Our Ref: Joshua Preston
Direct Phone: [redacted]
Document No: LEGAL_315483.1

1 December 2017

Ms Cate Carr
Executive Director
Liquor, Gaming and Racing
Office of Liquor, Gaming and Racing
P O Box 18055
COLLINS STREET EAST VIC 8003

By email: [redacted]

PRIVATE & CONFIDENTIAL
BY EMAIL

Dear Cate

Payment of casino tax on poker tournament entry fees

We refer to previous correspondence in relation to this matter, including the letter of the Minister for Consumer Affairs, Gaming and Racing of 3 March 2017 and we apologise for our delay in responding to you.

We note the State's position that entry fees charged to players to participate in poker tournaments fall within the definition of 'Gross Gaming Revenue' for the purposes of calculating tax payable in accordance with s 22 of the Casino (Management Agreement) Act 1993 (Vic).

Crown Melbourne Ltd (**Crown**) respectfully disagrees with this position.

Crown maintains that entry fees for poker tournaments fall outside the definition of 'Gross Gaming Revenue'. This has been Crown's clear and consistently communicated view ever since the Victorian Commission for Gambling and Liquor Regulation (**VCGLR**) first indicated a change of its position regarding the treatment of such entry fees in around September 2008.

We think it is important that the State and the VCGLR are aware of the detail of Crown's position regarding this issue. For this reason, we have enclosed the attached submission, which has been prepared by our external counsel, Minter Ellison.

In the course of analysing the issue of whether the entry fees fall within the definition of "Gross Gaming Revenue", several other issues have arisen, such as:

- whether the 'buy in' amounts which players contribute to the pool of funds, and which are returned to the winning player in their entirety, can be said to have been 'received' by Crown within the meaning of the definition of 'Gross Gaming Revenue'. It appears to us that they do not, because they are held on trust by Crown and the beneficial interest in them is received by the winning player, not Crown. The implication of this is that these amounts may need to be 'backed out' of the receipts for the purposes of the Gross Gaming Revenue calculation.

- the apparent inconsistency of treatment as between Crown and others who host poker tournaments, such as the Australian Poker League, including the fact that other hosts appear to be conducting tournaments in which a substantial portion of the 'entry fees' paid by players in fact go into the prize pool, such that it can be said that the winner 'derives a percentage or share of the amount or amounts wagered' from the game, contrary to 2.3.1(j) of the Gambling Regulation Act 2003 (Vic).

This qualification does not however apply to "all sums paid out as winnings" as winnings paid out are not conditioned by the words "by the Company". In contrast to "all sums received by the Company".

We would welcome the opportunity to discuss these issues and the attached submission with you and your representatives in further detail, should that be of assistance.

Yours sincerely

Barry Felstead
Chief Executive Officer – Australian Resorts

Encl

MinterEllison

SUBMISSION – THE PROPER CONSTRUCTION OF "GROSS GAMING REVENUE"

Part A: Executive summary

1. The purpose of this submission is to demonstrate that entry fees levied by Crown in respect of poker tournaments do not form part of "Gross Gaming Revenue" on which tax is payable under the *Casino Management Agreement Act* 1993 (Vic) ("the Act").

2. This conclusion is dictated by the language of the definition of "Gross Gaming Revenue". Clause 2 of the Act sets out the definition of "Gross Gaming Revenue". The definition refers to "sums ... received ... from the conduct of playing of games". That expression must be construed having regard to the context in which it appears.

3. Examination of that context reveals that the only sums that may be applied to reduce "Gross Gaming Revenue" and thus tax liability are those sums paid out "as winnings". It follows that there is a relationship of interdependency between "sums ... received" and "sums paid out".

4. Having regard to this interdependency, sums which bear no relationship to the sums paid out "as winnings" fall outside the scope of the provision. For the reasons outlined in detail in Part B, the phrase "sums ... received ... from the conduct or playing of games" must be taken to mean only those sums that are risked or otherwise enter the pool of funds from which winnings are paid out.

5. Entry fees are not of that character. They are not staked or risked, and do not enter the pool of funds from which winnings are paid out. Accordingly, they are not caught by the definition of "Gross Gaming Revenue" and no tax is payable on them.

