

IN THE MATTER OF CROWN RESORTS LIMITED

AND IN THE MATTER OF CASINO TAX UNDER THE CASINO (MANAGEMENT AGREEMENT) ACT 1993 (VIC)

MEMORANDUM OF ADVICE

To: **Arnold Bloch Liebler**

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IN THE MATTER OF CROWN RESORTS LIMITED**AND IN THE MATTER OF CASINO TAX UNDER THE CASINO (MANAGEMENT AGREEMENT) ACT 1993 (VIC)****MEMORANDUM OF ADVICE**

1. We are instructed on behalf of the Board of Crown Resorts Limited (**Crown**) to provide further advice in relation to the application of the casino tax payable by Crown under the *Casino (Management Agreement) Act 1993 (Vic)* (**Casino Management Act**) specifically with respect to a program (**Matchplay**) by which patrons obtain credits for use on electronic gaming machines ('pokies' or **EGMs**) by exchanging points awarded under a loyalty scheme.
2. We have previously provided a memorandum and a supplementary memorandum of advice on 5 July 2021 with respect to the application of casino tax to Matchplay and various other programs by which jackpots and bonuses are provided to patrons of EGMs. We concluded that the programs under which Crown provides pokie credits do not entail payment of any sum by Crown to the patron, or by the patron to Crown upon use for a bet. The mechanism of credits allows the patron to play games with bets to the value of the credits, but free of charge.
3. Since providing our advice, Counsel Assisting the Victorian Royal Commission into the Casino Operator and Licence has provided closing submissions which contend that, when a member converts loyalty points to pokie credits in the context of Matchplay, there is a sum received by Crown for the purpose of casino tax calculation.¹
4. We have also been directed to the position propounded by the Victorian Commission for Liquor and Gambling Regulation (**VCGLR**) in a letter to Crown dated 15 July 2015, drawing on advice by Leslie Glick QC dated 10 July 2015, in relation to the treatment of certain vouchers (styled 'Lucky Money' and 'Free Play') given to patrons by Crown in promotional activities which were able to be exchanged for gaming chips. The

¹ Counsel Assisting the Victorian Royal Commission into the Casino Operator and Licence, Closing submissions (July 2021), Section 5, [1.171].

VCGLR stated that the face value of the vouchers, when converted to chips and gambled, was a sum received by Crown for the purpose of casino tax calculation.

5. We have been instructed to consider whether the closing submissions of Counsel Assisting, or the position stated in the VCGLR's letter and Mr Glick QC's opinion, affect our previous conclusions with respect to application of casino tax to the Matchplay program.

Summary

6. We confirm our view that the provision of pokie credits under the Matchplay program by the exchange of loyalty points, and use of those pokie credits, do not constitute "sums... received" by Crown for the purpose of calculating Gross Gaming Revenue and casino tax and the Casino Management Act.
7. We consider that the casino tax on gaming revenue is directed at sums of money received in connection with gaming, not wider adjustments of value between the casino operator and a patron. The Crown Rewards loyalty scheme confers contractual rights upon members (by awarding points) on certain terms. Redemption of loyalty points is the mechanism by which Crown discharges its contractual obligation by providing pokie credits enabling free bets. Upon redemption, Crown does not itself receive a sum within the definition of Gross Gaming Revenue.
8. Neither the Crown Rewards loyalty points nor the pokie credits are redeemable for cash. By contrast, the position propounded by the VCGLR on the basis of Mr Glick QC's advice appears to respond to the consequences of vouchers exchanged for chips redeemable for cash, and it does not alter our assessment of the Matchplay program. In our view, exchange of loyalty points and use of pokie credits which are not redeemable for cash do not involve Crown receiving any sums for the purpose of Gross Gaming Revenue.
9. Further, the process of converting loyalty points into pokie credits is anterior to and distinct from the gaming, such that nothing is received by Crown in the exchange "from the conduct or playing of games".

Background

10. We refer to the background set out in our memorandum and supplementary memorandum of advice both dated 5 July 2021, and do not repeat it here. However, it is convenient to restate that Crown is required to pay casino tax pursuant to cl 22.1(b) of the Management Agreement with the State of Victoria forming Schedule 1 to the Casino Management Act, calculated as a proportion of “Gross Gaming Revenue” defined in cl 2 as follows:

“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... Melbourne Casino... less the total of all sums paid out as winnings during that period in respect of such conduct or playing of games”.

