TRIM ID: CD/22/21465

Decision and reasons for decision

In the matter of disciplinary action against Crown Melbourne Ltd pursuant section 20(1)(dc) of the *Casino Control Act 1991.*

Commission:	Fran Thorn, Chair Andrew Scott, Deputy Chair Ron Ben-David, Deputy Chair Claire Miller, Commissioner Chris O'Neill, Commissioner
Date of Decision:	3 November 2022
Date of Reasons:	7 November 2022
Decision:	For the reasons attached to this decision, the Victorian Gambling and Casino Control Commission has decided to: (a) take disciplinary action in respect of Crown Melbourne Ltd.'s serious misconduct, described in these reasons as the *code breach finding* and impose a fine of $100,000,000 ($100 million); (b) take disciplinary action in respect of Crown Melbourne Ltd.'s illegal conduct, described in these reasons as the *button pick finding* and impose a fine of $20,000,000 ($20 million); both fines being payable within 28 days of the date of this decision; (c) in respect of each of the disciplinary actions referred to immediately above, issue a notice or notices to Crown Melbourne Ltd pursuant to section 20A of the *Casino Control Act 1991* (Vic) to require it to pay the Commission's reasonable costs and expenses of this disciplinary action; (d) separately, issue a direction to Crown Melbourne Ltd pursuant to section 23 of the *Casino Control Act 1991* (Vic) to prohibit re-introducing the *red carpet* and *bingo* programs (or like programs).
Signed:	
	Fran Thorn
	Chair

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PART 1 – BACKGROUND AND CONTEXT

1. This disciplinary proceeding is taken by the Victorian Gambling and Casino Control Commission (**Commission**) based on findings of the 2021 Royal Commission into the Victorian Casino Operator and Licence (**RCCOL**).
2. The broader context is that the RCCOL identified several instances of wrongdoing by Crown Melbourne Ltd (**Crown Melbourne**) in its capacity as the operator of the Melbourne Casino.
3. In respect of that wrongdoing, Crown Melbourne submitted that it was not the role of the RCCOL to punish or deter because:

   > *…unlike in some judicial processes, the focus of [the RCCOL's] important work is not a punitive one, or even one concerned with deterrence….*[1]

4. The RCCOL did not make recommendations that were directed at punishment or deterrence.
5. Rather, it limited itself to responding to its terms of reference including by finding Crown Melbourne unsuitable to operate the Melbourne Casino and recommending that it be supervised for a period during which it might attempt to reform in order to achieve suitability.[2]
6. Shortly after the RCCOL, the *Casino Control Act* 1991 (Vic) (**CCA**) was amended to give effect to those recommendations and, in about early 2024, the Commission will be called upon to decide whether it is *clearly satisfied* that Crown Melbourne has sufficiently reformed to become suitable.[3]
7. Meanwhile, in respect of the instances of wrongdoing identified by the RCCOL, the parliament also amended the CCA so that Crown Melbourne's wrongdoing[4] might be considered in an appropriate forum.
8. That amendment was through the addition of section 20(1)(dc) to the CCA which allows the Commission to take disciplinary action on any matters where the RCCOL found that Crown Melbourne or its associates engaged in conduct that is illegal and/or constitutes serious misconduct (**the RCCOL Finding Provision**).
9. The explanatory memorandum which accompanied the RCCOL Finding Provision identifies that its purpose *is to empower the Commission to act on the findings of the [RCCOL] and enable disciplinary action to be taken based on those findings.*[5]
10. Among the findings of illegal and serious misconduct made by the RCCOL are those related to the responsible service of gambling or *RSG*.[6]
11. Those findings are referred to in these reasons as the *code breach finding* and the *button pick finding.*

The extent of the wrongdoing

12. The *code breach finding* is, in essence, a finding that Crown Melbourne consistently and for many years failed to intervene, when it should have, with those of its customers who were demonstrating the indicator of gambling harm constituted by often gambling for long periods without a break.[7]

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[1] RCCOL Transcript, 3 August 2021, Responsive closing submissions, T4059/35-37.
[2] As well as also making other recommendations which were not directed at punishing or deterring Crown Melbourne from the wrongdoing it had been found to have engaged in.
[3] And that it is in the public interest that Crown Melbourne be permitted to operate the Melbourne Casino, unsupervised.
[4] Or that of its associates.
[5] Explanatory Memorandum, Casino and Gambling Legislation Amendment Bill 2021 (Vic), p4.
[6] Those findings are contained, for the most part, in Volume 2, Chapter 8 of the RCCOL report. The Commission notes that the subject matter of these reasons is the two specific Resonsible Service of Gambling (**RSG**) findings that are appropriate to be dealt with pursuant to the RCCOL Finding Provision. Whilst there are several other RSG matters that were identified by the RCCOL that are not the subject of these reasons, the regulatory and parliamentary response to the RCCOL has been multi-faceted and includes, for example, the enactment of specific legislation in respect of RSG (see *Casino Legislation Amendment (Royal Commission Implementation and Other Matters) Act 2022* (Vic)). The fact that certain matters referred to in Chapter 8 of the RCCOL report are not also referred to in these reasons should not be interpreted as a suggestion that those matters are unimportant.
[7] RCCOL Final Report, Vol 2, Ch 8, p37 [184].

13. During this matter, the Commission exercised its compulsory powers to compel Crown Melbourne to provide information about the nature and extent of that wrongdoing. As is described later in Part 2 of these reasons, Crown Melbourne has been unwilling or unable to provide the type of detailed information that the Commission had expected to receive.

14. As such, it has been necessary for the Commission to assess the extent of the wrongdoing constituted by the *code breach finding,* based upon the evidence it otherwise has available.

15. That evidence is constituted by a combination of publicly available information[8] and the evidence referred to by the RCCOL.[9]

16. Having regard to that information and evidence, the Commission has formed the view that it is appropriate to frame the nature and extent of the wrongdoing constituted by the *code breach finding* in the following terms*:*

    a. Crown Melbourne has been obliged to intervene with those of its customers who often gamble for long periods without a break since at least 2009;[10]

    b. the RCCOL made the *code breach finding* in October 2021;[11]

    c. the period between the commencement of the obligation and the making of the finding is approximately 12 years or 4380 days;

    d. for the entirety of those[12] 12 years, Crown Melbourne applied a policy which meant that at no time did it intervene with gamblers at the temporal point that was found by the RCCOL[13] to have been appropriate;

    e. in these circumstances, Crown Melbourne failed to intervene and was thereby in breach for the entirety of the 12-year period between the commencement of the obligation and the making of the finding;

    f. it is not possible to say precisely, on the evidence before it, [14] how many individual times Crown Melbourne failed to intervene in those 12 years. The following however provides a very conservative approach to gauging the number of times in the relevant period that Crown Melbourne failed to intervene when it ought to have:

        i. the RCCOL examined Crown's Responsible Gaming Register for the arbitrarily chosen day of 10 June 2018 and identified 18 occasions on which Crown Melbourne failed to intervene and interact with patrons after its staff had received a notification that they had been gambling for at least 18 hours with no significant break;

        ii. taking this arbitrarily chosen day and multiplying it across the 4380 days between the commencement of the obligation and the making of the finding arrives at a figure of 78840 individual instances of a failure to intervene;

    g. This is a significant and damning figure in itself. However, this calculation is based on the occasions that a Responsible Gaming Advisor (**RGA**) was sent a notification regarding a 'carded' patron who had been gambling for at least 18 hours and this was recorded in the Responsible Gaming Register. As such, this is a measure that is likely to be unreliable and significantly understate the extent of Crown Melbourne's

[8] Constituted by a published submission Crown Melbourne made to the Productivity Commission: See the submissions of Crown Melbourne's parent company Crown Resorts Ltd, to the Productivity Commission research paper: *Australia International Tourism Industry*. Available at (https://www.pc.gov.au/research/completed/international-tourism/comments/submissions/submission-counter/sub028-international-tourism.pdf), accessed 10 October 2022.
[9] Being evidence, together with that which is otherwise publicly available, to which the Commission is specifically empowered to have regard for the purpose of this matter by operation of section 20(15) of the CCA.
[10] RCCOL Final Report, Vol 2, Ch 8, p14 [85].
[11] That is when it published its final report.
[12] Approximately.
[13] Being a temporal period of between 3 and 6 hours.
[14] In circumstances where Crown Melbourne declined the opportunity it was given to provide evidence to the contrary, noting that through the exercise of compulsory powers by the Commission in the course of this matter it was expressly asked to provide the details of the nature and extent of the serious misconduct it accepted for the purpose of the *code breach finding.*

wrongdoing.[15] In the Commission's view, the following provides another, more reliable, basis on which the Commission may consider the extent of the wrongdoing constituted by the *code breach finding*:

i. according to Crown Melbourne, the Melbourne Casino attracts 19 million visits annually.[16] That is, on average, about 52,054 visits per day;

ii. according to the RCCOL, the prevalence of problem gambling in the Victorian adult population is 0.7 per cent;[17]

iii. on that basis, if 0.7 per cent of the 52,054 visits per day resulted in Crown Melbourne being frequented by a person who is vulnerable to gambling harm, then each day, on average, there would be at least approximately 364 individuals who are likely to be harmed, at the Melbourne Casino, by the gambling products Crown Melbourne offers;

iv. if each of those vulnerable gamblers were permitted to gamble for long periods without a break, then it would be appropriate to multiply that daily figure of about 364 by the number of days (about 4380) that Crown Melbourne failed to comply with its obligation to intervene;

v. that calculation results in a conclusion that Crown Melbourne failed to comply with its obligations around 1,594,320 times;

h. alternatively, if one was to consider other evidence, such as, for example, the extent to which, according to the RCCOL, the prevalence of problem gambling at the Melbourne Casino is 3 times higher than among all Victorians who gamble,[18] then it would be open to conclude that Crown Melbourne failed to comply with its obligations around 4,782,960 times over the relevant and approximate 4380 day or 12-year period. Even if the number of occasions on which Crown Melbourne failed to comply with its obligation to intervene was in fact only half of that figure the scale of Crown's conduct would have been very substantial and capable of significantly contributing to gambling related harm.

17. Whatever the precise number of individual breaches, the Commission considers that the evidence is clear that the serious misconduct, constituted by the *code breach finding* was by any measure significant, systematic, sustained, and very serious.

18. It is also inevitable that considerable amounts were gambled and lost by those who were allowed to gamble for long periods without a break. The Commission should proceed on that basis accordingly. Over time, Crown Melbourne would have undoubtedly derived considerable revenue from its conduct.

19. The same can be said about the *button pick finding.*

20. That finding is essentially that Crown Melbourne failed to comply with a statutory direction it was given in March 2019.

21. That statutory direction required Crown Melbourne to take all reasonable steps to ensure that its customers did not use devices (sometimes called *picks*) or *like items* to hold down or continually depress the buttons on certain electronic gaming machines (or **EGMs**).[19]

22. Although Crown Melbourne took some steps to prevent the use of *picks* and particularly the Crown branded *picks* that it had historically provided to its customers, it did not take all reasonable steps, because it only discouraged

[15] The RCCOL heard evidence that for uncarded players RGAs were required to rely on observation alone to determine whether an 'uncarded' patron had often gambled for long periods. The RCCOL observed that to be "an almost impossible task" made all the more difficult by the inadequate resourcing that Crown Melbourne allocated to the task. The RCCOL found that most of the time there were fewer than three RGAs present on the gaming floor and sometimes no RGAs at all. The RCCOL also found that even when all three RGAs were present, each had to supervise approximately 870 EGMs and approximately 180 gaming tables. (See RCCOL Final Report, Vol 2, Ch8, pp22, 24, [127], [137] [138]). In these circumstances, it is reasonable to proceed on the basis that 78840 significantly understates the scale of Crown Melbourne's conduct.

[16] See the submissions of Crown Melbourne's parent company Crown Resorts Ltd, to the Productivity Commission research paper: *Australia International Tourism Industry,* p3. Available at (https://www.pc.gov.au/research/completed/international-tourism/comments/submissions/submission-counter/sub028-international-tourism.pdf), accessed 10 October 2022.

[17] RCCOL Final Report, Vol 2, Ch 8, p5 [30], referring to data from 2019.

[18] RCCOL Final Report, Vol 2, Ch 8, p10 [59].

[19] On what are known as unrestricted EGMs.

rather than prevented the use of *like items* such as credit cards or heavy objects being used on the relevant EGMs.

23. Just as it did in respect of the *code breach finding* the Commission exercised its compulsory powers to compel Crown Melbourne to produce information about the nature and extent of the illegal conduct, constituted by the *button pick finding.*

24. Although this is an issue considered further in Part 3 of these reasons, for present purposes, it is sufficient to note that Crown Melbourne was, again, just as it was in respect of the *code breach finding,* unwilling or unable to properly assist the Commission.

25. In these circumstances, the Commission has carefully considered the question of whether, based on the evidence available, it is possible to quantify the number of occasions on which Crown Melbourne failed to comply with the relevant statutory direction.

26. The Commission has formed the view that it is not possible for it to do so. However, the Commission does not consider that to be a matter which precludes it from assessing the extent or seriousness of the *button pick finding* and the extent to which the fine it has decided to impose is necessary to achieve both general and specific deterrence.

27. The Commission is satisfied that, in circumstances where the *button pick finding* constitutes the second occasion on which Crown Melbourne has failed to comply with a direction it was given by the casino regulator and is a further example of Crown Melbourne failing to comply with the intent[20] of regulatory action, this too is a very serious matter which justifies the taking of substantial and significant disciplinary action.

Summarising the outcome

28. Crown Melbourne accepts that disciplinary action, in the form of a fine, is warranted in respect of both the *code breach finding* and the *button pick finding.*[21] That acceptance is put on the basis that the *code breach finding* constitutes serious misconduct[22] and the *button pick finding* constitutes illegal conduct.[23]

29. Crown Melbourne, however, says that both fines should be *modest* because of the matters it has identified in its submissions and the extent to which (it says) those matters diminish the need for the outcome to act as a deterrent.

30. The Commission disagrees the fines should be *modest* and much of the reasons which follow are directed at the issues of how and why the Commission has formed that view.

31. Overall, the Commission has concluded that Crown Melbourne's submissions are almost entirely unsupported or contradicted by the evidence and the relevant regulatory environment. For that reason, the Commission has formed the view that Crown Melbourne's submissions do not support its contention that the fines it accepts as warranted should be *modest.*

32. In the Commission's view, the imposition of the maximum available fine for the *code breach finding* and the significant fine that it has decided to impose for the *button pick finding* are necessary and appropriate to deter Crown Melbourne and others from engaging in similar conduct.[24]

The structure of these reasons

33. As matters have transpired, these reasons have become lengthy. As such, it is appropriate to provide what is, in effect, a roadmap to assist those who might have cause to consider them.

34. Broadly, the Commission's reasons are divided into 7 main parts.

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[20] As distinct from the strict form.
[21] Crown Melbourne's response to section 26 notice, 22 August 2022, p7, [5], citations omitted.
[22] Crown Melbourne's response to section 26 notice, 1 August 2022, p9 [6.2].
[23] Crown Melbourne's response to section 26 notice, 1 August 2022, p3 [1.1].
[24] And furthermore, are fines that are reasonable and appropriate having regard to the historical approach that the Commission and its predecessors have taken to determining disciplinary action fines. Further details of why and how the Commission has formed that view are set out in Part 6 of these reasons.

