

MinterEllison

2 August 2021

**PRIVATE & CONFIDENTIAL
BY EMAIL**

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Solicitors Assisting the Royal Commission

Dear Colleagues

Royal Commission into the Casino Operator and Licence

1. We refer to your letter dated 24 July 2021, and to the email from Ms Gill on 26 July 2021 confirming that there is a typographical error in that letter, and clarifying that the Commissioner would be assisted by submissions on the following issues:
 - 1.1. *Is it appropriate to conclude that Mr Murphy advised Crown Melbourne how staff engaged in illegal conduct in Malaysia could avoid or reduce the chance of detection?*
 - 1.2. *If yes, is that conduct improper?*
2. For the reasons set out in more detail below, we submit that the responses to these issues are:
 - 2.1 No.
 - 2.2 Not applicable.
- A. Preliminary matters**
3. Given that the subject matter of these submissions covers legal advice provided to Crown, in respect of which legal professional privilege rights belong to Crown, these submissions are provided on a confidential basis, and a non-publication order is sought in relation to them, to the extent necessary to protect that privilege. For the avoidance of doubt, we have no difficulty with these submissions being provided to Crown, or to the directors of Crown.

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The Terms of Reference

4. The permissible scope of the Commission's inquiry is subject to the letters patent establishing the Commission.¹
5. The 24 July 2021 letter asks, by reference to certain assumed facts, whether Richard Murphy engaged in conduct that was "improper". (Similarly, a letter from solicitors for the Commission dated 27 July 2021, relating to advice said to have been given by Minter Ellison about the relationship with the VCGLR, asks whether MinterEllison acted "improperly".) We reject the suggestion of improper conduct at a factual level, for the reasons given in paragraphs 12 to 33 below. However, more fundamentally, the Terms of Reference do not identify, as one of the matters into which the Commission is to inquire or on which the Commission is to report, the possible impropriety of any conduct on the part of MinterEllison, or any of Crown's advisors more generally. Such an inquiry cannot be described as "necessary to satisfactorily resolve" the matters that are within the Terms of Reference (to quote the language in paragraph 10(K) of the Terms of Reference).
6. The prejudice that would flow from the publication² of such a finding is a further and powerful reason against construing the Terms of Reference to permit such a finding to be made, as is illustrated by *Brinsmead v Commissioner, Tweed Shire Council Public Enquiry*.³ The New South Wales Supreme Court held that the Commissioner in that case did not have the power to make findings that the plaintiff had engaged in criminal or professional misconduct. That conclusion was based on the Court's construction of the relevant legislation, the terms of reference and having regard to the reasoning of the High Court in *Balog v Independent Commission Against Corruption*.⁴ Of particular relevance to the present matter, Price J said this (emphasis added):⁵

These legislative provisions suggest that the functions of the first defendant were confined to inquiring, reporting, recommending and in cases of breach of law communicating with the appropriate authority. Confirmation, in my view, that it was not intended that the first defendant have the power to make findings of criminal or professional misconduct is found in the terms of reference ... which provide for the Commissioner "to inquire, report and provide recommendations to the Minister". The defendants point to the width of the terms of reference and make specific mention of clause 5 which provides for any line of inquiry which "warrants mention". **The Commissioner's powers were limited, to my mind, by the governing words of inquire, report and provide recommendations. Absent from the terms is a specific authority to express a finding of criminal liability or professional misconduct. The Commissioner was obliged to exercise all his powers in good faith and be guided by the terms of reference: *Ross v Costigan (No 2)* [1982] FCA 73; (1982) 64 FLR 55.**

It is difficult to conclude, without a specific provision, that the legislature intended to confer upon the Commissioner the power to express a finding of criminal liability on evidence, which may be inadmissible in a subsequent criminal prosecution. Although the legislation does not specify the findings that might be made or oblige that admissible evidence be collected, **a construction which protects the individual from the risk of damage to reputation or prejudice in criminal proceedings is to be preferred. Such a construction of the relevant legislation would not hinder or prevent the Inquiry** from inquiring, reporting and providing recommendations to the Minister on the efficiency and effectiveness of the governance of the Tweed Shire Council.