11. At all times Crown has operated the Crown Rewards loyalty program under rules which we understand have not altered in material respects. The rules provide that points are awarded to members of the program for “play on casino games” (including EGMs and table games) and for “lifestyle spend” (including participating restaurants, hotels and shopping).² However, the loyalty program, and privileges and points accrued under it may be varied, suspended or cancelled by Crown in various circumstances.³
12. The rules also provide for members to “exchange” points for awards, which include pokie credits.⁴ Awards may also include ‘Table Play’ vouchers redeemable for gaming chips,⁵ paying for dining or hotel accommodation, and shopping in Crown’s retail precinct,⁶ including goods or services supplied by certain third parties.⁷ The exchange for awards requires the patron to present the membership card which may only be used by that patron.⁸
13. The terms and conditions of the Crown Rewards program provide that pokie credits exchanged for points are not redeemable for cash.⁹ To complete the exchange under the

² Crown Rewards Rules (1 August 2019) (CRW.510.046.1352), rule 6.1.

³ Crown Rewards Rules, rules 3, 14 and 16.

⁴ Crown Rewards Rules, rule 7.2.1; Crown Rewards program brochure (CRW.001.001.0154), pp 9, 12.

⁵ Although loyalty points earned on EGMs are not redeemable for Table Play vouchers: Crown Rewards program brochure, cl 4 (p 22).

⁶ Crown Rewards program brochure, pp 8-9.

⁷ Crown Rewards Rules, rule 10.

⁸ Crown Rewards Rules, rules 4.3, 7.2.1.

⁹ Crown Rewards program brochure, cl 7 (p 22).

Matchplay program, a member enters the membership card at the EGM and makes a selection through the player menu on the service window, following which the pokie credits are available for use.

14. The structure of the Crown Rewards program in these respects appears compatible with provision in Part 5, Division 5 of the *Gambling Regulation Act 2003* for a “loyalty scheme”, being “a system, used in connection with the operation of gaming machines in approved venues or a casino, in which the players of those gaming machines accumulate bonus, loyalty or reward points from playing the gaming machines”: s 1.3. In particular, consistently with the *Gambling Regulation (Pre-commitment and Loyalty Scheme) Regulations 2014 (Loyalty Scheme Regulations)*:
- (a) the Crown Rewards program enables loyalty points to be accumulated from the purchase of goods or services not related to the playing of gaming machines: reg 24;
 - (b) Crown Rewards points earned from gaming are not treated differently than points earned from lifestyle spend, consistently with the prohibition against gaming points being redeemed for benefits of greater monetary value than for non-gaming points:¹⁰ reg 27; and
 - (c) there is no prohibition on a casino operator (as distinct from other operators) allowing participation in a loyalty scheme that enables loyalty points to be redeemed for gaming machine credits: reg 26.
15. Statements by Crown to patrons of their accrued entitlements are given by reference to the number of points earned, and not an equivalent monetary value. However, for the purpose of exchange for awards, Crown Rewards points have a nominal value of one cent (\$0.01), such that points are required to be exchanged at a rate of 100 points per dollar of a particular amount of pokie credits or other awards.¹¹ The attribution of a nominal value is consistent with, and even explained by, the regulations above requiring

¹⁰ Although we have not been instructed as to the precise detail by which Rewards points are calculated from different gaming activities.

¹¹ Crown Rewards program brochure, pp 9 and 12, and cl 8 (p 22).

points derived from a variety of activities to be treated as equally valuable in redeeming a variety of awards.

16. Crown treats loyalty points in its accounts as liabilities, and exchange of loyalty points as a credit to revenue and reduction of such liabilities.