35. Part 1 sets out the background and context of this matter. It explains how it has come to be considered by the Commission and the extent of the conduct. It summarises the outcome and addresses the broader questions of why RSG is important and how it is regulated.

36. It also explains the relationship between the Commission's consideration of what, if any, disciplinary action should be taken in respect of the specific RCCOL findings that are the subject of these reasons and the broader issue of Crown Melbourne's attempts to reform itself to return to suitability.

37. Parts 2 and 3 deal specifically with the *code breach finding* and the *button pick finding*.

38. Both of these parts follow similar structures in that they commence with Crown Melbourne's acceptance of its serious misconduct or illegal conduct (as the case may be) and its acceptance that fines are an appropriate form of disciplinary action. They each then proceed to consider the specific submissions Crown Melbourne has made by reference to the relevant regulatory environment and the evidence.

39. Careful and detailed consideration of the regulatory regime and the evidence[25] has been necessary because Crown Melbourne's submissions are largely bereft of any reference to those matters. Careful and detailed consideration has also been necessary because, as the Commission has already noted, it is the specific matters that Crown Melbourne has identified in its submissions that form the basis upon which it contends that the need for deterrence is diminished and, therefore, that the quantum of the accepted fines should be *modest.*

40. Having required such detailed and careful consideration of the evidence, Parts 2 and 3 are necessarily lengthy.

41. Part 4 sets out certain matters, relevant to the Commission's decision, that were not referred to by Crown Melbourne, and Part 5 deals with the topic of the fine or fines that Crown Melbourne accepts are warranted. In particular, it considers the question of whether only one fine should be imposed for each of the *code breach finding* and the *button pick finding* (as Crown Melbourne submits should occur) or whether the Commission should proceed to impose multiple fines in recognition of the fact that the wrongdoing considered in these reasons involved (likely) in excess of a million individual failures to comply. Part 5 also deals with some specific matters which are relevant in circumstances where the Commission has decided to impose the statutory maximum fine in respect of the *code breach finding.*

42. Part 6 deals with a specific legal issue arising from Crown Melbourne's submissions and Part 7 with what are described as *other matters,* namely the issue of costs and prohibiting the reintroduction of certain programs Crown Melbourne voluntarily ceased during the RCCOL.

43. In what remains of this Part 1 the Commission deals with the topics of why RSG is important, how it is regulated, and the relationship between the Commission's consideration of this disciplinary proceeding and the broader issue of Crown Melbourne's desire to return to suitability.

Why RSG is important

44. As Crown Melbourne correctly submitted to the RCCOL: *The gambling products and services that Crown [Melbourne] provides have the potential to cause serious harm, not only to its patrons but also to their family, friends and communities....*[26]

45. In the context of a submission in those terms, the broad findings of the RCCOL included that:

> *Perhaps the most damning discovery by the [RCCOL] is the manner in which Crown Melbourne deals with the many vulnerable people who have a gambling problem. The cost to the community of problem gambling is enormous. It is not only the gambler who suffers. It also affects many other people, and institutions.*
>
> *Crown Melbourne had for many years held itself out as having a world's best approach to problem gambling. Nothing can be further from the truth. The Commission heard many distressing stories from people whose*

[25] Being evidence which, pursuant to section 20(15) of the CCA expressly includes any information contained in the RCCOL final report and any information that is otherwise publicly available.

[26] Crown Melbourne's Written Closing Submissions to the RCCOL, 2 August 2021, p177 [F.1.], citations omitted. The submissions Crown Melbourne made specifically for the purpose of the Commission's consideration of this matter included similar acknowledgments about the *serious harm* that can be caused by the gambling products and services it provides.

lives were ruined by gambling but whose situation might have been improved if casino staff had carried out their obligations under Crown Melbourne's Gambling Code.[27]

46. As such, far from being a matter which involves only the consideration of a *potential to cause serious harm* (as Crown Melbourne would have it),[28] the evidence at the RCCOL identified many instances of actual harm being inflicted.

47. The RCCOL demonstrated the significance[29] of that harm by reference to several case studies.

48. Those case studies provided *real-world* examples of the financial loss, suicide attempts, broken relationships, forced sex work, crime, punishment, and other hardships that were experienced by those who were permitted to often gamble at the Melbourne Casino for long periods without a break.[30]

49. The harms that are described in the RCCOL's case studies are not harms that are unique to those who gamble at the Melbourne Casino.

50. On the contrary, those case studies identify harms that can be experienced by anyone who is permitted to often gamble for long periods at any of the several hundred licensed gambling venues that exist throughout Victoria.

51. Similarly, it is important to consider that the amounts gambled in Victoria, every day, are enormous. For example, in the context of EGMs alone, Crown Melbourne is just one of over 480[31] licensed providers of a gambling product on which $7,497,906 is spent, in Victoria, every single day.[32]

52. Accordingly, RSG is clearly a matter of considerable importance not only because, as Crown Melbourne has pointed out, gambling products have the *potential to cause serious harm.* The number of people who might (actually) be affected by that harm and the amounts of money that is gambled further add to that importance.

53. Ensuring that gamblers are not permitted to often gamble for long periods without a break (which is at the heart of the *code breach finding*) and that gamblers are not permitted to artificially and continually depress the play buttons on certain EGMs (which is at the heart of the *button pick finding*) are critical components of protecting Victorians from gambling harm.

How RSG is regulated

54. The regulation of RSG is complex for reasons which include that, as well as being an activity which involves the potential for harm, legalised gambling is also an activity that the RCCOL reported brings with it certain *benefits*.[33]

55. These reported benefits include recreation, entertainment, winnings for successful gamblers, revenue for those who provide gambling products, and (at least indirectly) revenue to the State through the tax that is levied on those who provide gambling products.

56. Other benefits of gambling reported by the RCCOL include the employment and training opportunities that gambling and associated tourism and entertainment venues offer and how the tax derived from gambling contributes to the myriad services the State provides to its citizens.[34]

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[27] RCCOL Final Report, Vol 1, Ch 1, p3 [11] – [12].
[28] Which, it should also be noted, is a potential for harm which is exacerbated in the context of the Melbourne Casino by reason of its relative attractiveness to those who are susceptible to being harmed by gambling products – see RCCOL Final Report, Vol 2, Ch 8, p10 [59].
[29] Even if the total proportion of the Victorian population that might be susceptible to gambling harm is, in an overall sense small, in that, according to the RCCOL, the evidence given in that forum was that the prevalence of problem gambling in the Victorian adult population in the 2019 financial year was 0.7 per cent, that prevalence rises in the context of casinos. See RCCOL Final Report Vol 2, Ch 8, p5 [30].
[30] See the Case Studies referred to as *Elizabeth's story; Binbin's story; Stuart's story* and *Carolyn's Story* at RCCOL Final Report, Vol 2, Ch 8, p26 – 28.
[31] As of the date of these Reasons in November 2022 there are 488 licensed venues with EGMs in Victoria.
[32] Pokies across Victoria (https://responsiblegambling.vic.gov.au/resources/gambling-victoria/pokies-across-victoria) (VRGF website) accessed 29 August 2022.
[33] RCCOL Final Report, Vol 2, Ch 8, p3, [12] – [21], citations omitted.
[34] Further details about that contribution were expressly noted by the RCCOL in its final report – see RCCOL Final Report, Vol 2, Ch 8, p3-4 [16] – [21].

57. The aims of the regulatory regime that apply to licensed gaming providers include those of promoting tourism, employment, and economic development accordingly.[35]

58. That is not to say, however, that the regulatory regime is designed to prioritise the *benefits* identified by the RCCOL over managing the harm that gambling products can cause.

59. On the contrary, the relevant legislation is clear in that the:

    a. GRA (which is the act that applies to the vast majority of those who provide gambling products) has *main objectives,* which include those of fostering the responsible service of gambling;[36] and

    b. CCA (which is the act that applies in the specific context of the Melbourne Casino and pursuant to which the Commission is considering this disciplinary action) provides that the Commission's express statutory objectives include those of fostering responsible gambling at the Melbourne Casino.[37]

60. It is not the case, as Crown Melbourne submitted to the RCCOL, that its RSG obligations are in any way affected or diminished by its simultaneous statutory and contractual obligations to *endeavour to ensure that the Melbourne Casino Complex is fully and regularly patronised*.[38]

61. Ever since the Melbourne Casino was established, in the early 1990s, mechanisms have existed which prioritise and address the risks associated with the irresponsible service of gambling.

62. Over time, as the regulatory environment and community expectations have evolved, additional mechanisms have been introduced to further address the problem, both in the specific context of the Melbourne Casino and also in respect of the various other licensed providers of gambling products that operate throughout Victoria.[39]

63. In their present form, both the CCA and the GRA contain several provisions which are either directed at, or form part of, the suite of protections that are designed to ensure that licensed gambling operators offer their gambling products responsibly. The RSG requirements contained in the CCA are in many respects mirrored in the GRA.

64. Specifically, insofar as the Melbourne Casino is concerned, most of the provisions by which RSG is regulated are set out in Part 5 of the CCA.

65. Most relevantly to the *code breach finding* and the *button pick finding,* however, the RSG regulatory regime includes obligations that Crown Melbourne must comply with both ministerial and statutory directions.

66. In respect of ministerial directions, section 69 of the CCA provides that it is a condition of Crown Melbourne's casino licence that it *implement* a responsible gambling code of conduct (**code**) that complies with the relevant Ministerial Direction. It is the obligations that Crown Melbourne has by operation of section 69 that are central to the *code breach finding.*

67. In respect of statutory directions, section 23 of the CCA provides that the Commission may give Crown Melbourne a written direction that relates to the conduct, supervision, or control of operations in the Melbourne Casino, which must be complied with as soon as it takes effect. It is section 23 that is central to the *button pick finding*.

68. Although they arise under the GRA rather than the CCA, the obligations to comply with both ministerial and statutory directions are obligations that apply to all gambling licensees and not just Crown Melbourne. This is a topic that the Commission will return to later in Parts 2 and 3 of these reasons when considering Crown Melbourne's submissions on the subject of general deterrence.

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[35] See section 1(a)(iii) of the CCA. Also see section 1.1(f) of the *Gambling Regulation Act 2003* (Vic) (**GRA**).
[36] See section 1.1 of the GRA.
[37] See section 4 of the *Gambling Legislation (Responsible Gambling) Act 2000* (Vic), substituting section 140(c) of the CCA.
[38] Crown Melbourne's Written Closing Submissions to the RCCOL, 2 August 2020 p180 [F.10].
[39] Among others, these have included the reforms which followed the October 2006 Victorian Government report titled *Taking Action on Problem Gambling and the subsequent Gambling Legislation Amendment (Problem Gambling and other Measures) Act 2007* (Vic). Another example is the voluntary pre-commitment system for electronic gaming machines known as "Your Play" that was introduced in 2014 and became effective from 1 December 2015, by amendments made at that time to the GRA. The evolution of the regulatory environment has continued through the enactment of the *Casino Legislation Amendment (Royal Commission Implementation and Other Matters) Act 2022* (Vic) which came into force on 1 October 2022.

The relationship between this matter and the broader issue of suitability

69. As was noted at the commencement of this Part 1, Crown Melbourne is presently unsuitable and being supervised by a special manager accordingly.

70. Crown Melbourne wishes to attain suitability and, in about early 2024, the Commission will be called upon to decide whether it is *clearly satisfied* it has done enough to become suitable to operate the Melbourne Casino unsupervised.

71. In conferring that power on the Commission, the parliament has expressly identified the matters to which the Commission both *must* and *may* have regard.[40]

72. The matters to which the Commission *must* have regard include reports of the special manager and those of certain inquiries, including the final report of the RCCOL.

73. Meanwhile, in respect of the matters that the Commission *may* have regard, the parliament has specified that the Commission *may* consider *the reports or findings of any regulator or law enforcement agency that has investigated* Crown Melbourne.

74. In these circumstances, as well as being a document that sets out the reasons which relate to the issue of what, if any, disciplinary action the Commission should take in respect of the *code breach finding* and the *button pick finding,* these reasons are also a document to which the Commission may, in the future, return to when it comes to exercising its discretion on the question of suitability.

75. As such, it is appropriate that the Commission note the following matters in respect of any future consideration that might be given to these reasons, insofar as they are relevant to the issue of suitability.

76. *First*, at the RCCOL, Crown Melbourne accepted that its historical RSG arrangements were inadequate. Its submissions included that:

> *…aspects of [Crown Melbourne's] Responsible Gambling systems and practices need to be improved. The evidence that has emerged [during the RCCOL] has identified a number of weaknesses in them...Crown [Melbourne] acknowledges that it can and must do more with respect to the responsible service of gambling so as to ensure that its detection and minimisation of problem gambling improves.*[41]

77. *Secondly*, as well as submitting that it needed to improve in the area of the RSG, Crown Melbourne also assured the RCCOL that it could be *relied upon* to make the necessary improvements.[42]

78. Having regard to these submissions (and notwithstanding that the Commission acknowledges Crown Melbourne's reform program both generally and more specifically in respect of RSG is ongoing), it is appropriate for the Commission to note that this matter has identified several aspects of Crown Melbourne's RSG reform program that are not as well advanced as they could be.

79. In the Commission's view, the information Crown Melbourne has provided during this matter can be summarised as providing a lot of detail about how little has been done. Much of that detail is a description of activities undertaken rather than outcomes pursued and achieved.

80. For example, in the course of this matter, Crown Melbourne has told the Commission it is still:

    a. *undertaking a comprehensive review;*

    b. *developing a communications plan;*

    c. *assessing the viability of delivering automated [responsible service of gambling] messaging via EGMs;*

    d. *investigating uplifts in its case management tools;*

    e. *designing new position descriptions and [Key Performance Indicators];*[43]

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[40] See section 36H of the CCA.
[41] Crown Melbourne's Written Closing Submissions to the RCCOL, 2 August 2021, p178 [F.4.], citations omitted.
[42] Crown Melbourne's Written Closing Submissions to the RCCOL, 2 August 2021, p226 [F.209.].
[43] Crown Melbourne's response to section 26 notice, 1 August 2022, p19 – 20.

f. developing an in-depth training review, led by Melbourne-based Crown Melbourne psychologists which will, once developed, be subject to feedback from the RGAP;[44]

g. developing reliable algorithms for the detection of at-risk, uncarded, gambling;[45]

h. collecting data to consider the issue of what, if any, link exists between Crown Melbourne's loyalty programs and problem gambling.[46]

81. The Commission is concerned that Crown Melbourne remains at the point of merely describing plans and/or preparatory activities, rather than identifying objectives and outcomes that can be assessed by the Commission.

