in the casino and the operator must comply with the direction.

> ***operations***, in relation to a casino, means –
>
> (a) the conduct of gaming …;
>
> (b) the management and supervision of the conduct of gaming …;

30. This provision suggests a distinction between the "conduct" of a game, on the one hand, and the "management" of the conduct of a game on the other. This might provide the basis for an argument that an "entry fee" is part of the management of the conduct of a game and not part of the conduct of the game itself. (We return to this argument below).

31. Section 58 provides that Crown must provide to "special employees", training courses "relating to the playing of games, the conduct of games and approved betting competitions and associated activities in connection with casino operations." A "special employee" means a person who is employed or working in a managerial capacity or who is authorised to make decisions, involving the

exercise of his or her discretion, that regulate operations in a casino or a person who is employed or working in the conduct of gaming.

32. Section 106 confers upon inspectors the function of receiving and investigating complaints from casino patrons "relating to the conduct of gaming or betting in a casino."

33. These last two provisions evince an intention that the regulation of the "conduct" of games is not to be narrowly construed. Employees are to be trained in the conduct of games. Inspectors have investigatory powers in relation to the "conduct" of games. It might be that the width of these powers is established through the phrase "relating to", rather than "conduct", but it would be surprising if employees did not have to be trained in matters including "entry fees" and if investigators lacked powers to investigate complaints about, for example, the levying of an "entry fee" in an amount, or in circumstances, that fell outside tournament rules.

34. Secondly, s 60 of the Control Act provides as follows.

> (1) The Commission may approve the games that may be played in a casino … and the rules for those games. …
>
> (2) A casino operator must not permit a game to be conducted or played in a casino unless – …
>
> (c) the game is conducted or played in accordance with the approved rules for the game.

35. The provisions for the "entry fee" form part of the tournament rules, which are recognised as part of the rules of the game of poker. The game of poker is conducted in accordance with those rules. Arguably, then, the "entry fee" is paid when and because the game of poker is played in accordance with the rules.

36. Thirdly, s 64 is headed, and provides for, the "conduct of gaming". The subject-matter of each sub-section has been underlined to highlight the subject-matters that the Parliament has provided as being within the concept of the conduct of gaming.

(1) The casino operator is responsible for ensuring that the following provisions are complied with in the casino and is guilty of an offence if they are not complied with –

(a) gaming equipment must not be used in the casino unless –

(i) the Commission has approved in writing of the use in the casino of that equipment or of the class or description of equipment concerned, whether or not subject to conditions; and

(ii) the equipment is used only in accordance with conditions to which the approval is subject;

(b) all playing cards dealt in the course of gaming in the casino must be dealt from a card shoe or, if the Commission has approved, by notice published in the Government Gazette, of the use of another procedure or device for dealing cards, by that procedure or from that device;

(c) chips for gaming in the casino must not be issued unless the chips are paid for in money to the value of the chips or by chip purchase voucher that, on payment of the amount shown on the voucher, was issued by or on behalf of the operator;

(d) gaming wagers must not be placed in the casino otherwise than by means of chips unless the rules of the game require or provide for the placing of wagers in money;

(e) all wagers won in the course of gaming or betting in the casino must be paid for in full without deduction of any commission or levy, other than a commission or levy provided for in the rules of the game or betting competition; …

(i) a person who is a casino employee or an agent of the casino operator must not at the casino induce patrons to enter the casino;

(j) a person must not be required to pay a deposit, charge, commission or levy (whether directly or indirectly and whether or not it is claimed to be refundable) to enter the casino or, except as may be provided by the rules of a game or betting competition or as may be approved by the Commission, to take part in gaming or betting in the casino.

37. This is an important provision. It demonstrates the kinds of things Parliament considered were involved in the "conduct of gaming".[14] Section 64(1)(j) makes it clear that charges to take part in gaming – which must include entry fees – are

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[14] The section heading – "conduct of gaming" – does *not* form part of the Control Act: *Interpretation of Legislation Act 1984*, s 36(2A). That heading may, however, be taken into account in the process of construction: *Interpretation of Legislation Act 1984*, s 36(4), 35(b).

part of the conduct of gaming. It contemplates that Crown may, consistently with the rules of a game, levy a charge on a person to take part in gaming and that such a charge would be in the conduct of the game.

