RE: 141219 Commissions Advice (003).pdf

From: Melanie McGrail <[redacted]>
To: Glen Ward <[redacted]>, Joshua Preston <[redacted]>
Cc: Richard Murphy <[redacted]>, Huw Whitwell [redacted]
Date: Fri, 23 Mar 2018 13:52:20 +1100
Attachments: 3573_001.pdf (461.34 kB)

Hi Glen

Please see attached Neil Young's advice dated 23 December 2013.

Cheers
Melanie

Melanie McGrail | Executive Assistant to:
Barry Felstead (Chief Executive Officer – Australian Resorts)
Joshua Preston (Chief Legal Officer – Australian Resorts)
Lonnie Bossi (Chief Operating Officer)
Alan McGregor (Chief Financial Officer – Australian Resorts)

CROWN
PERTH

Great Eastern Highway, Burswood
PO Box 500 Victoria Park
Western Australia 6979
[redacted]
W crownperth.com.au

From: Glen Ward [mailto:[redacted]
Sent: Friday, 23 March 2018 9:51 AM
To: Joshua Preston
Cc: Richard Murphy; Huw Whitwell
Subject: RE: 141219 Commissions Advice (003).pdf

Hi Josh

Sorry to be a pain, but you will see that Neil's advice refers back to an earlier advice (23 December 2013). I don't suppose you have that one to hand, too?

Cheers – Glen

Glen Ward
Partner
[redacted]
MinterEllison Rialto Towers 525 Collins Street Melbourne VIC 3000
minterellison.com Follow us on LinkedIn and Twitter

From: Joshua Preston [mailto:[redacted]
Sent: Friday 23 March 2018 12:02 pm
To: Glen Ward <[redacted]>
Cc: Richard Murphy <[redacted]
Subject: 141219 Commissions Advice (003).pdf

Morning Glen,

See attached as discussed. Apologies for the delay in forwarding it through to you.

If possible can you please consider it and let me know when the earliest possible time might be to discuss it with you.

Cheers
Josh

Joshua Preston
Chief Legal Officer – Australian Resorts

CROWN RESORTS

[redacted]

W crownresorts.com.au

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IN THE MATTER OF THE *CASINO (MANAGEMENT AGREEMENT) ACT 1993* AND THE PAYMENT OF CASINO TAX ON FREE PLAY VOUCHERS

JOINT MEMORANDUM OF ADVICE

A. Introduction

1. We are asked to advise Crown Melbourne Ltd (**Crown**) about its liability to pay "casino tax" on "Free Play" vouchers and chips which are distributed by Crown as part of its promotional activities.

2. Crown is the licensed operator of Crown Casino. It was formerly known as Crown Ltd.

3. We are briefed with a memorandum of advice on the same issue given by senior counsel on 6 September 2001. The conclusion reached by senior counsel in that advice was that "Free Play" vouchers and chips ought not to be included in the calculation of Gross Gaming Revenue for the purposes of determining Crown's liability in respect of the payment of casino tax.

4. Since that date, there have been changes to both the legislation that governs Crown's activities and to the procedures adopted by Crown for the issue of "Free Play" vouchers and chips. In light of those changes, we are asked to review the earlier advice and to advise on the following issues:

   (a) Should the face value of "Free Play" vouchers and chips be included in the calculation of Gross Gaming Revenue for the purposes of determining Crown's liability in respect of the payment of casino tax?

   (b) If the answer to question (a) is "no", may Crown bring a claim against the State for recovery of any amounts paid that are attributable to the inclusion in Gross Gaming Revenue of the face value of "Free Play" vouchers and chips?

   (c) Are there any restrictions or limitations as to quantum or time or other matters that are relevant to a claim by Crown against the State?