82. Furthermore, the Commission's concerns in that regard are made more acute when one considers that:

a. as is described later in these reasons, particularly in Part 2, some of the activities that have been described by Crown Melbourne in the course of this matter relate to issues that were first formally identified by the regulator of the Melbourne Casino as long ago as 2008;[47]

b. Crown Melbourne has been representing to the Commission and its predecessors for several years now that it is committed to reform, and it is now almost 2 years since the former chair of Crown Melbourne met with the then VCGLR[48] and gave her *absolute personal commitment* together with that of the relevant board and management to work in collaboration with the Victorian casino regulator to achieve necessary reform;[49]

c. Crown Melbourne's initial attempts at reform were found by the RCCOL to have been inadequate, including to the extent that, in the period after 17 December 2020 (when the VCGLR was assured that Crown Melbourne would act collaboratively) Crown Melbourne continued to interact with its regulator in a manner which now former Crown Melbourne directors and executives later accepted was *deeply* and *very regrettable*;[50] and

d. in June 2022, Crown Melbourne was expressly warned by the special manager that it *needs to undertake considerable further work to demonstrate real progress towards transformation and embedded change over the remainder of the special manager's term.*[51]

83. Furthermore, as is described in Parts 2, 3, and 4 of these reasons, Crown Melbourne's response to the specific matters that are the subject of these reasons has given the Commission further cause for concern.

84. In summary, those concerns are that Crown Melbourne's response to this matter has left the Commission with the distinct impression that Crown Melbourne is determined to continue interacting with the Commission in the same way as it did with the former VCGLR. That is in the same manner for which it was roundly criticised by the RCCOL, by reference to a multitude of matters.[52]

85. Many aspects of Crown Melbourne's response to this matter and particularly the:

a. making of submissions that are not supported (or contradicted) by the evidence;

b. failure to provide the Commission with *everything it could reasonably need to be aware of in order to exercise its functions efficiently and effectively*[53] insofar as they concern the extent of the wrongdoing constituted by the *code breach finding* and the *button pick finding;*

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[44] Crown Melbourne's response to section 26 notice, 1 August 2022, p24.
[45] Crown Melbourne's response to section 26 notice, 1 August 2022, p25.
[46] Crown Melbourne's response to section 26 notice, 1 August 2022, p33.
[47] Particularly insofar as it relates to developing reliable algorithms for the detection of at-risk, uncarded, gambling as described in Crown Melbourne's response to section 26 notice, 1 August 2022, p25.
[48] On 17 December 2020.
[49] See transcript of meeting conducted on 17 December 2020 between the Commission and Crown.
[50] See transcripts of RCCOL evidence - Transcript of Xavier Walsh, 5 July 2021, T3332/46-T3333/33, Transcript of Jane Halton, 7 July 2021, T3586/20-28 and Transcript of Helen Coonan, 8 July 2021, T3765-T3676.
[51] Special Manager's Published Activity Report, June 2022, p2.
[52] See generally, RCCOL Final Report Vol 2, Ch 10.
[53] On the extent to which it is reasonable for the Commission to expect that Crown Melbourne will provide it with *everything it could reasonably need to be aware of in order to exercise its functions efficiently and effectively* see RCCOL Final Report, Vol 2, Ch 10, p 84 [4] – [7]. An example referred to later in these reasons is the provision of information in respect of the nature and extent of the wrongdoing constituted by the *code breach finding.*

c. making of assertions about the law without providing the Commission with the details that might readily allow it to assess the validity of those assertions;

are redolent of the *old Crown,* which Crown Melbourne keeps saying it wishes to leave behind.

86. If the submissions in this matter represented the total of the work being done, then the Commission would have reason to be concerned.

87. Crown Melbourne must do better in its dealings with the Commission, including in respect of important matters such as its approach to disciplinary proceedings and the production of information when the Commission exercises its compulsory powers. It must demonstrate to the Commission by its actions that it is moving, or has moved, towards suitability.

PART 2 –THE CODE BREACH FINDING

88. In this Part 2 of its reasons, the Commission specifically considers the *code breach finding,* namely that *Crown Melbourne has for many years consistently breached its Gambling Code and, therefore, a condition of its casino licence*[54] in respect of those of its customers who were often gambling for long periods without a break.

89. In considering this finding, the Commission begins with a consideration of the circumstances in which the RCCOL made the *code breach finding* before then proceeding to consider Crown Melbourne's submissions in respect of that finding.

90. As has already been noted, the nature of the submissions that have been made by Crown Melbourne has meant that careful and detailed analysis of both the relevant regulatory regime and the evidence has been necessary. The object of that analysis has been to determine the legitimacy or otherwise of the submissions Crown Melbourne has made and particularly the extent to which those submissions are supported (or contradicted) by the evidence.

91. The regulatory framework within which the RCCOL made the *code breach finding* is set out below.

92. Section 69 of the CCA provides[55] that a responsible gambling code of conduct is a condition of the licence to operate the Melbourne Casino and that the operator of that casino must *implement* the code in a form that complies with a relevant ministerial direction.

93. Among other things, that ministerial direction specifies that the code must provide for interactions to occur with gamblers who *are displaying indicators of distress that may be related to problem gambling.*

94. In this way, Crown Melbourne is, in effect, obliged to observe its customers and interact with those displaying indicators of distress that may be related to problem gambling.[56]

95. The indicators of distress related to problem gambling are referred to as *observable signs.*

96. Although these *observable signs* are many and varied,[57] they include that which relates to how often and for how long a particular person gambles. Presently, that observable sign is expressed in the relevant Crown Melbourne policy documents as *often gambles for long periods without a break.*[58]

97. The RCCOL focused heavily on this particular observable sign and, in doing so, had cause to consider the specific Crown Melbourne policy which exists to address it. That policy is known as the Play Periods Policy.

98. In doing so, the RCCOL's considered the temporal period that should be applied as constituting a *long period* for the purpose of the concept of the observable sign *often gambles for long periods without a break.*

99. The RCCOL reviewed the available research and academic literature and concluded that between 3 and 6 hours should be considered a *long period* and that interactions between Crown Melbourne staff and its customers should have occurred on that basis.[59]

100. Crown Melbourne's policy however (even if it were applied) did not provide for interactions between the 3 and 6 hours of continuous gambling.

101. Instead, it provided that interactions would not begin occurring until the 12-hour mark, at the earliest. Furthermore, the RCCOL also found many instances where the terms of the policy were not applied and as

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[54] RCCOL Final Report, Vol 2, Ch 8, p37 [184].
[55] Among other things.
[56] Ministerial Direction pursuant to section 10.6.1 of the GRA, Victorian Government Gazette, No S 430, 17 September 2018, p4 – 6.
[57] And include, among others, requests to self-exclude, intolerance to losing, aggressive and anti-social behaviour and making requests to borrow money.
[58] It should be noted that since 2009 this observable sign has been relevantly expressed using combinations of words which have varied. Notwithstanding those variations the objective of this requirement (or requirements), however expressed, has at all times been to ensure that time spent and/or frequency of gambling would be a matter which would cause Crown Melbourne to intervene with its customers for the purpose of complying with its responsible service of gambling obligations.
[59] RCCOL Final Report, Vol 2, Ch 8, p18 [100]. The RCCOL also concluded by reference to the research it reviewed that the concept of *often* should be construed as meaning two or more gambling sessions in a week. See RCCOL Final Report, Vol 2, Ch 8 p18 [105].

such gamblers were allowed to gamble without interaction with Crown Melbourne's staff well beyond the timing parameters notionally set by the policy.

102. The supervision of those *uncarded* customers who were not members of a Crown Melbourne loyalty program was also found to be inadequate.

103. The evidence upon which the RCCOL made these findings included that given by Crown Melbourne customers, support workers and Crown Melbourne's own RSG staff. They were also based on the RCCOL's analysis of a Crown Melbourne business record described as *The Responsible Gaming Register.*

104. Although limited to the extent that it is a business record that was created in the context of the inadequate systems noted by the RCCOL,[60] the register is a record that is generated as part of the business system that Crown Melbourne has developed to monitor its customers.

105. Among other things, that system records the time carded players have spent gambling at the Melbourne Casino and the alerts that have been sent to Crown Melbourne's RSG staff to prompt them to interact with those who have been gambling for long periods without a break.

106. In respect of the Register, the RCCOL found that it:

> *…shows many instances where no interaction occurred in response to a phone alert…for several hours after they were received. The Register also disclosed many instances where the action taken was not the interaction required by the applicable Play Periods Policy and the…Code. Examples include failures to take any action at the 12-hour mark, 16-hour mark, 20-hour mark and even after 24 hours (as required by the relevant Play Periods Policy).*
>
> *These are not isolated instances. They are part of a pattern of systemic failures that is evident from a close examination of the Register.*[61]

107. To demonstrate its point, the RCCOL chose a day at random and reproduced the information contained in the Register for that day.

108. That day was 10 June 2019, being a day when the Register recorded 18 instances of Crown Melbourne customers having gambled for 19 hours or more. These 18 instances were constituted by a combination of gamblers betting on tables and those gambling on EGMs.

109. By reference to the Register, the RCCOL said:

> *Two facts stand out from the Register for 10 June 2019. First, the [Crown Melbourne] staff who were involved failed to comply with the applicable Play Periods Policy (which required…[interaction] with customers at the 12, 16 and 20-hour mark, and required [a Responsible Gaming Adviser] to attend if a customer has been gambling for 24 hours or more without a substantial break…Second, in some cases, the patron was only observed several hours after the [Responsible Gaming Adviser] received notification that the patron had been gambling for an extended period.*[62]

110. It is in these circumstances that the RCCOL made the finding that is referred to as the *code breach finding,* namely that: *Crown Melbourne has for many years consistently breached its Gambling Code and, therefore, a condition of its casino licence.*[63]

111. As the Commission has already noted in Part 1 of these reasons, the evidence supports a conclusion that these consistent breaches over many years resulted in likely in excess of a million individual instances of Crown Melbourne failing to intervene with those of its customers who were *often gambling for long periods without a break.*

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[60] Including, for example, the extent to which Crown Melbourne's observation of non-carded players who were not a member of a Crown Melbourne loyalty program was identified as being inadequate.
[61] RCCOL Final Report, Vol 2, Ch 8, p32 [170] – [171].
[62] RCCOL Final Report, Vol 2, Ch 8, p35 [174].
[63] RCCOL Final Report, Vol 2, Ch 8, p37 [184].

Crown Melbourne's acceptance that the *code breach finding* constitutes serious misconduct

112. Crown Melbourne accepts that the *code breach finding* constitutes serious misconduct because: *A failure to implement an RG Code is a breach of a condition of [Crown Melbourne's] casino licence.*[64]

113. In accepting that matter, Crown Melbourne also accepts that:

> *…compliance with that condition [is] a matter of considerable social importance. The condition was inserted into the casino licence by an Act of Parliament, and failure to comply with it had the potential to contribute to the harm that results from problem gambling.*
>
> *The [RCCOL] found that the conduct that gave rise to the breach of the licence condition occurred 'consistently' and 'over many years'. Particulars of the conduct identified by the RCCOL include:*
>
> *(a) allowing players to gamble continuously for 12 hours or more without any observation or interaction, with some customers allowed to gamble continuously for well over 24 hours;*
>
> *(b) many instances of failures to take the action required by the RG Code in response to an alert; and*
>
> *(c) allowing a large number of customers in the problem gambling category to escape attention.*
>
> *…*
>
> *…The breach of a licencing condition inserted by an Act of Parliament and going to a matter of considerable social importance is not trivial and is deserving of censure according to community standards.*
>
> *Accordingly, Crown [Melbourne] accepts that the [relevant] conduct found by the RCCOL…constitutes misconduct.*
>
> *…*
>
> *The RCCOL's findings demonstrate that there was a real risk that failure to implement a code of conduct fostering responsible gambling, consistently and over many years, would cause or contribute to harm suffered by some problem gamblers and their families and friends. The duration and consistency of the conduct that gave rise to the breach of the licence condition indicates that a substantial number of persons had the potential to be adversely affected by it. For the individuals affected, the harm could be very serious.*
>
> *…*
>
> *…in all of the circumstances, Crown [Melbourne] accepts that the RCCOL found that Crown [Melbourne] engaged in conduct in respect of RG that constitutes serious misconduct.*[65]

114. In the Commission's view, the *code breach finding* plainly constitutes serious misconduct and, in forming that view, the Commission has generally been assisted by a consideration of the various authorities and analysis to which Crown Melbourne referred,[66] insofar as it addressed the distinction between the concepts of *illegal* conduct and *serious misconduct*.[67]

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[64] Crown Melbourne's response to section 26 notice, 1 August 2022, p9 [6.2].
[65] Crown Melbourne's response to section 26 notice, 1 August 2022, p14 – 15 [10.4] - [10.15] (extracts).
[66] In the course of its response to a compulsory notice the Commission issued in July 2022.
[67] Although in acknowledging that general assistance, it should also be noted that there are certain aspects of Crown Melbourne's submissions on the legal principles that should be applied for the purpose of determining whether misconduct can properly be said to constitute serious misconduct which appear to misstate the law. This includes, for example, Crown Melbourne's purported invocation of issues of suspension or cancellation of its casino licence as being relevant matters of context for the purpose of determining whether misconduct can properly be characterised as serious. Although it has not been necessary for the Commission to resolve the matters arising from this aspect of Crown Melbourne's submissions for the purpose of it arriving at an outcome in this matter, the Commission may seek further specific submissions from Crown Melbourne in respect of some of its submissions on the legal principles it says are applicable to determining whether a specific finding of misconduct can be properly characterised as serious misconduct, should it become necessary to do so.

115. Having found that the *code breach finding* is one of serious misconduct, it has not been necessary for the Commission to consider the additional question of whether the *code breach finding* also constitutes illegal conduct and the Commission has not proceeded to form a view in that regard.

Crown Melbourne's acceptance that a fine is appropriate

116. Although it accepts that the *code breach finding* is one of serious misconduct and that a fine is appropriate, Crown Melbourne also says that:

    a. the quantum of that fine ought be *modest*; and

    b. this is not a case where it is appropriate for the Commission to issue a letter of censure or vary Crown Melbourne's casino licence.

117. The Commission agrees that a fine is appropriate. It also agrees that there is little or no utility in issuing a letter of censure or considering a variation of Crown Melbourne's casino licence, in the specific circumstances of this case.

118. The issue remains however whether it is in fact appropriate for the fine for the *code breach finding* to be *modest,* as Crown Melbourne submits.

119. In considering that question, the Commission notes that it agrees with Crown Melbourne's submission that the *code breach finding* is not a finding that Crown Melbourne breached the relevant code in a range of ways. Rather, it is a finding that Crown Melbourne engaged in a particular type of conduct (namely failing to act when a customer displayed the observable sign *often gambles for long periods without a break*) on many occasions.[68]

120. In accepting that matter however, the Commission also notes that the *code breach finding* is (as Crown Melbourne has acknowledged) constituted by conduct it engaged in *consistently* and *for many years*. Moreover, as the Commission has already identified, the evidence establishes that those consistent breaches over many years are likely to have been constituted by in excess of a million individual failures to intervene.

121. Accordingly, the Commission does not consider the fact that the *code breach finding* is limited to only one type of (mis) conduct to be a matter which substantially reduces the need for deterrence (general and specific). It is also not a matter that is capable of supporting a submission that the fine for the *code breach finding* should be *modest.*

122. The breaches were, as the Commission has already noted, extensive, sustained, systemic, and very serious.

123. Otherwise, in support of its contention that the accepted fine should be *modest,* Crown Melbourne seeks to invoke the recent High Court decision in *Australian Building and Construction Commissioner v Pattinson*[69] (***Pattinson***) and submit that:

    a. the issue of general deterrence is of limited or no relevance in this case because Crown Melbourne is the only casino operator that can be the subject of disciplinary action under the CCA;[70] and

    b. there are otherwise six matters relevant to the issue of specific deterrence[71] which Crown Melbourne says constitute bases upon which a *modest* fine should be imposed.