Counsel Assisting and VCGLR

17. In summary, Counsel Assisting contend in Section 5 of their closing submissions that:
 - (a) “the word ‘sums’ in the definition of [Gross Gaming Revenue] means money or money’s worth”: [1.175];
 - (b) the better view is that loyalty points are “money’s worth”, as being equivalent to or used like money to purchase goods and services: [1.176]; and
 - (c) exchange by the patron of loyalty points entails receipt by Crown of those points, and is receipt of “money’s worth” and therefore a sum within the definition of Gross Gaming Revenue: [1.181].
18. In summary, the position of VCGLR and Mr Glick QC’s opinion state that when a voucher is converted into chips and gambled, the value of the chips “represents” a “sum” received by Crown. The reasoning appears to be directed to the value on the face of the voucher transferred, but also to be premised upon the chips (if not gambled) being exchangeable for cash.

Ernst & Young and Mr Robertson QC

19. We note that we have also been provided with advice given to Crown by Ernst & Young (EY) (dated 22 July 2021) and Mark Robertson QC (dated 29 July 2021).
 - (a) EY concludes that the term “sums” connotes a monetary amount, and (drawing on analysis in the context of GST) redemption of loyalty points involves the exercise of contractual rights rather than receipt of a sum by Crown; and

- (b) Mr Robertson QC concludes that:
- (i) conversion of loyalty points into pokie credits is the mechanism by which Crown discharges its contractual obligation to provide free bets, and does not result in Crown receiving anything in connection with gaming; and
 - (ii) the position of the VCGLR and Mr Glick QC was referable to vouchers which enabled exchange into cashable chips, and he agrees that the gambling with cashable chips would constitute the receipt of a sum by Crown.

Consideration

20. The issue for consideration in this advice is whether the exchange of loyalty points for pokie credits, or the use of such pokie credits, entails the provision by a patron of value which is within “sums... received” by Crown, and which must therefore be included in the calculation of the Gross Gaming Revenue on which casino tax is imposed under the Casino Management Act pursuant to cl 22.1(b) of the Management Agreement (which is ratified by that Act).

Meaning of “sums”

21. The definition of Gross Gaming Revenue is directed to “sums” received by Crown. The term is not defined in the legislation. Its natural meaning is a “quantity or amount of money”.¹² This natural meaning is confirmed by regard to the words which follow in the definition: “including cheques and other negotiable instruments whether collected or not”. Those instruments deal with money, and do not point to an interpretation which embraces other items having value.
22. The submissions of Counsel Assisting assert that “sums” extends beyond money to “money’s worth” (and the submissions proceed to conduct the analysis of casino tax on Matchplay by reference to the notion of money’s worth): Section 5, [1.175]. The basis

¹² *Oxford English Dictionary* (3rd ed), accessed online: “sum” n.1, sense 1.a.; see also sense 1.b. “A quantity or amount of money, gold, silver, etc”, and 1.c. “A quantity of money of a specified amount”; *Macquarie Dictionary* (4th ed): “a quantity or amount, especially of money”.

of the interpretation appears to be a contention that the Management Agreement “draws a distinction” between “sums” in Gross Gaming Revenue from operations, and use of the term “sums of money” in the provisions catering for events constituting force majeure in the original development of the casino (such events not being remediable by expenditure of all reasonable sums of money): cl 2 and 16. However, the two provisions deal with distinct subject matter of development and operations, and the text is not inconsistent.

23. We consider that the text of the Management Agreement does not display any basis for a different or wider than ordinary meaning being given to “sums” in Gross Gaming Revenue.¹³ The submissions of Counsel Assisting cite an unexceptional range of cases and circumstances where value (sometimes styled as “money’s worth”) is recognised as having a requisite character of consideration or capacity for sustaining a transaction, including where loyalty scheme points had value able to be expressed in money so that use of them was regarded as a deductible expense under Canadian tax law. However, the submissions of Counsel Assisting do not demonstrate that the legal effect of transfers of different value in different contexts informs the meaning and operation of “sum” for the purpose of casino tax.
24. In our view, the casino tax on gaming revenue is directed at sums of money received in connection with gaming, not wider adjustment of value between casino operator and patron.
25. We recognise nonetheless that, in principle, a casino operator may enter arrangements (if within the commercial and regulatory limits applicable in the circumstances and according to the jurisdiction in which the casino operates) which enable a patron to provide alternative funds or valuable property for the purpose of gaming.¹⁴ Such arrangements would require further analysis or characterisation as to the amounts

¹³ We note that the Victorian casino tax attaching to “sums” is cast in terms different to the gaming duty payable under the *Finance Act 1997* (UK) which in part is calculable from “the value, in money or money’s worth, of the stakes”: see *London Clubs Management Ltd v Revenue and Customers Commissioners* [2020] UKSC 49; [2021] 2 All ER 333 (*London Clubs*).