B. Casino Tax

5. Crown operates the casino in accordance with the provisions of the *Casino (Management Agreement) Act 1993* (the **Management Act**). That Act ratifies the Management Agreement for Crown Casino. The effect of ss 6-6I is that the Management Agreement, and the Deeds of Variation thereto, take effect as if they had been enacted by the Management Act. Section 7 of the Management Act provides that if a provision of the Management Agreement is inconsistent with the *Casino Control Act 1991*, the provision of the Management Agreement prevails and the application of the *Casino Control Act 1991*, in relation to the Crown Casino, is modified accordingly.

6. Sections 112A, 113 and 114 of the *Casino Control Act 1991* impose various taxes, charges and levies upon Crown as the operator of Crown Casino. However, these provisions are effectively supplanted by section 11 of the Management Act. Section 11(1) provides that the payments to the State for which provision is made by Part 4 of the Management Agreement are taxes, fees, charges and other payments payable by Crown in lieu of taxes and levies payable under sections 112A, 113 and 114 of the *Casino Control Act 1991*.

7. Clause 22.1 of the Management Agreement (as varied) provides that while the casino licence remains in force, Crown must pay, among other things, "casino tax" to the State each month. The amount of the casino tax is calculated as a specified percentage of the Gross Gaming Revenue for the month in question.

8. Gross Gaming Revenue is defined in the Management Agreement (as varied) 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 of the total of all sums paid out as winnings during that period in respect of such conduct or playing of games but excluding any Commission Based Players' Gaming Revenue.*

C. Free Play vouchers and chips

9. "Free Play" vouchers and chips are distributed by Crown as a promotional activity.[1] The vouchers and chips are physical items that entitle the holder to exchange them for chips at a gaming table or at the Cage for chips or cash.[2]

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1 In its operations, Crown distinguishes "Free Play" vouchers and chips from the "chip purchase vouchers" referred to in ss 64 and 68 of the *Casino Control Act 1991*. "Chip purchase vouchers" are a document that

10. Those promotional activities are designed to bring attention to various games and to encourage participation in gaming activities. "Free Play" vouchers and chips are issued by Crown to players or potential players at no charge to the players or potential players.

11. In 2001, the procedure for the use of "Free Play" vouchers was as follows. Upon presentation of a voucher, free play chips were handed to the player. Free play vouchers were not redeemable for cash and could only be exchanged for free play chips. Like the vouchers, free play chips could not be exchanged for cash and could only be used for wagering and would remain in play until they were lost by the player. When free play chips were used to place a winning bet, the winnings were paid in standard chips. Crown's experience and expectation was that customers would continue placing bets with free play chips until they were lost.

12. Two changes have been made to the procedures governing Free Play vouchers and chips since 6 September 2001.[3] First, as noted above, Free Play vouchers can be presented at a gaming table for chips or presented at the Cage for chips. Secondly, Free Play vouchers and chips can be exchanged for cash.

D. The inclusion of "Free Play" vouchers in Gross Gaming Revenue

13. The first question we are asked is whether the face value of "Free Play" vouchers and chips should be included in the calculation of Gross Gaming Revenue for the purposes of determining Crown's liability in respect of the payment of casino tax.

14. As noted above, senior counsel provided advice on 6 September 2001 about the inclusion of Free Play vouchers and chips in the calculation of Gross Gaming Revenue. Notwithstanding that advice, we are instructed that Crown has continued to include Free Play vouchers and chips in the Gross Gaming Revenue for the purposes of the calculation of casino tax.

Crown asks a player to sign to authorize and record the deduction of the player's money from his or her deposit or credit account held with Crown, for the player to obtain chips to play at the table. However, we observe that in the direction from the Victorian Commission for Gambling Regulation dated 11 April 2011, the Commission contemplate that "Free Play" vouchers may take the form of a "chip purchase voucher" in that it directed that Crown "not issue, use or accept from patrons free play chip purchase vouchers and free play chips that are not redeemable for money in accordance with section 64(g)(iii) of the Act."