I do not agree with the further submission of the defendants that the *Balog* principle does not extend to findings of professional misconduct. **The principles in *Balog* in my view reach findings of misconduct beyond the mandate of a commission. The risk of unfair damage to professional reputation is a significant consideration. Such findings are best left to the appropriate professional bodies ...**

¹ *Inquiries Act 2014* (Vic), s 12(b).

² Whether the Report is published is in the hands of the Executive and no assumption can be made that the Executive would withhold publication of the findings: *Inquiries Act 2014*, s 37.

³ (2007) 69 NSWLR 438.

⁴ (1990) 169 CLR 625.

⁵ (2007) 69 NSWLR 438 at 446 [30]-[32].

7. Given the potential reputational consequences that would likely flow from any finding that a legal practitioner has acted improperly (as distinct from a formal finding of professional misconduct), the same analysis should apply even though the Commission would not itself be imposing any legal sanction.

Procedural fairness

8. The manner in which a Royal Commission conducts its inquiry is subject to the requirements of procedural fairness.⁶
9. It is well-established that the fairness of the procedure depends on the nature of the matters in issue.⁷ Here, the proposed finding of “impropriety” on the part of Mr Murphy and/or MinterEllison would amount to serious censure by the Commissioner, which censure would cause significant damage to MinterEllison's and Mr Murphy's professional reputation and public good standing.
10. It follows that fairness in this case required that MinterEllison and Mr Murphy be offered an adequate and reasonable opportunity to address all the allegations, evidence and submissions put forward to support such findings as were proposed.⁸ Because it was not made apparent until very recently that findings of “improper conduct” by MinterEllison or Mr Murphy were within the Commissioner's contemplation, it would be unfair to them now to make a finding that they acted improperly. In particular, we note the following:
- (a) MinterEllison would have participated in the Commission's process in a different way had it known that the firm or Mr Murphy might be the subject of adverse findings of the kind foreshadowed in the second issue. In that regard, we note that the Application for Leave to Appear of Mr Murphy (and other partners of MinterEllison who had received notices to attend) was refused by Order dated 3 June 2021. MinterEllison was only granted conditional leave to appear by Order dated 10 June 2021, with such leave limited to examining witnesses giving evidence on behalf of MinterEllison and witnesses giving evidence that concerned work completed by MinterEllison for Crown Resorts Limited or Crown Melbourne Limited. We were never made aware of any witnesses, other than Mr Murphy, giving evidence concerning the work completed by MinterEllison.
 - (b) Despite the Commissioner's statement on 24 March 2021 that witnesses "will be asked to prepare a written statement and will be guided as to the subject matter with which their written statements should deal",⁹ Mr Murphy was not given the opportunity to provide a written statement addressing facts relevant to a possible finding of "improper conduct".
 - (c) During the course of his examination, it was not put to Mr Murphy that he (or MinterEllison) had engaged in conduct that was improper, wrongful or that may amount to professional misconduct. Nor was it put to him that evidence before the Commission might allow such a finding to be made.
 - (d) Counsel Assisting's closing submissions did not suggest any impropriety or professional misconduct on the part of MinterEllison or Mr Murphy.
 - (e) MinterEllison has now been given a matter of days to respond to very serious allegations, which, if found to have been made out, would have significant adverse reputational and professional consequences and (even if they fell within this Commission's Terms of Reference) were not put to Mr Murphy in advance of, or during, his examination.

B. The advice provided to Crown in relation to Malaysia

11. The second paragraph of your letter of 24 July 2021 says:

'Mr Murphy's advice was to the effect that, according to Malaysian law, it was illegal for Crown staff working in Malaysia to promote foreign casinos.'

⁶ *Inquiries Act 2014* (Vic), s 12(a).