¹⁴ Compare the discussion in *London Clubs* of the applicable value in circumstances where “a gambler stakes a diamond necklace with an uncertain market value”: [45]-[48] (Lord Kitchin); cf *Casino Control Act 1991* (Vic), ss 64 and 68.

appropriated to bets made.¹⁵ However, we do not address in this advice the scope of permissible transactions under Victorian law or have instructions for a wider consideration of the structure of transactions in Crown's operations and any assessment of sums received. This advice is directed to the Matchplay program for exchange of loyalty points for pokie credits.

Loyalty points

26. The points awarded under the Crown Rewards program are a creature of the loyalty scheme, and do not have independent operation or extrinsic value. In substance, they represent a calibration of the contractual rights accrued by the patron with Crown which the rules of the Rewards program provide¹⁶ – points are awarded according to a patron's expenditure in certain activities and are able to be exchanged for certain benefits.
27. The contractual rights attaching to loyalty points have constraints. They are obtained from spending, and are not able to be purchased directly. They are not able to be exchanged for cash, and are only otherwise exchangeable by that patron upon being accrued to a sufficient level and according to the rules of the Rewards program with Crown. They may be varied or cancelled in certain circumstances.
28. However, the patron's contractual rights under the Rewards program undoubtedly have value, and the loyalty points are a symbol or measure of that value. Upon Crown awarding points to a patron under the loyalty scheme, it is unsurprising that corporate accounting principles would require Crown to recognise a contingent liability.
29. We have noted above that the attribution of a nominal value of one cent per point is a standardised conversion rate enabling compliance with the regulations precluding inflated benefits for gaming as compared with other activities. That circumstance does not transform the points or the underlying valuable contractual rights into a "sum".
30. We note that certain Rewards points are (on terms) exchangeable for Table Play vouchers which are used to obtain gaming chips that are in turn redeemable for cash.¹⁷

¹⁵ See *London Clubs*, [34]-[35] (Lord Kitchin); *Lipkin Gorman v Karpnale* [1991] 2 AC 548, 575-6 (Lord Hoffman).

¹⁶ We note the similar factual analysis cited by EY as set out in the the Commissioner of Taxation's public ruling with respect to loyalty schemes in the GST context: GSTR 2012/1, [100]-[101].

¹⁷ See paragraph 12 above.

In this regard, such loyalty points might be viewed as carrying an entitlement to money which, upon exchange for another reward (such as pokie credits), is returned to Crown and thereby results in Crown receiving a “sum”. However, in our view, that ignores the conditions on which the contractual rights are held, the election by the patron and the conversion of contractual rights required in order for the patron to have the monetary amount. Until the exchange into Table Play voucher and cashable chips, the patron does not have the money. Exchange of points into pokie credits, which could alternatively have been exchanged into Table Play vouchers convertible to cashable chips, does not itself involve Crown receiving a sum.

Exchange of points for pokie credits

31. As noted, the Crown Rewards program rules provide for a patron to “exchange” points for awards.¹⁸ The language of the regulations with respect to loyalty schemes is “redeem”.¹⁹
32. The exchange or redemption of the points, when carried out, involves conversion or crystallising of accrued contractual rights upon the election of the patron.
33. It may be seen that the points are an intermediate mechanism between accrual of rights and receipt of a benefit. The mechanism of points enables a patron to accrue rights progressively to a level which allows exchange for a benefit, and to choose at a later time which benefit is to be subject of exchange.
34. It is contended in Counsel Assisting’s closing submissions that the exchange of loyalty points for pokie credits involves Crown *receiving* loyalty points from the patron, thus being receipt of a sum for the purpose of casino tax: Section 5, [1.179]-[181].
35. However, in our view, that submission does not accurately characterise the transaction, and is incompatible with the structure and operation of a loyalty scheme and membership. Rather, the exchange or redemption involves a discharge (to the extent of the points being exchanged) by Crown of the contractual obligations incurred at the time of awarding the loyalty points. We agree with the opinion of Mr Robertson QC that the

¹⁸ See paragraphs 12-13 above.