2 We are briefed with numerous examples of "Table Play Vouchers", "Promotional Coupons" and "Bonus Table Play" vouchers. The conditions of the "Table Play Voucher" include the following: "Present this voucher at any table game. The voucher will be exchanged for cash chips to the value of $5. No partial redemption."

3 We have not been asked whether the issue by Crown of "Free Play" vouchers and chips is consistent with s 64(1)(c) of the *Casino Control Act* that provides that "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." We express no opinion on that subject.

15. In our opinion, the answer to the question remains "no".

16. We confirm the advice given by senior counsel that "Free Play" vouchers and chips that are issued and subsequently recovered by Crown do not constitute a "sum … received" in any period by Crown from the conduct or playing of games within the casino. Unlike standard chips,[4] "Free Play" vouchers and chips do not represent a sum of money to Crown. Crown does not receive any sum from the player for the "Free Play" vouchers and chips. That conclusion accords with the ordinary meaning of "revenue" as income that arises in the course of ordinary activities of an entity[5] and with the definition of that concept in *Statement of Accounting Concepts: Definition and Recognition of the Elements of Financial Statements* (SAC4, 1995). Crown received no income or inflow or other financial enhancement from the issue of "Free Play" vouchers and chips.

17. While the fact that "Free Play" vouchers and chips may now be exchanged for cash makes them more like a negotiable instrument, it remains our view that they are not negotiable instruments in the relevant sense envisaged by the Management Agreement. It is necessary to consider the definition of "Gross Gaming Revenue" more closely. The definition is concerned to identify "sums … received" by Crown from the conduct or playing of games. The express inclusion of cheques and negotiable instruments serves to remove any doubt that sums due to Crown as payee of an instrument must be brought to account. That emphasises, however, that the definition of "Gross Gaming Revenue" is concerned to identify sums received by Crown, including by way of cheques and negotiable instruments, where Crown is the holder (as payee) of the negotiable instrument. Even assuming a "Free Play" voucher is a negotiable instrument, it would be one in which the player (not Crown) is the holder or payee of the negotiable instrument. It remains the case that Crown receives nothing from the negotiable instrument.

E. Proceedings to recover amounts paid due to inclusion of "Free Play" vouchers in Gross Gaming Revenue

18. Since at least 2001, Crown has included the face value of "Free Play" vouchers in Gross Gaming Revenue, on which its pays casino tax.

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4 *Casino Control Act 1991*, s 64(1)(c).

5 *Chemeq Ltd v Shepherd Investments International Ltd* (2007) 62 ACSR 359 at [151]-[152] (WASCA).

19. The next question we are asked is whether Crown may bring a claim against the State for recovery of any amounts paid that are attributable to the inclusion in Gross Gaming Revenue of the face value of "Free Play" vouchers and chips.

20. In our opinion, the answer is a qualified "yes".

21. There are no statutory procedures set out in either the *Casino Control Act 1991* or the Management Act for obtaining refunds from the State of taxes, charges or levies paid.

22. There are three possible bases on which a claim might be made at common law.

    (a) First, a payer will be entitled prima facie to recover monies paid under a mistake if it appears that the monies were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the monies or that the payee was legally entitled to payment of the monies.[6]

    (b) Secondly, a payer may recover payments made that were not legally payable where they were extracted from the payer by an officer of the executive acting under colour of legislative authority.[7]

    (c) Thirdly, it is possible that the absence of any legitimate basis for retention of the money by the State might itself ground the claim without the need to show any causative mistake on the part of the payer or duress in demands for payment made by the State.[8] While this ground has been established in England, it has not yet been recognised in Australian law.

23. Which, if any, of these grounds might be available to Crown requires further factual investigation. As to mistake, did Crown make a mistake in making payments of casino tax which included an amount calculated by reason of the inclusion of the face value of "Free Play" vouchers and chips in its Gross Gaming Revenue? Why did Crown continue so to pay casino tax after 6 September 2001? As to duress, by what process did Crown make the payments? To what extent was the Commission or the State involved in making demands of Crown that it include "Free Play" vouchers and chips in Gross Gaming Revenue? To what extent can it be said that

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6 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378.