6. The construction outlined above is also consistent with:

   (a) the Victorian Commission for Liquor and Gaming's original treatment of entry fees, under the original approved rules for poker at the Melbourne Casino, as not forming part of "Gross Gaming Revenue", which treatment speaks to the intent underlying the definition; and

   (b) the distinction drawn in the *Casino Control Act* 1991 (Vic) between the "management and supervision of the conduct of gaming" and the "conduct of gaming". It is the latter, narrower phrase which is deployed in the "Gross Gaming Revenue" definition. Having regard to the text and context of the provision, administrative entry fees lie outside the scope of this phrase.

Part B: The proper construction of "Gross Gaming Revenue"

1. An agreement between the State and Crown dated 20 September 1993 is embodied[1] in the *Casino (Management Agreement) Act* 1993 (Vic).

2. Clause 2 of the agreement defines "Gross Gaming Revenue" as follows:

> "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** ....
>
> [Emphasis added.]

[1] The agreement is set out in Sch 1 to the Act.

3. The Minister for Consumer Affairs, Gaming and Liquor Regulation has written to Crown stating that she has received advice that entry fees levied by Crown in respect of poker tournaments fall within the definition of "Gross Gaming Revenue". That advice must rest on a view that the entry fees are captured by the expression "sums ... received ... from the conduct or playing of games". The question with which this submission is concerned is whether that is so.

4. It is a fundamental principle of construction that an expression in a statute must be construed in context. As the High Court observed in *CIC Insurance Ltd v Bankstown Football Club Ltd*[2], the "modern approach to statutory construction":

> insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise ... .

5. It would therefore be wrong in approach, and contrary to authority, to set about construing "sums ... received ... from the conduct or playing of games" in the abstract. Rather, in working out the legal meaning to be attributed to those words, consideration must be given to how they fit into the definition of "Gross Gaming Revenue" considered as a whole.

6. When read as whole, the first thing to notice about the definition is that the only sums that may be applied to reduce "Gross Gaming Revenue" are sums paid out "as winnings". If a sum is not paid out "as winnings" — for example, if it is applied to defray expenses — it cannot be applied to reduce "Gross Gaming Revenue".

7. The next thing to notice is that it is evident that the definition of "Gross Gaming Revenue" sets up a relationship of interdependency between:

   (a) "sums ... received ... from the conduct or playing of games"; and

   (b) "sums paid out as winnings ... in respect of such conduct or playing of games"

8. If it be necessary to identify a specific textual basis for that relationship, the word "less", which is interposed between the two concepts, plainly ties them together. In addition, the function of the word "such", in the expression "sums paid out in respect of such conduct or playing of games", is to direct attention back to the conduct or playing of games from which sums are received.

9. To notice the relationship between "sums ... received" and "sums paid out", and to notice that the only sums that may be applied to reduce "Gross Gaming Revenue" are those paid out "as winnings", is to have regard to context. A construction should be given to "sums ... received ... from the conduct or playing of games" that gives effect to that context[3].

10. If the expression "sums ... received ... from the conduct or playing of games" be read as capturing sums that bear no relationship to the sums paid out "as winnings", a dissonance results. The textual symmetry of the definition is upset. A construction that is more logical and textually symmetrical is to read "sums ... received ... from the conduct or playing of games" as referring to those sums that enter the pool of funds from which winnings are paid out. Put differently, unless staked or risked, there can be no prospect of winnings, and the nexus mandated by the provision is not present. Such a construction results in a definition of "Gross Gaming Revenue" that captures the difference between sums paid into the pool of funds from which winnings are paid out and sums paid out of that pool as winnings — a result that accords with common sense.

11. To illustrate with a simple example, if in a particular poker tournament the total of the sums paid into the pool of funds from which winnings are paid out is $50,000, with the total of the sums paid out as winnings being $40,000, tax will be payable on $10,000, being the difference between the total of the sums paid into the pool and the total of the sums paid out. That tax is payable in such a scenario makes sense.

12. To vary the example slightly, if the total of the sums paid into the pool of funds from which winnings are paid out is $50,000, and the total of the sums paid out as winnings is $50,000 (that

---

[2] (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

[3] *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [59] per French CJ, Hayne, Kiefel and Nettle JJ ("To ignore context ... is calculated to lead to error").

is, all sums paid into the pool are paid out), no tax will be payable. That is logical and appropriate because no profit has been made.