124. Although for reasons that are described later in Part 6, the Commission is concerned about the extent to which *Pattinson* can properly (and/or always) be said to apply to its consideration of disciplinary proceedings in the manner urged by Crown Melbourne, the Commission has decided that before it proceeds to consider the matters described in that part, it should first consider each of the matters that Crown Melbourne has specifically identified, following the approach that Crown Melbourne has urged the Commission to take.

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[68] Crown Melbourne's response to section 26 notice, 22 August 2022, p9 [13], citations omitted.
[69] 2022 HCA 13.
[70] Crown Melbourne's response to section 26 notice, 22 August 2022, p9 [10], citations omitted.
[71] Insofar as it concerns the *code breach finding.*

125. As such, in what follows in this Part 2 of its reasons, the Commission first considers the issue of the relevance of general deterrence to the *code breach finding* before then proceeding to consider each of the matters that Crown Melbourne has explicitly identified, on the question of specific deterrence, by reference to the evidence.

126. In doing so, the Commission has remained mindful of Crown Melbourne's submissions, based on *Pattinson,* including that:[72]

> *…it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence.*[73]

General deterrence and the *code breach finding*

127. The Commission rejects Crown Melbourne's submission that the issue of general deterrence *is of limited, if any, relevance in this case because Crown Melbourne is the only casino operator that can be the subject of disciplinary action under the CCA.*[74]

128. The Commission does so for several reasons:

129. *First,* the *code breach finding* concerns the issue of the responsible service of gambling and the extent to which Crown Melbourne failed to intervene with those of its customers who were displaying an indicator of gambling stress or harm by gambling for long periods without a break.

130. As has already been noted,[75] the risk that gamblers might experience gambling harm by gambling for long periods without a break is not a risk that is unique to Crown Melbourne.

131. Rather, it is a risk that exists equally to all of the many hundred entities licensed to provide gambling products in Victoria. For example, in respect of the particular type of gambling product known as EGMs, Crown Melbourne is just one of the approximately 489 Victorian venues where EGMs are permitted. It is also just one of almost 380 unique licensees required to comply with RSG obligations, insofar as they concern EGMs.

132. All of these providers of EGMs are obliged to intervene if their customers gamble for long periods without a break and regulatory action can be taken against those who fail to do so.

133. Although those obligations are placed on other licensees by the GRA (rather than the CCA, which applies to Crown Melbourne), it is a gross mischaracterisation of the regulatory regime for Crown Melbourne to seek to quarantine itself from the myriad other licensed gambling providers who are regulated by the Commission.

134. Any sensible assessment of the regulatory regime must recognise the extent to which RSG requirements are mirrored in both the CCA and GRA.

135. Any differences, such as the precise wording of the applicable ministerial direction or the parameters for when a gambling provider should intervene, are differences of form, not substance.[76]

136. *Secondly,* the extent to which the CCA, rather than the GRA, is the primary source of Crown Melbourne's RSG obligations is easily explicable.

137. Crown Melbourne is a unique gambling and entertainment environment. Among other things, it offers forms of gambling, such as card games and roulette, not offered at other venues. It also caters for *premium players* or *VIPs*. That is, persons with whom Crown Melbourne has established and curated specific and ongoing business

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[72] Kiefel CJ, Gageler, Keane, Gordon, Steward, Gleeson JJ.
[73] *Pattinson* at [15].
[74] Crown Melbourne's response to section 26 notice, 22 August 2022, p9 [10].
[75] In Part 1 of these reasons.
[76] For example, whilst there are variations in the form of both the ministerial direction and codes that apply to other venues, all EGM operators are nevertheless obliged to observe and intervene with gamblers who are displaying signs of problem gambling, including the sign of *often gambles for long periods without a break.* The 2020 ministerial direction that exists specifically in respect of EGM *venue operators* other than Crown Melbourne provides that they are *expected to interact with a person who has been observed to have been playing gaming machines for a prolonged period without a break and ask that person to take a break away from the gaming machine area* (clause 3.5). In the context of the specific *model code* that applies to what is known as *ALH Group,* that code specifically nominates that the signs of distress or unacceptable behaviour to which staff must be alert includes *gambling for extended periods; that is, gambling for three hours or more without a break* (p9).

relationships by which *VIPs* are paid a *commission* or *rebate* in return for gambling large sums at the Melbourne Casino. The risks associated with the infiltration of the Melbourne Casino by criminal elements are also subtly different from those at other gambling venues.

138. These matters, together with the sheer size of the Melbourne Casino, the history of its establishment and the fact that, unlike most other gambling venues, it operates 24 hours a day, seven days a week, make it entirely appropriate that a specific piece of legislation[77] should exist in respect of it.

139. That is not to say, however, that the operations and obligations of Crown Melbourne are so different to other licensed gambling providers that it can be distinguished for the purpose of general deterrence.

140. Victorian gambling licensees, other than Crown Melbourne, will look to these reasons to obtain guidance from the Commission about their obligation to intervene with gamblers who are displaying stress by gambling for long periods without a break.

141. *Thirdly,* rather than something that can be dismissed in the manner urged by Crown Melbourne, the issue of general deterrence is, in the Commission's view, of greater relevance in the context of Crown Melbourne's responsible service of gambling obligations.

142. On that topic, Crown Melbourne is one of Victoria's largest purveyors of EGMs. It should be a leader and, as the RCCOL expressly noted in its report, has sought to hold itself out as such.[78]

143. It has for many years advocated that it could be trusted to operate EGMs in certain locations within the Melbourne Casino with fewer restrictions than those that exist in other licensed EGM venues. This has meant, for example, that some EGMs at the Melbourne Casino operate with faster *spin rates* than elsewhere.

144. Having held itself out as a leader, advocated its trustworthiness and now been found to have engaged in such egregious conduct over such a sustained period, the need for general (and indeed specific) deterrence is heightened, rather than diminished in the context of the *code breach finding*.

145. The Commission rejects Crown Melbourne's submission that the issue of general deterrence *is of limited, if any, relevance* to the *code breach finding* accordingly.

146. In the Commission's view, the issue of general deterrence, insofar as it relates to the *code breach finding,* demands the imposition of a *significant* fine, rather than the *modest* fine for which Crown Melbourne contends.[79]

Crown Melbourne's submissions on specific deterrence

147. In addition to its submission on general deterrence, Crown Melbourne has identified six matters it says are relevant to the issue of specific deterrence and support what it says is the appropriateness of a *modest* fine.

148. It is these matters that are considered next in this Part 2 of the Commission's reasons.

Reform, organisational change, and previous public reviews

149. The *first* specific deterrence matter Crown Melbourne identifies, insofar as it concerns the *code breach finding,* is that (it says) it does not need to be deterred from future like breaches because its current reform program means it is *no longer the same organisation* as it was when the conduct that constituted the *code breach finding* occurred.

150. Relatedly, Crown Melbourne also says that:

> *This is not a case in which the [Commission's] disciplinary action is the primary means by which deterrence of future contraventions is to occur. The previous public reviews, together with Crown's reforms and the*

[77] In the form of the CCA.
[78] See RCCOL Final Report, Vol 1, Ch 1, p3 [12] where the RCCOL noted that *Crown Melbourne had for many years held itself out as having a world's best approach to problem gambling. Nothing can be further from the truth.*
[79] Furthermore, based on the totality of matters that are described in these reasons, the Commission has formed the view that deterrence requires the imposition of the statutory maximum in respect of the *code breach finding.*

people driving them, have already ensured that Crown [Melbourne] will do all it reasonably can to prevent its breaches of the RG Code from being repeated.[80]

151. The Commission rejects these submissions and, in doing so, will first consider Crown Melbourne's submission based on reform and organisational change before separately considering its submission based on the assertion that this is not the primary means by which deterrence of future contraventions is to occur.

The nature of the reform and organisational change

152. Crown Melbourne is not reforming because it has, of its own volition, decided that RSG improvements, its intervention with customers who gamble for long periods, or its operations more generally is necessary and appropriate.

153. Rather, the genesis of its reform and organisational change is the *final chance*[81] it has been granted by the legislature to satisfy the Commission[82] that it is capable (in the future) of being considered suitable to hold the Melbourne Casino licence unsupervised.

154. The reform program is also one which has been engaged since 2020 when an inquiry in New South Wales found Crown Melbourne's parent company (Crown Resorts Ltd (**Crown Resorts**)) and another subsidiary company (Crown Sydney Ltd) unsuitable to operate a casino in that state. The Crown group embarked on a reform program accordingly.

155. Subsequently, that program of reform expanded to include Victoria and Western Australia.[83]

156. Properly understood therefore, it was one or all of the:

    a. acceptance by Crown group companies that it was open to make findings of unsuitability in each of New South Wales, Victoria, and Western Australia;

    b. findings of unsuitability in each of those three states;

    c. desire of the Crown group generally to rid itself of its status of being unsuitable to operate casinos in each of those three states;

    that left Crown Melbourne with no choice but to engage in the process of the reform that is currently underway.

157. It both mischaracterises and overstates the processes of reform and organisational change to submit, that they are capable of impacting the deterrence (either specific or general) that needs to be achieved by the outcome of this disciplinary action.

158. *Secondly*, it is also important to appreciate that the reform process to which Crown Melbourne refers is finite.

159. In that regard, as has already been noted in Part 1 of these reasons, in about early 2024, the Commission will be called upon to decide whether Crown Melbourne has sufficiently reformed to regain suitability.

160. If the Commission decides in the affirmative, the major incentive that is driving Crown Melbourne's reform program will evaporate, and the Commission will be legislatively precluded from conducting another suitability review for 3 years after it has made its next decision on suitability.[84]

161. The deterrent effect that needs to be achieved by the outcome of this decision must stand as a deterrent that will continue to incentivise Crown Melbourne to comply with its RSG obligations into the future, including beyond the date upon which the current process of reform is complete and a decision on suitability has been made.

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[80] Crown Melbourne's response to section 26 notice, 22 August 2022, p10 [15].
[81] By reason of recommendations that were made by the RCCOL, as subsequently accepted, and made law by the parliament.
[82] And Casino Regulators in other states.
[83] Following Royal Commissions in both Victoria and Western Australia.
[84] See section 36J(2) of the CCA.

162. *Thirdly*, as has again also been noted in Part 1 of these reasons,[85] the Commission is deeply concerned about the lack of progress that Crown Melbourne is making with its reform program.

163. Although it is unnecessary to repeat the details of the matters referred to in Part 1 here, it is appropriate to note that those matters clearly demonstrate that, in and of itself, the reform program has, to date, been ineffective in deterring Crown Melbourne from failing to meet its regulatory obligations.

164. *Fourthly* on the specific issue of organisational change, Crown Melbourne well knows that most of the change to which it refers was also change that was, in effect, imposed upon it.

165. That imposition occurred as a result of the VCGLR's report into Crown Melbourne's operations in China[86] and the suitability inquiries that occurred in New South Wales and Victoria at about the same time.

166. The outcome of those matters resulted in the positions of a large number of Crown Melbourne and Crown Resorts directors and executives becoming untenable and Crown Melbourne thereby being left with no choice but to embark on an involuntary process of organisational change.

167. Although it is not necessary for the Commission to list the very large number of directors and executives whose positions became untenable in the period after 2020 (when the VCGLR's China investigation was occurring and the suitability inquiry in New South Wales began), only the briefest perusal of the VCGLR's China Report is necessary to identify the extent of the departures that have occurred in recent years.

168. Subsequently, departures continued in the period that followed the RCCOL because the positions of reformers also became untenable.

169. These more recent departures occurred because of failures to deliver on Crown Melbourne's initial assurances of reform and particularly the extent to which, after giving those assurances, Crown Melbourne continued to conduct its regulatory affairs in a manner that was *deeply* and *very regrettable.*[87]

170. In the Commission's view, the evidence does not support Crown Melbourne's submission that its reform program or the organisational change that has occurred to date is a matter capable of substantially affecting the need for the outcome of this matter to serve as both a specific and general deterrent.

171. The Commission rejects Crown Melbourne's submissions on specific deterrence based on what it says is its reform program and organisational change accordingly.

The incongruous submission that other fora were the primary means of deterrence

172. Crown Melbourne's submission that this disciplinary action is not *the primary means by which deterrence of future contraventions is to occur*[88] is incongruous, and the Commission takes that view for the following two reasons.

173. *First*, as has already been noted at the commencement of these reasons, Crown Melbourne expressly submitted to the RCCOL, via its senior counsel, that it was not the role of the RCCOL to punish or deter.

174. That submission was (evidently) accepted by the RCCOL in that it took no action (including making no recommendations) in respect of what, if any, disciplinary action should be taken as a result of the wrongdoing it had uncovered. Indeed, the RCCOL did not even recommend that specific provisions such as the RCCOL Finding Provision[89] should be enacted.

175. Instead, the Parliament, in its wisdom, decided to enact the RCCOL Finding Provision for the specific purpose of enabling disciplinary action to be taken, based on the extensive findings of wrongdoing that were made by the RCCOL.[90]

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[85] See in particular the details referred to in that regard in part 1 of these reasons, under the heading: *The relationship between this matter and the broader issue of suitability.*
[86] Which was produced and provided to the Minister pursuant to section 24 of the CCA in or about early February 2021.
[87] See transcripts of RCCOL evidence - Transcript of Xavier Walsh, 5 July 2021, T3332/46-T3333/33, Transcript of Jane Halton, 7 July 2021, T3586/20-28 and Transcript of Helen Coonan, 8 July 2021, T3765-T3676.
[88] Crown Melbourne's response to section 26 notice, 22 August 2022, p10 [15].
[89] Pursuant to which this matter has proceeded.
[90] Explanatory Memorandum, Casino and Gambling Legislation Amendment Bill 2021 (Vic), p4.

176. *Secondly,* the interpretive aides that are relevant to the RCCOL Finding Provision make it clear that the parliament intends this disciplinary proceeding to be the primary means by which deterrence is to occur.

177. In that regard, the relevant second reading speech makes clear that the purpose of the amendments, which included the RCCOL Finding Provision, was that:

    a. the parliament had decided to enact an *even stronger response [to that which had been recommended by the RCCOL] …to ensure the State is not hampered in its efforts to implement comprehensive regulatory reforms;*[91] and
    b. the relevant parliamentary intention was *to take whatever action is necessary to strengthen casino oversight in Victoria and ensure that Crown [Melbourne] is held accountable to all Victorians for the wrongdoings uncovered by the [RCCOL] and assure Victorians that such wrongdoings can never happen again.*[92]

178. It demonstrates a troubling level of detachment from each of the:

    a. events which have resulted in the Commission considering this matter;
    b. manner in which Crown Melbourne decided to participate in those events;
    c. changes been made to the regulatory regime for the specific purpose of addressing the wrongdoing that was identified by the RCCOL;

    for Crown Melbourne to submit that this is not *the primary means by which deterrence of future contraventions is to occur.*

179. This disciplinary action is plainly the primary means by which deterrence is to occur.

180. It is also incongruous that in its submissions Crown Melbourne has invoked the explanatory memorandum and second reading speech referred to immediately above on other matters[93] but did not do so to the extent that they so obviously contradict its submission that this is not the *primary means by which deterrence of future contraventions is to occur.*

181. The Commission not only rejects Crown Melbourne's submission that this is not the primary forum for deterrence but also considers that this submission has been an unnecessary distraction and one that should not have been made.