7 *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 276; *Mason v New South Wales* (1959) 102 CLR 108 at 115, 117, 126, 127, 129, 145-146; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 41-42.

8 See *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 67, 89, 103; *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70.

Crown paid the sums voluntarily? Those investigations might show that no mistake was made by Crown and that no duress was applied to it. If so, that would leave Crown with an as yet untested basis for recovery based on the third identified cause of action, the so-called *Woolwich* principle.

24. So, while there are common law causes of action available to recover moneys paid to the State, whether or not any of them is available to Crown in this case depends on the results of further factual investigations.

F. Restrictions or limitations on recovery

25. If a cause of action is available to Crown, it is then necessary to consider any applicable limitation periods. We first observe that none of the time periods or processes for recovery set out in the *Taxation Administration Act 1997* applies because casino tax is not paid under a "taxation law" (as defined).

26. Section 20A of the *Limitation of Actions Act 1958* provides as follows:

> **20A Limitation on proceeding for recovery of tax**
>
> (1) Subject to subsection (2), a proceeding for the recovery of money paid by way of tax or purported tax or by way of an amount that is attributable to tax or purported tax under a mistake (either of law or of fact) or under colour of authority must be commenced—
>
> (a) within 12 months after the date of payment; or
>
> (b) in the case of a proceeding in accordance with another Act that provides for the refund or recovery of the money within a longer period, within that longer period.
>
> (2) Despite anything to the contrary in any other Act, if money paid by way of tax or purported tax or by way of an amount that is attributable to tax or purported tax is recoverable because of the invalidity of a law or provision of a law, a proceeding for the recovery of that money must (whether the payment was made voluntarily or under compulsion) be commenced within 12 months after the date of payment.
>
> (2A) Subsections (1) and (2) apply to a proceeding between parties of any kind.
>
> (3) Subsection (2) does not apply to a proceeding for the recovery of money that, assuming that the law or provision of a law imposing or purporting to impose the tax had been valid, would nevertheless have represented an overpayment of tax or of an amount that is attributable to tax, if that law provides for the refund or recovery of the money within a period longer than 12 months after the date of the payment.
>
> (4) An order may not be made under this or any other Act enabling or permitting a proceeding to which subsection (2) applies to be commenced after the expiration of the period referred to in that subsection.
>
> (5) In this section—

law means—

(a) an Act; or

(b) a subordinate instrument within the meaning of the **Interpretation of Legislation Act 1984**; or

(c) any other instrument that—

(i) applies as a law of Victoria; or

(ii) is made under, and is enforceable in accordance with, the provisions of an Act or of an instrument referred to in paragraph (b) or subparagraph (i);

proceeding includes—

(a) seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injunction; or

(b) seeking any order under the **Administrative Law Act 1978**;

tax includes fee, charge or other impost.

27. The interpretation and application of the section in its present form is largely untested.[9] If sub-section (1) applies to the proceeding, then Crown will only be able to recover amounts paid within 12 months of commencing the proceeding. (We see nothing in the *Casino Control Act 1991* or the Management Act that provides for a longer period of recovery).

28. Whether s 20(1) applies turns on whether amounts paid by Crown to the State as part of the payment of "casino tax", where that part is based on the inclusion within Gross Gaming Revenue of the value of "Free Play" vouchers, is money paid by way of (a) tax; (b) purported tax; (c) an amount that is attributable to tax; or (d) an amount that is attributable to purported tax.