⁷ *Kiao v West* (1985) 159 CLR 550 at 585 (Mason J).

⁸ See *Mahon v Air New Zealand Ltd* [1984] AC 808; *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

⁹ Transcript, 24 March 2021, P.10.

12. At the outset, we note that Mr Murphy did not purport to advise Crown on Malaysian law, nor was he qualified to do so. Advice regarding laws in various overseas jurisdictions (including Malaysia) was obtained by Crown from local lawyers operating in those jurisdictions.¹⁰ Mr Murphy gave evidence that he could not recall the name of the Malaysian law firm that provided advice to Crown,¹¹ but the documents show that the relevant advice regarding Malaysian law was obtained from Shearn Delamore & Co (**Shearn Delamore**),¹² a leading Malaysian law firm.

Advice leading to the closure of the Malaysian office

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15. Crown Melbourne provided Mr Murphy with copies of the various advices that it had obtained regarding laws in overseas jurisdictions (including the November and December 2016 Shearn Delamore advice regarding Malaysian law) for the purpose of Mr Murphy assisting Crown to prepare a proposed operating model for Crown's VIP business.¹⁷ Crown also provided Mr Murphy with its summary of various local law advices, including the summary document¹⁸ sent to Mr Murphy on 3 February 2017 prepared by Jan Williamson.¹⁹
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16. Mr Murphy's role was to assist Crown to understand the risks involved in its overseas operations against the background of the local law advices Crown had received.
17. The draft VIP operating model document,²⁰ which Mr Murphy assisted Crown Melbourne to develop against the background of the local law advices that it had received, appropriately warned that there was uncertainty in the potential application of local laws to Crown's activities, arising in part from the wording of the relevant statute and the absence of case law. The draft document recognised *'varying degrees of risk and uncertainty as to the application of the local law and unpredictability regarding its application'*. Accordingly, the draft document recommended the closure of various of Crown's overseas offices (including in Malaysia) and the relocation of Crown's staff in those jurisdictions to Hong Kong. Mr Murphy gave evidence that he believed that,

¹⁰ Transcript P.2836 at lines 26 to 32.

¹¹ Transcript P.2837 at lines 7 to 10.

¹² MEM.5005.0003.2559, MEM.5002.0006.9070, MEM.5001.0004.2325, MEM.5001.0002.9858, MEM.5000.0002.3607, MEM.5002.0010.2956.

¹³ MEM.5002.0006.9070 at .9074.

¹⁴ MEM.5002.0006.9070 at .9073 and .9074.

¹⁵ MEM.5002.0006.9070 at .9074.

¹⁶ MEM.5002.0006.9070 at .9072.

¹⁷ MEM.5000.0003.2263.

¹⁸ MEM.5001.0003.6605.

¹⁹ Transcript P.2858 at line 21 to P2862 at line 37; MEM.5001.0003.6605_.6607.

²⁰ MEM.5000.0003.2263.

ultimately, Crown closed several offices, including its office in Malaysia.²¹

Proposal to re-engage staff in Malaysia

18. The minutes of a Crown Board meeting held on 31 October 2018 record that:
- (a) management was then considering a proposal to re-engage local staff in Malaysia in non-gaming related meetings and dealings with local customers; and
 - (b) the remuneration packages of local staff were to be structured so as not to incentivise non-compliant conduct (that is, the promotion of gaming at Crown casino).²²
19. Those minutes record that Mr Murphy provided some initial observations on the proposal, which,
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20. The same minutes record that Crown's directors did not endorse management's recommendation, and instead recommended that additional advice be obtained on the risks and mitigants of pursuing such a strategy.
21. After that Board meeting, in December 2018:
- (a) advice was sought from Hakluyt, a strategic advisory firm, about any political or societal changes that could affect the Malaysian government's attitude towards Crown's operations in Malaysia or, possibly, the interpretation or enforcement of relevant laws; and
 - (b) a telephone conference was held with Shearn Delamore, which was attended by Mr Murphy, to understand whether Shearn Delamore still agreed with the advice that the firm had given Crown Melbourne in November and December 2016, summarised in paragraphs 13 to 14 above. Shearn Delamore confirmed during that conference that they adhered to that advice and elaborated on it further (the **Malaysian law advice**).
22. A summary of the Shearn Delamore Malaysian law advice as confirmed by the firm in December 2018 was incorporated into a letter from Mr Murphy to Mr Joshua Preston of Crown dated 16 April 2019 as follows:²⁴
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23. Mr Murphy's summary of the Shearn Delamore Malaysian law advice was accurate.