The submission that the breach was not deliberate

182. The second matter that Crown Melbourne submits as being relevant to the issue of specific deterrence is that it says, the *code breach finding* was not deliberate.

183. Crown Melbourne says that there are two reasons why the Commission should proceed on that basis, namely that:

    a. in 2018, in the course of the Sixth Casino Review, the Commission's predecessor, the VCGLR, found that Crown Melbourne had generally complied with its responsible gambling code in each of the preceding five years;[94] and

    b. notwithstanding that finding, in 2019, Crown Melbourne retained a group of experts known as the *RGAP* to identify weaknesses in Crown Melbourne's RSG processes.[95]

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[91] Victoria, Parliamentary Debates, Legislative Assembly, 27 October 2021, (Hon Melissa Horne MP, Minister for Consumer Affairs, Gaming and Liquor Regulation), p4214.
[92] Victoria, Parliamentary Debates, Legislative Assembly, 27 October 2021,(Hon Melissa Horne MP, Minister for Consumer Affairs, Gaming and Liquor Regulation), p4212.
[93] Particularly for the purpose of seeking to establish parameters around the concepts of illegal conduct and serious misconduct.
[94] Although it did not do so in the submissions it made in this matter, at the RCCOL, Crown Melbourne recognised the extent to which the former VCGLR had, in the sixth casino review, identified that Crown Melbourne needed to do better when it came to RSG. As Crown Melbourne's written closing submissions at the RCCOL put it: *The VCGLR also found numerous respects in which Crown [Melbourne] could improve its responsible service of gambling. It made 11 recommendations directed to that end.* See Crown Melbourne's written closing submissions to the RCCOL, 2 August 2021, p190 [F.45].
[95] The retention of the RGAP being a matter in respect of which the RCCOL found that Crown Melbourne should *be commended.* See RCCOL Final Report, Vol 2, Ch 8, p50 [275].

184. The Commission has carefully scrutinised both the Sixth Casino Review report and the work of the RGAP, insofar as it is recorded in its August 2020 report.

185. The purpose of that scrutiny has been to assess the extent to which the evidence supports or contradicts the submissions Crown Melbourne has made by reference to these reports.

186. Having done so, the Commission has formed the view that these reports do not support Crown Melbourne's submission that the *code breach finding* was not deliberate.

187. On the contrary, a detailed and objective assessment of these reports identifies that in the Sixth Casino Review report, Crown Melbourne was expressly warned by the VCGLR on the extent to which its approach to the matters that are now the subject of the *code breach finding* was too *conservative.*

188. It also reveals that there is no evidence to suggest that the RGAP was ever directed to the guidance the VCGLR had given to Crown Melbourne on the temporal period at which its staff should intervene with gamblers who were gambling for long periods. The RGAP was also not asked to give its opinion on whether the VCGLR's position on that issue was appropriate and should be acted upon.

189. The evidence also establishes that Crown Melbourne failed and/or refused to act on the VCGLR's guidance and persisted in applying its own parameters on when and how it would interact with gamblers who *often gamble for long periods without a break.*

190. That is to say, rather than act on regulatory guidance (which was consistent with the view the RCCOL later took), Crown Melbourne instead decided to continue to apply the parameters the RCCOL later used as the basis of the *code breach finding*.

191. Furthermore, having advanced a submission based on the content of the VCGLR's Sixth Casino Review report, Crown Melbourne has also failed to explain why it did not act on the regulatory guidance it received.

192. The Commission considers Crown Melbourne's failure to act on the guidance it was given and the absence of an explanation of why it did not do so, to be matters that are relevant to the deterrent effect that must be achieved by the outcome of this matter.

193. It is, therefore, appropriate that the Commission record the details of the analysis it has conducted of the VCGLR's Sixth Casino Review report and the August 2020 RGAP report.

Does the Sixth Casino Review support that the conduct was not deliberate?

194. In summary, in its June 2018 Sixth Casino Review report, the VCGLR warned Crown Melbourne that:

a. its practice of intervening only once a customer had been continuously gambling for 16 or 24 hours was *very conservative, and not conducive to responsible lengths of play;*

b. other comparable casinos, such as the SkyCity Casino in Auckland, had policies which meant that interventions would occur much earlier, after 5 hours of continuous gambling;

c. the data Crown Melbourne was keeping to intervene with its customers who gambled for long periods was inadequate, particularly when compared to casinos in other jurisdictions;

d. community expectations were changing, and Crown Melbourne's RSG practices had not improved in accordance with those expectations.

195. The terms in which the VCGLR gave these warnings were unambiguous.

196. In the executive summary, it said:

> *Turning to responsible gambling, Crown aspires to be world leading in this area, as it does across its business. However its approach to this is essentially unchanged since the Fifth Casino Review.* ***In the VCGLR's opinion and in an area where community and regulatory expectations are heightening rather than diminishing, Crown's approach to responsible gambling needs to continually improve****, particularly in the use of technology, as some of its peers can be said to be ahead of it in key aspects.*[96]

[96] VCGLR's Sixth Review of the Casino Operator and Licence (**Sixth Casino Review Report**), p6.

[emphasis added]

197. In the body of the report, the VCGLR also said that it:

> *…considers that there [had] been limited progress by Crown Melbourne…in identifying opportunities for improvement in response to initiatives and research in other jurisdictions, including interstate and overseas…the VCGLR considers that there are various actions Crown Melbourne could take to minimise the risk of harm to persons gambling at the [Melbourne] casino.*[97]

198. On the topic of the extent to which Crown Melbourne should make further use of the data it has available to it, the VCGLR said:

> *…[EGMs], provide a large amount of data which, if tracked by customer, can be analysed to observe trends in customer behaviour and identify potential risks. Data analytics can isolate certain types of behaviour that may indicate problem gambling. These are based on behavioural information from gamblers who have already experienced harm, and* ***include frequency of play and expenditure****…*[98]

[emphasis added]

199. As well as criticising Crown Melbourne for not making use of the data it had available to it, the VCGLR also contrasted the lack of data that was made available to the directors and executives responsible for RSG with the *highly detailed statistics*[99] that were provided to the directors and executives relevant to Crown Melbourne's responsible service of alcohol functions.

200. Furthermore, the VCGLR also noted that:

    a. the former VCGR had been encouraging Crown Melbourne to make use of the data it has available to it, as a basis for intervening to prevent gambling harm, for a decade before its 2018 review; and

    b. about five years before the 2018[100] Sixth Casino Review, the VCGLR had specifically recommended this data be used insofar as it is relevant to matters that have now become the subject of the *code breach finding.* In doing so, the VCGLR stated in unambiguous terms that Crown Melbourne should use this data *in relation to intensity, duration and frequency of play as a tool, to assist in identifying potential problem gamblers.*[101]

201. The Sixth Casino Review report also noted the extent of the data that Crown Melbourne has available to it, particularly in respect of those who are members of its loyalty program, includes:[102]

    - *the time and date of each play when the loyalty card is inserted into an [EGM]…*
    - *cessation of play when [a] loyalty card is removed from an [EGM]…*
    - *gaming machine expenditure for session (net win or loss)…*
    - *type of game play ([EGM or table games), and*
    - *other spending in the casino complex, such as meals, hospitality and retail.*[103]

202. In doing so, the VCGLR noted that Crown Melbourne might use this data to meet its RSG obligations similar to the approach taken in other jurisdictions, including the United Kingdom, Canada, the United States, Scandinavia, New Zealand, and South Australia.[104]

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[97] Sixth Casino Review Report, p121.
[98] Sixth Casino Review Report, p103.
[99] Sixth Casino Review Report, p88.
[100] In the course of the Fifth Casino Review. Noting also, that this is a matter about which Crown Melbourne was reluctant to act, including to the extent that on 20 October 2017, it stated to the then VCGLR that, in its view, *…research and experience in relation to the use of algorithms or parameter based models to identify potential problem gambling behaviours via data is inconclusive and nascent when considering land based play.*
[101] Sixth Casino Review Report, p102.
[102] In respect of which it should be noted that it is necessary for Crown Melbourne to maintain such data for reasons which include, among other things, complying with its statutory obligations under the GRA (section 3.5.36) to provide gamblers who are members of a loyalty program with activity statements.
[103] Sixth Casino Review Report, p102.
[104] Sixth Casino Review Report, p103.

203. Moreover, that Crown Melbourne needed to do more in the area of RSG was also the subject of recommendation 8 of the Sixth Casino Review report.[105]

The regulatory guidance specifically on time spent gambling

204. As to the specific guidance the VCGLR gave on time spent gambling, the Sixth Casino Review report contains a separate section headed *Breaks in play.*[106]

205. Under that heading, the VCGLR specifically contrasted Crown Melbourne's approach with that of the SkyCity Casino in Auckland and referred to that casino's *Host Responsibility Program* and the extent to which it provided for intervention with gamblers who were gambling continuously for periods between 3 and 6 hours.

206. The VCGLR expressed the matter in these terms:

> *If a person has been observed gaming continuously for five hours without a break of at least 30 minutes (aggregated), an alert is sent to gaming staff and the host responsibility team to encourage the person to take a break.*

207. In doing, the VCGLR said:

> *…Crown [Melbourne's] policy of only intervening after 16 or 24 hours of continuous play is very conservative, and not conducive to responsible lengths of play for local players.* ***Noting that [Crown Melbourne's Responsible Gaming Staff] receive alerts after every four hours of continuous play, it would be open to Crown [Melbourne] to intervene with local players much earlier, to encourage the person to take a break and leave the casino premises.***[107]
>
> [emphasis added]

208. Having regard to these matters, in the Commission's view, rather than endorsing Crown Melbourne's approach to RSG, insofar as it concerns the matters that underpin the *code breach finding*, the VCGLR was clear that expectations were changing; Crown Melbourne should change its approach; should make better use of the data it has available to it; intervene much earlier, and consider the parameters that were at the time being used by SkyCity Auckland as the basis upon which that intervention should occur.

209. Crown Melbourne decided not to act on the guidance it was given by the VCGLR and, in the context of submitting that its conduct as constituted by the *code breach finding* was not deliberate, has not explained to the Commission why it did not act on that guidance.

210. The evidence contradicts Crown Melbourne's submission that its conduct, as constituted by the *code breach finding,* was not deliberate.

211. Furthermore, as well as that contradiction, it should also be noted that it is very difficult not to conclude that there was a conscious business decision to ignore the VCGLR's guidance, noting the undeniable commercial incentive for doing so.

212. That commercial incentive is the impact acting on the VCGLR's guidance would have on the:

    a. revenue Crown Melbourne would otherwise enjoy from its gambling operations; and

    b. time and effort Crown Melbourne would be required to expend to ensure the parameters proposed by the VCGLR were implemented.

213. That is to say, acting on the VCGLR's guidance and intervening earlier would have inevitably resulted in gamblers being more closely observed and spending less time gambling at the Melbourne Casino. This would inevitably increase Crown Melbourne's compliance costs and also reduce the revenue Crown Melbourne would otherwise derive.

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[105] Being a recommendation which, as at the date of these reasons, remains the subject of ongoing implementation and correspondence between the Commission and Crown Melbourne.
[106] Sixth Casino Review Report, p96.
[107] Sixth Casino Review Report, p97.

214. Rather than support a conclusion that the conduct constituted by the *code breach finding* was not deliberate, the evidence establishes the contrary, particularly after 2018, when the VCGLR gave its view on the matter.

215. The Commission rejects Crown Melbourne's submission that an application of the content of the VCGLR's Sixth Casino Review report supports a conclusion that the conduct constituted by the *code breach finding* was not deliberate.

216. The outcome of this matter must deter Crown Melbourne and others from deliberately ignoring the advice of its regulator. It must also deter Crown Melbourne and others from deliberately failing to intervene with gamblers who gamble for long periods without a break and from prioritising their gambling revenue over their RSG obligations.

Does the RGAP support that the conduct was not deliberate?

217. It is also necessary for the Commission to specifically consider the second basis upon which Crown Melbourne has submitted that the *code breach finding* was not deliberate. That basis is said to be the work of the RGAP.

218. On that topic, the Commission has carefully considered the report of the RGAP that was produced after the Sixth Casino Review report (in August 2020) to assess whether it, in fact, provides a proper basis upon which the Commission could conclude that Crown Melbourne's conduct constituted by the *code breach finding* was not deliberate.

219. Having done so, the Commission has formed the view that the evidence constituted by the RGAP report provides no support or basis upon which such a conclusion might be made and the Commission has formed that view for the following two reasons:

220. *First,* the RGAP report notes that its function at the time was to:

    a. *comprehensively review…policies…, practices and procedures;*

    b. *identify gaps and weaknesses;*

    c. *make recommendations.*[108]

221. In doing so, the RGAP report specifically identifies the documents and information that was provided to it to produce its report.

222. Among those documents was a copy of the VCGLR's Sixth Casino Review report.[109]

223. What the RGAP report (or Crown Melbourne's submissions) do not describe, however, is whether the RGAP was ever directed to the:

    a. guidance the VCGLR gave, which has been extracted in detail above, including the extent to which it referred to the policies of SkyCity Auckland, and asked to give its opinion on the appropriateness of the times specified in that policy; and/or

    b. type of data that each of the VCGR, VCGLR and the RCCOL said could be used for assessing the adequacy and appropriateness of Crown Melbourne's RSG interactions with its customers.

224. The Commission is concerned that in retaining the RGAP, Crown Melbourne appears not to have specifically asked the RGAP to consider the guidance the VCGLR gave. Instead, the highest the matter can be put is that the RGAP was only asked to:

> *…consider the recommendations contained in the 2018 Sixth Review of the Casino Operator and Licence and build upon and extend Crown [Melbourne's] responsible gambling framework to achieve evidence-based best practice benchmark standards.*[110]

[108] See RGAP Terms of Reference as described in the RGAP Report dated August 2020 (**RGAP Report**) (CRW.526.007.7005 at .7006).
[109] See RGAP Terms of Reference as described in the RGAP Report (CRW.526.007.7005 at .7006).
[110] See RGAP Terms of Reference as described in the RGAP Report (CRW.526.007.7005 at .7006).

225. A review conducted in these terms was superficial and not directed at the specific areas for improvement which later became the subject of the RCCOL's *code breach finding*.[111]

226. The Commission considers that if Crown Melbourne were genuine in ensuring that the work of the RGAP dealt with the most important issues, it would have directed its experts to the relevant areas for improvement identified by the VCGLR and asked the RGAP to provide its opinion on those matters. Had it done so, the RGAP might have produced a report which genuinely engaged with the matters that have now become the subject of the *code breach finding*, rather than simply being asked to undertake the very general and superficial task that was set for it, as described in the August 2020 RGAP report.

227. Alternatively, if Crown Melbourne's position is that it did in fact direct the RGAP to the important matters that have since become the subject of the *code breach finding*, but the RGAP nevertheless did not address those matters, one would have thought that would have been identified in the course of submissions made about the deliberateness or otherwise of the *code breach finding.*

228. Having failed to ensure that the RGAP addressed the relevant matters identified in the Sixth Casino Review report (and having failed to identify in its submissions why no such direction was given to the RGAP), the Commission has formed the view that the RGAP report is incapable of supporting Crown Melbourne's submission that its retention supports that the *code breach finding* was not deliberate.