38. This is consistent with the view that an "entry fee" is charged for the right to participate in the tournament. It is also consistent with the ordinary meaning of the noun "conduct" *viz* "the action or manner of conducting, directing, managing or carrying on."[15] Managing the right to participate in a game is part of the conduct of the game.

39. There might be an argument that the "entry fee" is preparatory to the conduct of any game. This is the argument that was raised by PricewaterhouseCoopers and is consistent with the argument that the "entry fee" is part of the "management" of the conduct of the game. The difficulty with this argument is s 64(1)(j) of the Control Act. That provision brings "entry fees" within the scope of the "conduct" of games.

40. Thus, while there are provisions in the Control Act that might tell both for (s 23) and against (s 60) the proposition that "entry fees" are received from the conduct of the game of poker, we think the better view is that evinced by s 64(1)(j) of the Control Act, which is that they are so received.

41. There might be an argument that the Ninth Deed of Variation to the Management Agreement changes the above conclusion. As we set out above, that Deed inserted clause 22.1(b)(iii) into the Management Agreement with effect from 1 January 2010. The Variation added some additional words that draw a distinction between Table Games and gaming machines. Most relevantly, the Variation added a requirement that the GGR be "attributable to the operation of Table Games". The consequence is that the GGR must be received "from the conduct or playing of games" (by force of the definition of GGR) and must be "attributable to the operation of Table Games". The question is whether the latter words assist Crown's argument that entry fees fall outside the scope of

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[15] Oxford English Dictionary, *conduct, n1* (6a). See also *Haupt v Robinson* [1960] Qd R 180 at 185; *Biochem Pharma Inc v Commissioner of Patents* (1998) 92 FCR 87; *Raymond v Attorney-General* [1982] 1 QB 839 at 846; *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* (2011) 197 FCR 374 at [21]-[27].

GGR. In our view, they do not. First, it is apparent from the structure of clause 22.1(b)(iii), the changes it made to the pre-existing position and from the legislative history[16] that the purpose of the clause was to impose a higher rate of taxation on revenues derived from gaming machines. The purpose of clause 22.1(b)(iii), then, was not to change the criteria for liability to taxation, but to change the rate of taxation for gaming machine revenue. Secondly, we do not think the words "attributable to the operation of Table Games" impose an additional requirement that entry fees cannot satisfy. The word "attributable" in this context means "produced by". Further, as we understand it, Crown "operates" the game of poker in the same way whether within or outside a tournament setting. As a matter of substance, if (as we think) entry fees are received from the conduct for playing of games in the casino, they will also be attributable to the operation of Table Games within the ordinary meaning of those words.

42. As to other potential arguments, we not that Crown referred in its letter of 24 March 2009 to the definition of "conduct of gaming" in s 3.1.4 of the *Gambling Regulation Act 2003* as supporting its contention that the taking of a fee to cover incidental costs fell outside the concept. We agree with the Commission that s 3.1.4 of the *Gambling Regulation Act 2003* – which defines the phrase "conduct of gaming" – is of no assistance when construing cl 22 of the Agreement. The reach of s 3.1.4. is expressly limited to Chapter 3 of the *Gambling Regulation Act*, which is concerned with gaming machines.

43. Crown has also argued that the Commission adopts an inconsistent approach as between "entry fees" charged by Crown and "entry fees" charged by other venue operators that host poker tournaments.[17] So, Crown says that the Commission considers that other venue operators may host poker tournaments, and charge "entry fees", without contravening s 2.3.1(j) of the *Gambling Regulation Act 2003*. That section provides:

    (1) Each of the following games is declared to be an unlawful game – …

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16 Victoria, Legislative Assembly, *Parliamentary Debates* (Mr Robinson, Minister for Gaming) 11 June 2009 at 1952-2953; Explanatory Memorandum to the Casino Legislation Amendment Bill 2009.

17 See, eg, Crown's letter to the Commission dated 13 June 2013.

(j) any game with cards or other instruments of gaming wherefrom any person derives a percentage or share of the amount or amounts wagered.