²¹ Transcript P.2845 at lines 8 to 10.

²² CRL.506.007.5589 at 5597.

²³ Transcript P.2865 at lines 33 to 36.

²⁴ MEM.5000.0002.7837 at .7843.

24.

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the letter discussed the socio-political risks that were the subject of the Hakluyt advice. Mr Murphy's letter set out various measures that might be implemented by Crown to reduce those risks, but his advice ultimately concluded: '*... it is for Crown to assess whether the potential benefit of local staff resuming work in Malaysia outweighs the residual risk of enforcement action.*'²⁵

27.

Following Mr Murphy's letter to Crown of 16 April 2019, further advice was sought and obtained by Crown regarding its overseas operations, including advice from Shearn Delamore and Herbert Smith Freehills.

C. Submissions

28.

It would be wrong to conclude that Mr Murphy advised Crown Melbourne how staff engaged in illegal conduct in Malaysia could avoid or reduce the chance of detection.

29.

A similar proposition was put to Mr Murphy during his evidence in connection with his advice of 16 April 2019:²⁶

'COMMISSIONER: Just so I follow, the decision was really, on one side it is likely illegal, but on the other side, if you keep a really low profile you are not going to get caught. So your choice is act illegally, but if you do it in a sort of sophisticated way, the chances are you won't get prosecuted and the chances are your staff won't get prosecuted either, but it's not to say this is legal conduct?'

30.

Mr Murphy rejected that proposition:

'A. No, Commissioner, that's not what this is saying.'

31.

Mr Murphy in his evidence made clear that:

(a) He did not understand the activities of Crown's staff to be illegal

Rather, Mr Murphy understood, based on the advice of local lawyers such as Shearn Delamore in Malaysia, that Crown's activities in overseas jurisdictions were within the law.

²⁵ The closing submissions of counsel assisting, paragraph 2.27, observed that the risk of staff being detained 'was clearly signalled in the legal advice'.

²⁶ Transcript P.2875 at lines 38 to 46.

By way of example, Mr Murphy's understanding that Crown was operating in accordance with the requirements of the laws in overseas jurisdictions was confirmed in the following evidence:²⁷

'COMMISSIONER: At any stage did you say to your client that "What you are doing in these jurisdictions either is, or may well be illegal, and you are an organisation where probity and reputation and proper behaviour is of utmost importance, just don't do it"?'

A. No, I didn't, Commissioner.

COMMISSIONER: Why not?

A. Because my understanding of what they were doing in those jurisdictions was in accordance with local law.'

32. In short, Mr Murphy did not 'advise Crown Melbourne how staff engaged in illegal conduct in Malaysia could avoid or reduce the chance of detection'.
33. Mr Murphy's advice to Crown Melbourne regarding matters related to the engagement and conduct of staff in Malaysia was careful and appropriate. Mr Murphy took into consideration the Shearn Delamore Malaysian law advice (as well as the socio-political advice provided by Hakluyt) and provided warnings to Crown where there were any areas of uncertainty. Mr Murphy's conclusions were focussed on risk because the premise of the conclusions was that any activities would be lawful (but there were nevertheless risks).
34. For the above reasons it is submitted that the advice which Mr Murphy provided was not 'improper'.
35. Should the Commission be assisted by any further material regarding this topic, please let us know.

Yours faithfully
MinterEllison

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²⁷ Transcript P.2888 at lines 19 to 30.