229. In the Commission's view, Crown Melbourne's failure to direct the RGAP to the VCGLR's guidance contradicts Crown Melbourne's submission that its conduct was not deliberate.

230. It also strongly suggests that, by engaging the RGAP, Crown Melbourne was attempting to obfuscate, distract and/or disincentivise the then VCGLR from continuing to press the matters referred to in the Sixth Casino Review report.

231. In that way, Crown Melbourne's approach to the VCGLR's guidance and its retention of the RGAP is redolent of the same type of conduct as it was found by the RCCOL in respect of Crown Melbourne's purported implementation of Recommendations 3 and 17 of the Sixth Review Casino Review report.

232. That purported implementation was a matter that was carefully and thoroughly considered by the RCCOL in the course of certain *case studies.* It described the *dismissive and uncooperative attitude* of Crown Melbourne towards the VCGLR and also the extent to which Crown Melbourne *falsely claimed compliance* with recommendations made in the Sixth Casino Review report when it had in fact failed and/or refused to comply.[112]

233. In the Commission's view, Crown Melbourne's retention of the RGAP, and the terms by which it was retained, are indicative of the same *dismissive and uncooperative attitude* as was identified by the RCCOL in the implementation case studies described in its final report.

234. The evidence, therefore, contradicts Crown Melbourne's submission that its retention of the RGAP is capable of supporting a conclusion that the *code breach finding* was not deliberate.

235. *Secondly,* however, there is also another reason why the Commission has formed the view that the RGAP report does not support Crown Melbourne's submission that the *code breach finding* was not deliberate.

236. That reason is the extent to which the recommendations made by the RGAP[113] are, in part, a repeat of matters Crown Melbourne had previously been told by the VCGR (in 2008) and the VCGLR (in 2018).

237. In that regard, the findings of the RGAP included the following:

> *Crown [Melbourne] collates a range of responsible gaming metrics…However, data is not readily available for review by third-party evaluation, for example, academics reviewing responsible gambling practices…As a consequence, little is known as to whether or not, or the extent to which, various RG measures actually work…*[114]

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[111] Noting that some of the guidance that was contained in the VCGLR's June 2018 Sixth Casino Review Report was effectively a repeat of earlier guidance that had been given to Crown Melbourne by the former VCGR as early as the 2008 Fourth Casino Review report.
[112] See in particular RCCOL Final Report, Vol 2, Ch 10, p113 [211] – [215].
[113] In the report it published in August 2020.
[114] RGAP Report, p7.

238. Furthermore, the recommendations of the RGAP included Recommendation 16, that:

> *…data should be used to inform a future model for identifying at-risk gamblers, perhaps according to a system that assigns colours to risk levels (e.g., green-yellow-red). That model, in turn, could be tied to a customer approach strategy, such that staff use different methods of approach, dialogue and suggested action steps depending on the model-assigned risk level…*[115]

239. Having made a finding and recommendation in these terms, the RGAP effectively told Crown Melbourne the same thing as it had been told by the VCGLR 2 years previous when it made recommendation 8 in the Sixth Casino Review. It also effectively repeated what Crown Melbourne had been told by the then VCGR in the course of both the Fourth and Fifth Casino Reviews, namely that it needed to improve its data analytics *with a view to more pro-actively and effectively intervening where anomalies appear in an individual's gambling expenditure patterns*.[116]

240. Crown Melbourne had known since at least June 2018 when the then VCGLR published its Sixth Casino Review report that this type of data was being used in the United Kingdom, Canada, the United States, Scandinavia, New Zealand and South Australia to assess the effectiveness of measures aimed at the RSG, particularly as it relates to the issue of *often gambles for long periods without a break.*

241. This is another example of the *dismissive and uncooperative approach* identified by the RCCOL in respect of Crown Melbourne's approach to the outcome of the Sixth Casino Review.

242. Having regard to these matters, the Commission does not accept that the retention of the RGAP supports the submission that the *code breach finding* was not deliberate.

243. On the contrary, in the Commission's view, Crown Melbourne's approach to the guidance given by both the VCGLR and VCGR and its subsequent retention of the RGAP is just a further example of the same type of conduct described in the relevant RCCOL case studies.

244. Having rejected Crown Melbourne's submissions about the deliberateness of its conduct the outcome of this matter must deter Crown Melbourne and others from deliberately failing to act on guidance it is given by their regulator and also from making submissions that are either not supported and/or contradicted by the evidence.

The submission that Crown Melbourne *misunderstood* its obligations

245. Related to its submission that its conduct was not deliberate is Crown Melbourne's third *code breach finding* submission on specific deterrence, namely that (it says) it *misunderstood* its RSG obligations.

246. On that issue, Crown Melbourne says that it *understood the reference to 'long periods' in the code to be a reference to the periods set out in [its own internal] Play Periods policy, not three to six hours as the RCCOL found.*[117]

247. The Commission is deeply troubled by this submission for the following reasons.

248. *First*, it is another submission that is not supported by a reference to the evidence. Crown Melbourne has not, for example, sought to provide evidence from the directors, executives, experts or lawyers upon whose opinion its purported *misunderstanding* was based. It has also not identified the person or persons upon whose opinion the times specified in Crown Melbourne's policy were derived.

249. Such evidence would be necessary before the Commission could act upon a submission such as this. Crown Melbourne cannot seriously expect the Commission to act on bald statements about such important matters that are unsupported by evidence.

250. *Secondly*, the need for evidence to support this submission is even more acute than would ordinarily be the case.

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[115] RGAP Report, p61.
[116] Sixth Casino Review Report, p102, quoting the then VCGR's Fourth Casino Review Report dated June 2008.
[117] Crown Melbourne response to section 26 notice, 22 August 2022, p12 [23].

251. That is because, in its final report, the RCCOL found that: *There is, of course, no research or academic learning suggesting that a 12-hour play period*[118] *is reasonable*[119] and that *there is no merit*[120] in Crown Melbourne's contention that an intervention parameter of 12 hours was appropriate.

252. Having been dismissed by the RCCOL in these terms, it is incongruous that Crown Melbourne would attempt to advance a similar submission in this forum, unsupported by any (let alone any additional) evidence.

253. Crown Melbourne does not seek to assert that the RCCOL's conclusion (based as it was on a detailed assessment of the relevant literature that intervention should occur between 3 and 6 hours) was wrong or point to any matters which could support the RCCOL having erred in making this finding.

254. Indeed, rather than submit to that effect, in the period since the RCCOL, Crown Melbourne has, on the contrary, accepted the assessment of the literature conducted by the RCCOL and adopted those parameters.

255. To simply identify a parameter, purport to apply it and then seek to advance it as a basis for asserting that Crown Melbourne *misunderstood* its obligations is not persuasive.

256. Crown Melbourne offers no reason why the Commission could or should depart from the finding of the RCCOL that *there is no merit in this contention*[121] and the Commission is not persuaded by Crown Melbourne's bald, unsupported repeat of a submission that has already been rejected by the RCCOL accordingly.

257. *Thirdly,* the Commission also notes that, in addition to the extent to which the RCCOL dismissed Crown Melbourne's assertions that are now said to form the basis of its *misunderstanding*, this is also a submission that is contrary to the other evidence, upon which an assessment of it might be made.

258. On that topic, as has already been noted[122] in the context of Crown Melbourne's submissions on the issue of the deliberateness of its conduct, Crown Melbourne was specifically advised by the VCGLR on when it should intervene with gamblers who gamble for long periods.

259. That advice was contained in the formal document that was the Sixth Casino Review Report which, in turn, referred to the policy that was applied by the SkyCity casino in Auckland and the extent to which it provided for intervention if a person had been gambling for five hours without a break of at least 30 minutes.[123]

260. The advice the VCGLR gave also included the warning that Crown Melbourne's policy of only intervening after 16 or 24 hours of continuous gambling was *very conservative and not conducive to responsible lengths of play.*

261. To now say that it *misunderstood* its obligations and in doing so not even refer to the guidance it had been given by the VCGLR in the Sixth Casino Review report demonstrates an alarming disconnection from the extent to which attempts were made by the former casino regulator to have Crown Melbourne address these matters, well before they were escalated to the RCCOL and this disciplinary proceeding.

262. The Commission is deeply troubled that Crown Melbourne would say that it *misunderstood* its obligations in these circumstances, and the Commission rejects that submission based on the evidence before it.

263. Based on that evidence, in the Commission's view, the only sensible conclusion is that rather than *misunderstanding* its obligations Crown Melbourne consciously decided not to implement the guidance it was given by its regulator.

264. In doing so (and for the same reasons as have already been identified in respect of the deliberateness of Crown Melbourne's conduct), in the Commission's view, it seems likely that Crown Melbourne decided to prioritise the revenue it was otherwise deriving from its gambling operations over that of ensuring that it complied with its RSG obligations.

265. It should not have taken the outcome of the RCCOL and now this formal disciplinary action for Crown Melbourne to alter its approach.

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[118] As set by the relevant Crown Melbourne policy and for which Crown Melbourne has historically sought to contend.
[119] RCCOL Final Report, Vol 2, Ch 8, p54 [301].
[120] RCCOL Final Report, Vol 2, Ch 8, p18 [101].
[121] RCCOL Final Report, Vol 2, Ch 8, p18 [101].
[122] Earlier in this Part 2 of the Commission's reasons.
[123] Sixth Casino Review Report, p97.

266. The outcome of this matter needs to deter Crown Melbourne and others from failing to properly consider and implement the guidance it is given by regulators. It also needs to deter Crown Melbourne and others from making submissions that are unsupported and/or contradicted by the evidence.

Crown Melbourne's expressions of remorse and contrition

267. The *fourth* matter that Crown Melbourne submits in respect of the issue of specific deterrence is that of its expressions of remorse and contrition.

268. On that topic, the Commission acknowledges both that Crown Melbourne has expressed remorse and also that it has now (finally) made changes that are consistent with the guidance it was given by the VCGLR in June 2018.

269. In acknowledging those matters, however, several issues need to be considered to properly assess the genuineness of Crown Melbourne's expressions of remorse (and, thereby, its relevance to the issue of deterrence).

270. The *first* is to place Crown Melbourne's expressions of remorse into their proper context.

271. In that regard, the reforms Crown Melbourne has described in its written submissions are constituted by what it calls the *'Play Period Enhancement Project'.* Those enhancements now see Crown Melbourne staff alerted (and presumably interactions occur) when a gambler[124] has continuously gambled for 3.5 hours.

272. In other words, it is only now, after the protracted process constituted by the RCCOL, that reforms have finally been implemented, which are consistent with the approach the VCGLR suggested Crown Melbourne might adopt, years before the *code breach finding* was made.[125]

273. The Commission does not consider changes made in these circumstances evidence of genuine remorse.

274. *Secondly,* there are also the various issues that are discussed elsewhere in these reasons that have caused the Commission to question the genuineness of Crown Melbourne's expressions of remorse, including:

    a. the misstatement of the regulatory environment upon which Crown Melbourne has purported to submit that the issue of general deterrence is not relevant;

    b. the extent to which almost all of Crown Melbourne's submissions are unsupported or contradicted by the available evidence;

    c. Crown Melbourne's failure to adequately explain certain matters that plainly require explanation, such as those that arise from its submission that it *misunderstood* its obligations.

275. *Thirdly,* there is also the issue of how late Crown Melbourne's acceptance of its wrongdoing and expressions of remorse have come. Having opened the issue of remorse and contrition, it is appropriate for the Commission to consider the previous opportunities Crown Melbourne might have taken to express and demonstrate its remorse.

The failure to identify matters and the 'enhancements' made during RCCOL

276. Early in the RCCOL process, the Royal Commissioner, the Hon Ray Finkelstein AO KC, wrote to the then directors of Crown Melbourne and asked them to disclose any conduct that would or *might* constitute breaches of Crown Melbourne's various obligations.

277. In respect of that request, the then chairperson of Crown Melbourne issued an *admonition* to the staff of the Crown Melbourne that they were to *leave no stone unturned [and] bring out [their] dead.*[126]

278. Notwithstanding both the letter and admonition, Crown Melbourne failed to disclose the *code breach finding* or the matters upon which it is based as issues that could, should, or *might* be considered by the RCCOL.

[124] Who is a *carded* member of a Crown Melbourne loyalty program.
[125] That is when the VCGLR published its Sixth Casino Review report in June 2018.
[126] Transcript of Helen Coonan, 8 July 2021, T3773/35-36.

279. In the Commission's view, having regard to the guidance Crown Melbourne had received in the course of the Sixth Casino Review, this is a matter that clearly should have been disclosed to the RCCOL, and it is incongruous that it was not.

280. The letter from the RCCOL was clear; it required disclosure of matters that *might* constitute a breach, irrespective of whether Crown Melbourne had or had not formed the view that an actual breach had occurred.

281. Had Crown Melbourne been genuinely remorseful, it could and should have disclosed the matters that are now the subject of the *code breach finding* so that the RCCOL could more efficiently consider them. It might have also told the RCCOL why it had decided not to act on the VCGLR's guidance.

282. Alternatively, at the very least, Crown Melbourne might have specifically identified the VCGLR's guidance and the extent to which (as the RCCOL has now pointed out) it was consistent with the relevant academic literature.[127]

283. Instead, rather than identify the matters that have since become the subject of the *code breach finding,* Crown Melbourne obfuscated by telling the RCCOL that it had (whilst the RCCOL was operational) made changes to its relevant policy. These included changes to the point at which Crown Melbourne would intervene with gamblers who were gambling for long periods without a break.

284. Crown Melbourne said these changes were *enhancements.*

285. There are three points to be made about these *enhancements* insofar as they relate to the *code breach finding.*

286. *First*, they again failed to have regard to the VCGLR's guidance.[128]

287. *Secondly,* they were also changes that, as the RCCOL noted, were developed and implemented in just six days and by a person who, at the time, clearly failed to understand the issues involved.[129]

288. *Thirdly*, in failing to have regard to the VCGLR's guidance, these *enhancements* also sought to apply far more limited interventions than those that had been identified in the Sixth Casino Review report[130] and which were subsequently applied by the RCCOL, based on its assessment of the academic literature.

289. In that regard, for domestic players, these *enhancements* meant that there would be interventions after 8 and 10 hours of continuous gambling, and a customer would only be permitted to gamble for a maximum of 12 hours in a 24-hour period, and for 48 hours in a week.[131]

290. Crown Melbourne did not say:

    a. why these purported enhancements did not include an interaction between the 3 and 6 hours of continuous gambling as had been identified by the VCGLR; or

    b. what literature or opinion these purported *enhancements* were based.

291. In all of the circumstances, these *enhancements* were nothing more than an attempt to be seen to be doing something, even though that *something* fell well short of what the VCGLR had made clear, years earlier, was appropriate.

292. Furthermore, its approach to these *enhancements* also makes it clear that Crown Melbourne would steadfastly refuse to act on the VCGLR's guidance unless it was forced to do so.

293. Indeed, that much is further demonstrated by the fact that, by the time of its closing written submissions to the RCCOL, Crown Melbourne's position had further shifted.