¹⁹ See paragraph 14 above.

conversion of points is the mechanism by which Crown provides the award (relevantly in this case, pokie credits enabling free bets), and Crown does not itself receive a sum within the definition of Gross Gaming Revenue.²⁰ Accounting principles applied by Crown may adjust a liability to reflect the transaction, but are not instructive of whether it has received a sum.

36. The analysis is not altered according to the benefit chosen by the patron. A cost may be incurred by Crown, whether the benefit is pokie credits (which may result in paying out winnings), vouchers for dining at restaurants operated by Crown, or goods and services from certain third parties for which Crown is required to pay.²¹ But the contractual entitlement to the choice of such benefits was accrued at the stage of awarding points under the loyalty scheme, and the exchange of those points for a benefit is the crystallisation of those rights and not receipt by Crown of anything from the patron.
37. The other relevant aspect to the process under the Rewards scheme of effecting an exchange of points for a benefit, such as pokie credits, is that it is anterior to and distinct from the gaming itself (or whichever activity such as dining or shopping is enabled by the benefit). In the case of pokie credits, the exchange of points under the Matchplay scheme may be carried out through the service window on an EGM, and the pokie credits are then available.²² Accordingly, even if loading of the credits may be regarded as part of the conduct of a game,²³ the separate preceding step of exchanging loyalty points does not itself involve receiving anything “from the conduct or playing of games” for the purpose of Gross Gaming Revenue.

VCGLR position of “value” received

38. The correspondence of the VCGLR propounded a position with respect to the treatment of vouchers issued on certain terms by Crown in connection with promotional activities for table gaming, and thus concerned different circumstances than the Matchplay program of exchanging loyalty points for pokie credits. Further, the terms of the vouchers appear to have enabled conversion into cashable chips, whereas pokie credits

²⁰ Robertson QC (28 July 2021), pp 14-17.

²¹ eg a patron using loyalty points to purchase a watch: Counsel Assisting, Closing submissions, Section 5, [1.168].

²² See paragraph 13 above.

²³ cf Counsel Assisting, Closing submissions, Section 5, [1.189].

are not redeemable for cash. Accordingly, the position of the VCGLR and reasoning set out in the opinion of Mr Glick QC do not affect the conclusions we have reached in relation to the treatment of Matchplay program for the purpose of casino tax.

39. The *Casino Control Act 1991* treats chips as “tokens used instead of money for the purpose of gaming”: s 3(1).²⁴ Ordinary cash chips are redeemable for cash, and accordingly represent the patron’s own money. To the extent that the vouchers addressed by the VCGLR enabled patrons to obtain chips which could be redeemed for cash (without gambling), we agree that the gambling with chips exchanged from such vouchers involved receipt by Crown of sums from the conduct or playing of games.
40. The position stated by the VCGLR does not explicitly follow this reasoning or point to the critical feature of the chips as redeemable for cash. It is described indirectly as the *value* of chips gambled *representing* receipt of a sum. For the reasons set out above, that is not a strictly apposite application of the terms of Gross Gaming Revenue. The manner in which the VCGLR’s position was presented may be the result of a broader dialogue with Crown, and also addressing opinions of counsel provided by Crown which specifically considered whether the face value of the vouchers themselves should be included in the calculation of revenue. But once a voucher is converted into a chip, the terms or rights of the patron to deal with the chip (whether redeemable for cash or otherwise) will more directly inform whether a sum is received by Crown for the purpose of casino tax.

Conclusion

41. For the reasons set out above, having considered the submissions of Counsel Assisting and the position of the VCGLR based on advice of Mr Glick QC, in our view the exchange of loyalty points for pokie credits, and use of those pokie credits, do not constitute “sums... received” by Crown for the purpose of calculating Gross Gaming Revenue and casino tax and the Casino Management Act.

²⁴ See *London Clubs*, [33]-[35] (Lord Kitchin).

Dated: 30 July 2021

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