44. We do not think this argument provides any assistance to Crown's position in respect of its liability to casino tax. First, we think it is right to say that an "entry fee" is not "a percentage or share of the amount or amounts wagered." It is a charge to take part in the playing of a game. That establishes that a poker tournament for which an "entry fee" is charged is not an unlawful game. Secondly, the purpose of this provision is to make unlawful the conduct of particular games. On the other hand, cl 22 of the Agreement is concerned with liability to taxation. The provisions address quite different subject matter. It is unsurprising, then, that s 2.3.1(j) provides little assistance in the construction of cl 22 of the Agreement. Thirdly, it might, at best, be argued from s 2.3.1(j) that an "entry fee" is not a sum received from the *playing* of poker. But that conclusion says nothing about whether an "entry fee" is a sum received from the *conduct* of the game of poker. Ultimately, all this argument establishes is that Crown is liable to tax in respect of "entry fees" where other operators are not. That raises policy issues, but not legal issues.

45. Nor, in a legal sense, is any assistance to be found in the treatment of "entry fees" in other jurisdictions, at least not without a detailed consideration of the taxation regimes of those jurisdictions.

46. We do accept, however, that both of the above arguments provide the basis for a policy argument that Crown ought not be subject to a casino tax to which its competitors – both locally and interstate – are not so subjected.

47. There is one possible, technical argument we note in closing. From 1 January 2010, casino tax was levied on "the operation of Table Games", where Table Game was defined to mean a game "that has, at the date of this Deed, been approved under section 60 of the *Casino Control Act* as a "table game"". It is not clear what work those last four words do. The operation of s 60 is not expressly confined to "table games". The concept of a "table game" is not, so far as we are aware, referenced in the Control Act or the *Gambling Regulation Act 2003*. We have not seen an exhaustive list of approvals of games, but those we

have seen are not expressed in terms that a game is approved as a "table game". It might be arguable that while poker has been approved under s 60 of the Control Act, it has not been approved "as a "table game"" for the purposes of casino tax. On the other hand, it might be said that those four words are nothing more than a description of the circumstances in which approvals are given under s 60(1).

C. RECOVERY OF CASINO TAX

48. There is no ground on which the Commission might be prevented from recovering casino tax.

49. First, neither the *Limitation of Actions Act 1958*[18] nor the *Taxation Administration Act 1997* applies.[19] The usual rule in s 5(1)(d) of the *Limitation of Actions Act* that there is a 6-year period within which actions to recover sums recoverable by virtue of an enactment is expressly disapplied for proceedings by the Crown to recover tax and interest thereon. Further, the *Taxation Administration Act* applies only to an express class of "taxation laws" and neither the Control Act nor the Management Agreement Act is such a law.

50. Secondly, the Commission cannot be estopped from recovering casino tax levied by statute.[20] The reason is that a fiscal authority cannot be prevented from carrying out the public duties cast upon it by legislation.[21]

51. Thirdly, interest on casino tax accrues in accordance with cl 22C of the Management Agreement. Casino tax was payable within 7 days of the end of each relevant month. Interest is imposed at the "Default Rate", being the rate set under the *Penalty Interest Rates Act 1983*. Interest accrues daily and is calculated on a compound basis. (Sections 81J and 81K of the Control Act were referred to in the memorandum to counsel. However, those provisions only

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18 *Limitation of Actions Act 1958*, s 32.

19 Casino tax is not levied by one of the Acts defined to be a "taxation law" for the purposes of the *Taxation Administration Act 1997*.

20 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 214-215; *Stewart v Deputy Commissioner of Taxation* (2010) 267 ALR 637 at [14].

21 See *BBLT Pty Ltd v Chief Commissioner of State Revenue* (2003) 54 ATR 323; [2003] NSWSC 1003 at [111].

apply to the taxes on "approved betting competition" levied under Pt 5A of the Control Act. They may be left to one side.)

52. Finally, we note there is a power in the chief finance and accounting officer of the Commission, and the Minister responsible for the Commission, to write off an amount of revenue.[22] There are no express constraints on the matters relevant to the exercise of that power. In its negotiations with the Commission, Crown may refer to arguments about uncertainty arising from the old poker rules, the ambiguity of the phrase "conduct ... of games", the comparative taxation position for poker tournaments outside the casino and for interstate casinos as well as delay by the Commission.

Dated: 23 August 2013

[redacted]
NEIL J YOUNG QC
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[redacted]
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[22] *Financial Management Act 1994*, s 55.