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[127] RCCOL Final Report, Vol 2, Ch 8, p18 [100].
[128] Or the earlier guidance that had been given by the VCGR in the course of the fifth and sixth casino reviews.
[129] RCCOL Final Report, Vol 2, Ch 8, p21 [124].
[130] By reference to the policy at the Auckland casino.
[131] RCCOL Final Report, Vol 2, Ch 8, p21 [121]. Less stringent changes were also applied to *International Premium Program* gamblers, based on criteria which included among other things the length of their stay in Melbourne.

294. That shift was that, although it was prepared to accept that its historical approach of only intervening at 12, 15 and 17-hour marks was *inappropriate*[132] and change was necessary, it was only prepared to say that it was *looking at* implementing a 3-hour check.[133]

295. In making that submission however, Crown Melbourne did not identify when, or in what circumstances, a change to this effect would be implemented. It was also not prepared to accept what the RCCOL ultimately found, namely that the academic literature supports that interventions should occur between the 3- and 6-hour mark.

296. Instead, Crown Melbourne attempted to argue the toss by taking a pernickety and very narrow view of what the relevant literature was and was not capable of supporting.[134] In this way, even during the RCCOL itself, Crown Melbourne's approach to RSG was (just as the VCGLR noted in 2018) primarily driven by regulatory and other external pressures.[135]

297. By reference to these matters, the Commission has formed the view that, were it not for the thorough and diligent work of the RCCOL, equipped as it was with all the powers of a standing Royal Commission, the *code breach finding* may never have been identified as a matter that constituted serious misconduct and required disciplinary action to be taken. Furthermore, in the Commission's view, it is unlikely that Crown Melbourne would have ever made the changes the VCGLR proposed in June 2018 unless and until it was, in effect, forced to do so.

298. These matters contradict Crown Melbourne's expression of remorse.

Crown Melbourne's refusal to accept its misconduct in closing at the RCCOL

299. As well as its failure to disclose the *code breach finding*, Crown Melbourne also refused to accept its wrongdoing in its closing submissions to the RCCOL.

300. On that topic, Crown Melbourne made very detailed written submissions which, among other things, addressed those instances of wrongdoing it was, at that time, prepared to accept. Annexure J.1 to its written submission sets out those matters.

301. An example of a matter that Crown Melbourne did accept was the CUP process described in the Commission's reasons published in May 2022.

302. In respect of the matters that are the subject of the *code breach finding,* however, Crown Melbourne was not prepared to accept that it had engaged in any wrongdoing.

303. Instead, Crown Melbourne's position was that it had made the *enhancements* referred to earlier in these reasons and could be trusted to make such further changes as might be necessary. Crown Melbourne summarised its position in these terms:

> *No breach of RG Code by Play Periods Policy*
>
> *The RG Code is to be read together with the Play Periods Policy. It follows that there is no conflict between them. The submission [of Counsel Assisting] that the Play Periods Policy "countermands" the requirements of the RG Code, with the result that Crown has been "continuously" in breach of s 69, should not be accepted.*

304. In doing so, Crown Melbourne refused to accept what it now does, namely that the matters that underpin the *code breach finding* constitute a breach of the relevant code and, thereby a breach of its casino licence.

305. It was only after the final report of the RCCOL had been delivered and Crown Melbourne was compelled to provide information to the Commission for this matter[136] that it was prepared to accept that the *code breach finding* constituted an instance of serious misconduct which was susceptible to disciplinary action. It was also not until August 2022 and in response to an exercise of compulsory powers by the Commission that Crown Melbourne expressed any remorse or contrition.

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[132] Crown Melbourne's written closing submissions to the RCCOL, 2 August 2021, p 199 – 200 [F.83.].
[133] Crown Melbourne's written closing submissions to the RCCOL, 2 August 2021, p 199 – 200 [F.86.].
[134] Crown Melbourne's written closing submissions to the RCCOL, 2 August 2021, p 199 – 200 [F.87.] – [F.91].
[135] RCCOL Final Report Vol 2, Ch 8, p 52 [282], citing the Sixth Casino Review Report, p6.
[136] Being information that was provided to the Commission in August 2022.

306. That expression was not made until it had become clear that the Commission was considering disciplinary action regarding the *code breach finding*.

307. In the Commission's view, had Crown Melbourne been genuinely remorseful about the matters which constitute the *code breach finding* that expression could and should have come following the close of evidence at the RCCOL and in the course of Crown Melbourne's closing submissions.[137]

308. The evidence establishes that rather than being genuinely remorseful, Crown Melbourne took an obstinate approach and effectively put the RCCOL to its proof. It then only expressed remorse after it became clear that such an approach had been unsuccessful in avoiding the *code breach finding,* and disciplinary action by the Commission had become inevitable.

309. In the circumstances, the Commission has formed the view that Crown Melbourne's very late statements of remorse are incapable of altering the general and specific deterrence that would otherwise be required.

310. The Commission must deter Crown Melbourne and others from being obstinate and making very late expressions of remorse only when they have no other option.

The effect of Crown Melbourne's ultimate acceptance of the regulatory guidance

311. Related to the issue of the lateness of Crown Melbourne's expressions of remorse is the subject of the impact these reluctantly made changes are now having.

312. On that topic, information compulsorily produced in this matter demonstrates that there has been a shockingly large increase in RSG metrics now that Crown Melbourne has finally adopted the approach the VCGLR first suggested in June 2018.

313. Among others, this includes significant increases in the metrics constituted by the total number of referrals of gamblers to responsible gaming staff, entries in Crown Melbourne's responsible gaming register and the main activities of Crown Melbourne's Responsible Gaming Centre staff.

314. These increases are evident from the table and bar graph immediately below:[138]

	APR-19*	APR-21**	Nov-21	Dec-21	Jan-22	Feb-22	Mar-22	Apr-22	May-22	Jun-22	AVG since NOV 21	Trend since Nov 21
Total NOS recorded	1801	2402	3025	3560	3088	3264	5304	5337	5018	4967	4195	
Total gaming referrals	100	152	253	256	186	227	418	496	380	409	328	
Total gaming referred Observable Signs	16	47	72	91	70	105	168	88	136	203	116	
Play Period entries in RG Register	608	1094	1680	2232	1985	2081	3668	3497	3168	3069	2673	
*April 2019 used as a comparison to pre-COVID trade												
**April 2021 was the last full month of trade prior to Oct 28th re-opening (COVID impacts)												

[137] Even if it had not come in response to the request that had been made earlier in the RCCOL.

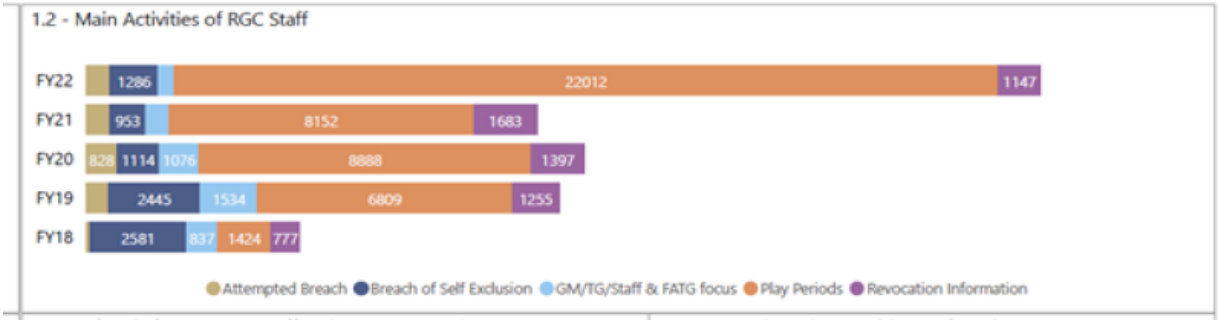
[138] Noting however that:

a. the table that has been proffered by Crown Melbourne as evidence relating to the 'on floor' presence of responsible service of gaming staff, rather than as being attributable to the alterations that have been made to the times at which interventions will occur; and

b. the bar graph has been proffered by Crown Melbourne as evidence relating to the increased efficacy of the training it is now providing to its responsible services of gambling staff.

315. As Crown Melbourne has pointed out by reference to this table, the data described as:

> *Play Period entries in RG Register - …represents the number of Play Period events that result in [Crown Melbourne's responsible service of gambling] personnel having a customer interaction or conducting an investigation. The average monthly total since Nov '21 is over quadruple that of the same period pre-COVID.*[139]



316. These results could and should have been yielded from at least June 2018, when the VCGLR published its Sixth Casino Review report.

317. Regrettably, however, they are results that are now only being achieved after the RCCOL made the *code breach finding,* and Crown Melbourne had no choice but to accept the appropriateness of the VCGLR's guidance.

318. Among other things, that long and drawn-out process required the RCCOL, utilising all of its powers, to consider the issue of when Crown Melbourne was intervening with its customers who were gambling for long periods without a break.

319. It should not have taken a Royal Commission for Crown Melbourne to make the changes that are now, finally, having the significant impacts that are depicted in the table and bar graph above.

320. Crown Melbourne could and should have acted on the VCGLR's guidance in June 2018. It did not and has not explained why it did not. Many people would have been protected from gambling harm had Crown Melbourne done so.

321. The Commission must deter Crown Melbourne and others from only altering their approach to their RSG obligations when they are, in effect, forced to do so.

The information produced about the nature and extent of the serious misconduct

322. A further matter that contradicts Crown Melbourne's expressions of remorse is how it has produced information to the Commission about the nature and extent of the *code breach finding*.

323. On that topic, Crown Melbourne has expressly acknowledged that:

> *…the code breach finding is a finding of a large number of breaches of the RG Code over a significant period, [and those] breaches of the RG Code had the potential to cause serious harm.*[140]

324. However, as has already been described in these reasons, the data that Crown Melbourne has available to it and from which it might have produced details about the nature and extent of its serious misconduct (at least insofar as it relates to those who are members of one of Crown Melbourne's loyalty programs and are therefore *carded*) is considerable.

325. This data has previously been referred to by each of the RCCOL,[141] the VCGR, the VCGLR and the RGAP. It is also data that Crown Melbourne used as the basis for the table and bar graph, reproduced immediately above.

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[139] Crown Melbourne's response to section 26 notice, 1 August 2022, p23, footnote 36.
[140] Crown Melbourne's response to section 26 notice, 22 August 2022, p13 [26].
[141] RCCOL Final Report Vol 2, Ch 8, p23 [129]

326. Having regard to:

a. the data Crown Melbourne has available to it;[142]

b. Crown Melbourne's statutory duty to assist the Commission;[143]

c. the guidance the VCGLR had given to Crown Melbourne in the Sixth Casino Review report on its expectations on the use that should be made of available data;[144]

d. the RCCOL's published finding that Crown Melbourne must work with the Commission openly and cooperatively and disclose to it everything it could reasonably need to be aware of to exercise its functions effectively and efficiently;[145]

the Commission decided to compel Crown Melbourne to produce information about the nature and extent of the matters the subject of the *code breach finding*.[146]

327. That requirement was in the form of a question which was in the following terms:

> *In the event that Crown Melbourne does accept that the RCCOL found that, in respect of RG, Crown Melbourne engaged in serious misconduct…details of the nature and extent of the serious misconduct that is accepted by Crown Melbourne.*

328. The Commission is dismayed at Crown Melbourne's response to this question.

329. Crown Melbourne has not interrogated its data or provided any assessment of the nature and extent of the serious misconduct it has accepted as constituted by the *code breach finding*.

330. Rather, Crown Melbourne's answer regarding the nature and extent of the serious misconduct it accepted for the *code breach finding* is little more than a repeat of information the Commission otherwise has available to it as a result of the RCCOL. Relevantly, Crown Melbourne's answer included the following:

> *The code breach finding was based on the RCCOL's finding that Crown was required under the RG Code to take action in respect of any customer who played continuously for three to six hours more than once a week. The RCCOL found that:*
>
> *(a) the RG code required Crown to act whenever a customer displayed an observable sign; and*
>
> *(b) in relation to the observable sign 'often gambles for long periods without a break':*
>
> *i. 'long periods without a break' should be interpreted as 'gambling for at least three hours, with an outer limit of five to six hours, without a proper break'; and*
>
> *ii. 'often' should be interpreted to mean more than once a week.*
>
> *Accordingly, every time a customer played continuously for more than three to six hours, and more than once a week, without Crown [Melbourne] taking an action, the RCCOL considered this to be a breach of the RG Code. The code breach finding is to the effect that Crown [Melbourne] breached the RG Code in this way consistently, for many years.*
>
> *…particulars that the RCCOL provided of that conduct include:*
>
> *(a) allowing players to gamble continuously for 12 hours or more without any observation or interaction, with some customers allowed to gamble continuously for well over 24 hours;*
>
> *(b) many instances in which Crown [Melbourne] failed to take the action required by the RG Code in response to an alert; and*

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[142] Including insofar as this is a matter which has in the past been helpfully described by the RCCOL, the VCGR, the VCGLR and the RGAP.
[143] See section 25A of the CCA.
[144] Sixth Casino Review Report, p121/2.
[145] RCCOL Final Report, Vol 2, Ch 10, p84 [4] – [7].
[146] Noting that this is an issue that is relevant to deterrence according to the *Pattinson* authority with Crown Melbourne says should be applied by the Commission in this case.

(c) allowing a large number of customers engaging in problem or risky gambling were escaping attention.

Crown [Melbourne] accepts that at least some of the customers referred to in (c) are likely to have played for long periods without a proper break, more than once a week; and that the finding that they 'escaped attention' was a finding that they were not approached by a staff member, as the RG Code required.

The RCCOL did not make a more precise finding as to the number of instances in which Crown [Melbourne] breached the RG Code. Accordingly, as to the nature and extent of the constituting the code breach finding, it is not possible to be any more specific than to note that the RCCOL found that Crown [Melbourne] breached the RG Code 'consistently' and 'over many years', and that the RCCOL made that finding on the basis set out above.[147]

331. Meanwhile, in its more general submissions, Crown Melbourne also submitted that: *The number of relevant breaches of the RG Code is…not possible to determine.*[148]

332. These answers are of little assistance and most certainly infringe the RCCOL's expectation that Crown Melbourne must disclose everything the Commission reasonably needs to be aware of to exercise its functions effectively and efficiently.[149]

333. These answers also contradict the expressions of remorse and contrition Crown Melbourne has otherwise made.

334. Crown Melbourne should have made a genuine attempt to interrogate its data to address the question the Commission posed about the nature and extent of its serious misconduct.

335. Even if the ultimate answer that was derived from such interrogation was qualified and could only be said to constitute a *best estimate* because, for example, it was limited only to *carded* players who are members of a Crown Melbourne loyalty program, that is not a reason not to have undertaken such interrogation.

336. Indeed, to have provided a *best estimate* would have been consistent with the approach Crown Melbourne took to the earlier CUP decision,[150] where it was unable to quantify the precise revenue that it derived from its illegal conduct but, nevertheless, provided the Commission with details of what it called its *theoretical revenue.*

337. Alternatively, if notwithstanding the data Crown Melbourne has available, it is genuinely not possible for it to determine the number of relevant breaches of the RG Code[151] an explanation should have been provided about why that is so.

338. Although the Commission is left with no choice other than to proceed on the basis that Crown Melbourne's serious misconduct constituted by the *code breach finding* occurred *consistently and over many years*, and its assessment of the evidence referred to in Part 1 of these reasons upon which it has formed the view that there are likely in excess of a million individual failures to intervene, its preference would have been for Crown Melbourne to have taken steps which might have allowed the Commission to have set more certain parameters around the extent of the serious conduct as constituted by the *code breach finding*.