29. There is a sound argument available to Crown that if "Free Play" vouchers and chips fall outside Gross Gaming Revenue, then to the extent that casino tax was calculated on those sums, it was not a "tax". Put simply, the Management Agreement did not impose casino tax was not imposed on those sums. There is also a sound argument available to Crown that "purported tax" means a tax that a law purported to impose. If so, the Management Act never purported to impose casino tax on "Free Play" vouchers and chips and so there is no "purported tax" at

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9 The section is, however, the subject of a reserved decision in a case before Sloss J in the Victorian Supreme Court. Section 20A was considered in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51. The section was, however, substantially amended before judgment was delivered in that case.

issue. Finally, because the amounts paid were neither a "tax" nor a "purported tax", they cannot have been amounts "attributable" to either of those concepts.[10] In any event, the phrase "an amount that is attributable to" one of those concepts picks up a situation akin to that in *Roxborough v Rothmans of Pall Mall*.[11] In that case, Rothmans had paid a tax to the State. It then "passed on" the burden of the tax to the Roxboroughs as part of its invoice for the sale of goods. Following the tax being declared invalid, the Roxboroughs sought recovery from Rothmans of the amount which it had paid that was attributable to the invalid tax, though the proceeding was not for the recovery of the tax itself from the State. That is not this case. Thus, it seems to us that a sound argument may be made for Crown that s 20(1) does not apply to this proceeding.[12]

30. Further, because the application of s 20(1) of the *Limitation of Actions Act* is expressly limited to actions for mistake and colour of authority, there would also be an argument open to Crown that success on the third kind of proceeding mentioned above, based on the so-called *Woolwich* principle, does not attract the operation of the sub-section.

31. If s 20(1) of the *Limitation of Actions Act* does not apply, then the usual limitation period of 6 years would apply.[13] The dates on which causes of action accrue for recovery of moneys paid to the State are not settled. For claims based on mistake of law, there is authority for the proposition that the cause of action accrues on the date of payment.[14] For claims based on demands made under colour of legislative authority, the cause of action accrues on the date on which it was unconscionable for the defendant to retain the moneys which, at least in some cases based on invalid taxes, is arguably the date on which the tax is declared invalid.[15] For claims

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10 That proposition is consistent with the reasoning and conclusion in *Maddingley Brown Coal Pty Ltd v Environment Protection Authority [No 2]* [2013] VSC 687 at [34]-[40] in relation to the coordinate phrase in s 20B of the *Limitation of Actions Act 1958*.

11 (2001) 208 CLR 516.

12 We also note s 18(5) of the *Taxation Administration Act 1997* which expressly "declares" that an amount by which tax is overpaid is taken to be tax for the purposes of that Act. There is no similar provision in the *Limitation of Actions Act*. It is arguable that, absent s 18(5), amounts of "overpaid" tax would not be a "tax" or a "purported tax" according to the same analysis as contained in this paragraph.

13 *Limitation of Actions Act 1958*, s 5(1)(a). Although the jurisprudential basis for a restitutionary claim of the kind that would be made by Crown is not based on a "contract implied in law" (see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221), it is tolerably clear that the legislative intention was to apply a limitation period of 6 years to restitutionary claims which would, in any event, be the position under doctrines of laches and delay.

14 *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581.

15 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at [41], [54].

based on the *Woolwich* principle, the cause of action accrues on the date of payment. In the circumstances of the present case, we think it most likely that the cause of action will be held to have accrued on the date of each payment, but that conclusion may be affected by the results of any further factual investigations.

32. We also note s 20B of the *Limitation of Actions Act 1958* which bars proceedings for the recovery of money where the plaintiff has "passed on" the amount sought to be recovered to another. For completeness, any further factual investigations should include whether any amount of casino tax based on the inclusion of "Free Play" vouchers in Gross Gaming Revenue has been passed on to any other person.

33. We will revisit the matters canvassed in this advice upon the receipt of further instructions. It may be appropriate to arrange a conference to discuss any matters arising out of this advice or out of the further investigations once they are completed.

Dated: 23 December 2013

[redacted]

NEIL YOUNG
Ninian Stephen Chambers

CHRIS YOUNG
Ninian Stephen Chambers