13. By contrast, if "sums ... received ... from the conduct or playing of games" is construed in the abstract, without regard to context, illogical and unfair results ensue. Suppose, for example, that $10,000 is levied in non-refundable entry fees which are not staked and which do not enter the pool of funds. These funds are instead used to cover administrative expenses associated with the running of the tournament. Participants separately provide stake moneys, with the result that $50,000 enters the pool of funds from which winnings are drawn, with the total of that amount paid out to the winner. If the $10,000 is treated as forming part of the "sums ... received", Crown ends up paying tax, not on any profit (for none has been made), but on a sum that has been expended on defraying costs associated with hosting the tournament.[4]

14. For these reasons, "sums ... received ... from the conduct or playing of games" should be construed as those sums that enter the pool of funds from which winnings are paid out. Such a construction conforms to the relationship of interdependency manifest on the face of the statute. Such a construction also conforms to the consideration that it is only those sums paid out "as winnings" that can offset "sums ... received". And such a construction has the incidental benefit of according with logic and fairness.

15. Applying this construction to the entry fees, those fees are not "sums ... received from the conduct or playing of games". They form no part of the pool of funds staked or risked, and from which winnings are paid out. Accordingly, they do not form part of "Gross Gaming Revenue" and no tax is payable on them.

Other observations

16. We make the following additional observations, which are consistent with the construction put forward above:

    (a) The Victorian Commission for Gambling and Liquor Regulation first resolved that the game of poker be approved to be played at the Melbourne Casino on 20 March 1997. The approved Rules were gazetted on 24 April 1997[5]. Rule 23.9 provided as follows:

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

    Although that rule no longer forms part of the existing approved Rules, it does speak to the intent underlying the definition of "Gross Gaming Revenue", which has not relevantly changed since the original Rules were gazetted. In other words, that the Commission approved this rule, when the playing of poker was first approved at the Melbourne Casino, indicates that it was the never the intention that entry fees form part of "Gross Gaming Revenue".

    (b) A distinction is drawn in the *Casino Control Act* 1991 (Vic), to which it is relevant to have regard[6], between the "conduct of gaming" and the "management and supervision of the conduct of gaming"[7]. This demonstrates that not every activity which bears a relationship with the playing of a game amounts to the "conduct ... of games". It demonstrates that there is an outer limit to that concept. The outer limit indicated by the text of the "Gross Gaming Revenue" read as a whole is that explained above.

17. Further, we are instructed that, in some tournaments, Crown makes its own contribution to the pool of funds from which winnings are drawn — that is, Crown "tops up" the existing prize pool comprising the buy-in amounts by making its own contribution. The entire prize pool is then paid out to the winner of the tournament. Although this submission is concerned with the issue of whether entry fees fall within the words "sums ... received ... from the conduct or playing of

[4] Illogical and unfair results ensue even where the entirety of the entry fees levied is not defrayed on costs associated with hosting a tournament. If the example given in [13] is varied so that $10,000 in entry fees is levied, with hosting costs totalling $8,000, so that $2,000 is retained, tax on the $10,000 at 21.25% (see the Act, Sch 10, cl 3.2(c)) will be $2,125. Thus, the total amount of tax payable will be more than the sum retained.

[5] Victorian Government Gazette, No S44 (24 April 1997).

[6] See s 7 of the *Casino (Management Agreement) Act*.

[7] See the definition of "operations" in s 3 of the *Casino Control Act*.

games", we note that it would appear that contributions made to the prize pool by Crown in the circumstances just described constitute "sums paid out as winnings" and thus can be applied to reduce "Gross Gaming Revenue".

18. Similarly, we are instructed that Crown will sometimes pay cash prizes to the winners of trade lotteries. Participation in these trade lotteries turns on the playing of games in that entry forms are awarded on the basis of a patron's gaming activity. The payment of cash prizes to the winners of such trade lotteries would appear to fall within the words "sums paid out as winnings". Although those sums must be "in respect of" the conduct or playing of games at the Melbourne Casino, the words "in respect of" are words of broad import. The cash prizes for the trade lotteries are referable to the playing of games in that participation in them turns on a patron's gaming activity in the manner described above. That is a sufficient connection with the playing of games to satisfy the words "in respect of". Accordingly, we note that it would appear that these sums, like the contributions of Crown to poker tournament prize pools, may be applied by Crown to reduce its "Gross Gaming Revenue".

1 December 2017