339. Crown Melbourne should have done so in furtherance of its obligation to provide the Commission with everything it reasonably needs to discharge its regulatory functions.

340. Having declined to provide this detail, the Commission has formed the view that this aspect of Crown Melbourne's submissions contradicts its expression of remorse.

341. Overall, the evidence also does not support a conclusion that Crown Melbourne is genuinely remorseful for the *code breach finding.*

147 In response to question 11 see Crown Melbourne's response to section 26 notice, 22 August 2022, p4 and 5.
148 Crown Melbourne's response to section 26 notice, 22 August 2022, p15.
149 RCCOL Final Report, Vol 2, Ch 10, p84 [4] – [7].
150 Which was the subject of reasons that were published by the Commission in May 2022.
151 Crown Melbourne's response to section 26 notice, 22 August 2022, p15.

Deterrence and the role of the Special Manager

342. The *fifth* matter Crown Melbourne identifies as relevant to specific deterrence is the role of the special manager.

343. On that topic, Crown Melbourne submits that the need for it to be deterred is diminished because it is presently being supervised by a special manager who has been tasked with *keep[ing] a watchful eye on the progress of reform* and *mak[ing] sure that all the rules and regulations are complied with.*[152]

344. Although it is correct that Crown Melbourne is the subject of supervision, the Commission does not agree that the special manager's position is capable of having an impact on the need for Crown Melbourne to be deterred from engaging in the type of conduct that constitutes the *code breach finding* (or indeed the *button pick finding* that is the subject of Part 3 of these reasons).

345. The Commission takes that view for the following reasons.

346. *First*, similar to the reform program described earlier, the role of the special manager is finite, and, if Crown Melbourne is successful in its aim to return to suitability, it will be allowed to operate the Melbourne Casino, unsupervised, in or about early 2024.

347. As such, the deterrent effect of the Commission's decision in this matter must outlast the role of the special manager and act to deter Crown Melbourne (and others), irrespective of whether they are the subject of supervision.

348. *Secondly*, Crown Melbourne's response to this matter has demonstrated the extent to which the special manager is not in control of all aspects of Crown Melbourne's business. It has not, for example, been part of the special manager's role to review Crown Melbourne's submissions and other responses regarding this matter.

349. The role of the special manager is confined by the statutory provisions that are set out in Division 4 of Part 3 of the CCA. The parameters that division sets are limited and do not extend to functions capable of affecting the need for the outcome of this matter to properly deter Crown Melbourne (and others) from engaging in similar conduct.

350. This matter has provided the Commission with a valuable insight into what it can expect from Crown Melbourne, in the form it exists today, on matters about which it is not being supervised.

351. The inappropriateness of so many of the submissions that Crown Melbourne has made, including the extent to which they are not supported or contradicted by the evidence, are not matters that involved the special manager.

352. The role of the special manager is incapable of substantially affecting the need for specific and general deterrence to be achieved through the outcome of this matter accordingly.

The *code breach* submissions based on other *French* factors

353. Crown Melbourne's *sixth* and final submission on specific deterrence[153] is advanced by reference to what is commonly known as the *French* factors (being a reference to the decision of French J in *Trade Practices Commission v CSR Ltd)*.[154]

354. In respect of these matters, Crown Melbourne acknowledges that a large number of breaches occurred over a significant period which had the potential to cause serious harm and which also occurred in the context of the substantial size of Crown Melbourne's operations are matters that the Commission should consider in determining the question of what, if any, disciplinary action should be taken.

355. In making that submission however, Crown Melbourne says that the other matters it has raised (i.e., those which have been dealt with earlier in Part 2 of the Commission's reasons) render these issues incapable of justifying a substantial fine because *there is no risk of Crown [Melbourne] seeing a modest fine as merely the cost of doing business.*[155]

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[152] Crown Melbourne's response to section 26 notice,, 22 August 2022, p13 [25], citing RCCOL Final Report, Vol 1, Ch 1, p25 [23].
[153] Insofar as it concerns the *code breach finding.*
[154] [1991] ATPR 41-076.
[155] Crown Melbourne's response to section 26 notice, 22 August 2022, p13.

356. The Commission disagrees and does so for the following reasons.

357. *First,* having rejected Crown Melbourne's submissions on both general and specific deterrence, there is no basis for concluding anything other than that a substantial fine is necessary to achieve both specific and general deterrence.

358. That a large number of breaches occurred over a significant period which had the potential to (and, based on the findings of the RCCOL, did)[156] cause serious harm and which occurred in the context of the substantial size of Crown Melbourne's operations are matters which heighten, rather than lessen, the need for the outcome of this matter to deter.

359. A substantial fine (and indeed a fine at the statutory maximum) for the *code breach finding* is the only way to achieve deterrence.

360. The *French* factors referred to by Crown Melbourne confirm that, as do the other issues of specific and general deterrence that Crown Melbourne has referred to when they are properly considered, by reference to the evidence.

361. *Secondly,* the Commission is also of the view that the outcome of this matter must exceed the relevant *cost of doing business* is an important consideration when it comes to the issue of deterrence.

362. Essentially, that concept is that the quantum of any fine or civil penalty which is imposed should be sufficient to deter the implementation of business models which involve contraventions of regulated entities' obligations.

363. As well as being a *French* factor, this is a concept that has more recently been referred to with approval by the High Court in *Pattinson* where the majority said:

> *…it is simply undeniable that, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravenor to abide by the law rather that to adhere to its preferred policy than will be necessary to persuade a poorly resourced contravenor that its unlawful policy preference is not sustainable. It is equally obvious that, the more determined a contravenor is to have its way in the workplace and the more deliberate the contravention is, the greater will be the financial incentive necessary to make the contravenor accept that the price of having its way is not sustainable.*[157]

364. The Court continued:

> *…the theory is that the financial disincentive involved in the imposition of a pecuniary penalty will encourage compliance with the law by ensuring that contraventions are viewed by the contravenor and others as an economically irrational choice…*
>
> *Where it is evident that a contravention has occurred as a matter of industrial strategy pursued without regard for the law, it is open to a court acting…reasonably to conclude that no penalty short of the maximum would be appropriate….*[158]

365. Having regard to these matters, the Commission notes that there is no doubt that Crown Melbourne is a well-resourced contravenor. It has for many years generated enormous wealth from the privilege of operating the Melbourne Casino, including because its licence permits it to engage in conduct, namely offering gambling products, that would otherwise be illegal.

366. For this reason alone, a greater financial incentive is necessary to ensure that Crown Melbourne does not continue to adhere to the type of policy which has resulted in both the *code breach finding* (and indeed the *button pick finding* that is the subject of Part 3 of these reasons) and simply see the fines that are imposed as *a cost of doing business.*

367. As the Commission has already said, the evidence does not support that Crown Melbourne's conduct was not deliberate, that it made a mistake, that it *misunderstood* its obligations or that it is genuinely remorseful. The evidence also does not support that the role of the special manager, the relevant reform and organisational change or the work of other forums, such as the RCCOL, can sensibly diminish the need for specific and general

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[156] See in particular the case studies referred to in the RCCOL Final Report, Vol 2, Ch 8, p26 – 28.
[157] *Pattinson* at [60], citing *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* [1978] ATPR 40-091 at 17,896.
[158] *Pattinson* at [66] and [67].

deterrence to be achieved by the outcome of this matter insofar as it concerns the *code breach finding* (or indeed the *button pick finding*).

368. An imposition of a fine at the statutory maximum rather than a *modest* fine for the *code breach finding* is necessary to deter Crown Melbourne from seeing the outcome of this matter as nothing more than *a cost of doing business*.

PART 3 – THE BUTTON PICK FINDING

369. In this Part 3 of its reasons, the Commission takes a similar approach to its consideration of the *button pick finding* to that which it adopted for the *code breach finding.*

370. It commences with an explanation of the circumstances in which the then VCGLR came to give Crown Melbourne the statutory *pick direction* and the circumstances in which the RCCOL came to make the *button pick finding*, being a finding to the effect that Crown Melbourne failed to comply with the *pick direction.*

371. Following that explanation, the Commission then proceeds to consider the issue of deterrence insofar as it is relevant to the *button pick finding.*

372. Just as it was in Part 2, that consideration is based upon an assessment of the relevant regulatory environment (to consider general deterrence) and a detailed assessment of the evidence insofar as it concerns the submissions Crown Melbourne has made on the topic of specific deterrence.

373. Just as it concluded in respect of the *code breach finding,* the Commission has formed the view that, overall, Crown Melbourne's submissions are not supported by either a proper consideration of the regulatory regime or the evidence relevant to its specific deterrence submissions.

374. The Commission has, for the reasons which follow in this part 3, formed the view that the substantial fine that is referred to in the decision to which these reasons are attached is necessary to deter Crown Melbourne and other licensed gambling providers from failing to fully and properly comply with statutory directions that are given by the gambling regulator.

EGMs and the practice of continually depressing *play* buttons

375. At their most basic level, EGMs consist of a screen that displays a series of letters, numbers, or characters.

376. A gambler deposits funds into the EGM and pushes the *spin* or *play* button to set the images on the screen spinning in a circular motion, similar to the internal wheels inside mechanical machines before the electronic era. The pushing of the button being the modern equivalent of pulling the lever on the side of the pre-electronic era poker machines.

377. The combination of letters, numbers or characters displayed on the screen following each *spin* (or press of the button) determines whether the player has either *won* or *lost* as a result of that *spin*.

378. For reasons which include supporting the responsible service of gambling, EGMs in Victoria will generally not continually operate if a gambler continuously depresses the *spin* or *play* button. Instead, a gambler must release the button from a previous *spin* before pressing it again to activate a further *spin.*

379. This requirement to press the button to place each bet provides a physical and temporal gap between each bet and means that the person *playing* the machine must make a conscious decision to gamble each time a *spin* is made.

380. As was noted in Part 1 of these reasons however there is an exception at the Melbourne Casino.

381. That exception is that Crown Melbourne is operates certain EGMs in certain parts of the Melbourne Casino with fewer restrictions than elsewhere in Victoria.

382. One of those fewer restrictions is that, on some machines at the Melbourne Casino, gamblers can continually depress the *spin* or *play* buttons so that the relevant EGM will keep, *automatically*, making spin after spin until the money that has been deposited by the gambler (and/or their winnings) have been exhausted.

383. The basic concept of this exception is that, by holding down the relevant button with their finger, a player will remain at the machine they are *playing* and only *play* one machine at a time.

384. Some time ago however, a technique was developed which took this process of continually depressing EGM buttons a step further.

385. That technique was the practice of continually forcing EGM buttons down by either wedging items into the button cavity or placing heavy objects on top of the relevant buttons. These techniques had several consequences which were contradictory to the responsible service of gambling, including that they allowed gamblers to simultaneously *play* multiple machines and also allowed gamblers to leave the EGM they were notionally playing.

386. For its part, Crown Melbourne facilitated its customers deploying the technique of wedging items into the button cavities of EGMs by providing them with Crown branded *button picks* (which look similar to a guitar plectrum or *pick*).

387. The photograph immediately below depicts the use of a Crown-branded *button pick* (circled in red) by a Crown Melbourne customer on an EGM in the *Teak Room* at the Melbourne Casino on 14 April 2021.[159] As is described later in this Part 3 of the Commission's reasons, this photograph demonstrates that the use of Crown branded picks continued at Crown Melbourne after the VCGLR had issued the *pick direction*:

388. Meanwhile, for its part, the next photograph, immediately below, depicts a Crown Melbourne customer in the *Teak Room* at the Melbourne Casino using credit cards to both *play* multiple machines and also perform the same function as the Crown Melbourne branded *button pick* that is depicted above. The photograph immediately below was taken on 24 April 2021.[160] Similar to the photograph immediately above, it demonstrates the extent

[159] That is, just over two years after the *pick direction* had been issued to Crown Melbourne in March 2019.
[160] That is just over two years after the *pick direction* had been issued.

to which other items that were not specifically *designed* to depress the buttons on relevant EGMs continued to be used at Crown Melbourne in the period after the VCGLR issued the *pick direction*:

The VCGLR's *pick direction*

389. The VCGLR became aware of the use of Crown-branded *button picks* at the Melbourne Casino and investigated.

390. During that investigation, it became apparent that Crown-branded button picks were being made readily available to Crown Melbourne's customers. It also became apparent that in addition to the Crown branded picks other methods were also being used, such as the use of credit or other cards and heavy items to continually depress the buttons on the relevant EGMs.

391. The VCGLR took the view that the use of *button picks or like items* was inappropriate and issued a statutory direction on 7 March 2019,[161] in the following terms:

    1. *Crown [Melbourne] must not issue or supply to patrons any **button picks or like items** (**being any item or device designed to hold down or continually depress an electronic gaming machine button**) for use on any electronic gaming machine in the Melbourne casino.*

    2. *Crown [Melbourne] must take **all** reasonable steps to ensure that button picks or like items (as described above) are not used by patrons for gaming on electronic gaming machines in the Melbourne casino.*

    [emphasis added]

392. That direction was referred to by the RCCOL in its final report as the *pick direction.*

393. When it was given to Crown Melbourne, the *pick direction* was accompanied by a letter that included the following:

    The VCGLR acknowledges that one of its objects under the [CCA] is to foster responsible gambling in order to minimise the harm caused by gambling. The use of button picks by patrons at the casino effectively enables a patron to conduct continuous gambling on an electronic gaming machine, without the patron actively exercising control over the [EGM]. The VCGLR considers that practice may increase the risk of gambling harm to members of the community and is not consistent with other harm minimisation strategies,

[161] Pursuant to section 23 of the CCA.

such as the pre-commitment scheme. For this reason, the VCGLR has acted to make clear to Crown [Melbourne] that button picks are not approved and cannot be permitted in the future.

394. A copy of the *pick direction* and the accompanying letter is Annexure A to these reasons.

395. In respect of the *pick direction*, the RCCOL found that:

> *…where players used picks or similar devices that did not carry a Crown brand, the players were discouraged from using them but were not stopped from playing in that way, and the use of these devices continues.*

396. In these reasons, this finding is referred to as the *button pick finding*.

Crown Melbourne's acceptance that the *button pick finding* constitutes illegal conduct

397. Crown Melbourne accepts that the *button pick finding* constitutes *illegal conduct.*[162]

398. As such, it has been unnecessary for the Commission to consider whether it also constitutes serious misconduct, and it has not done so.

399. The Commission does, however, note that Crown Melbourne's acceptance of its illegal conduct is predicated on an assertion that the *pick direction* does not impose an absolute obligation on Crown Melbourne to prevent the use of button picks. Instead, it is an acceptance that has been expressed on the basis that, although it took all reasonable steps to prevent the use of Crown-branded picks:

> *where players used picks or similar devices that did not carry a Crown brand, the players were discouraged from using them but were not stopped from playing in that way…*
>
> *[that] is a finding that Crown [Melbourne] engaged in conduct that could be characterised as a failure to take 'all reasonable' steps to ensure that button picks or like items…are not used by patrons for gaming on EGMs at the Melbourne Casino.*[163]

400. The Commission's consideration of this matter has proceeded on that basis.

Crown Melbourne's acceptance that a fine is appropriate

401. Similar to its position on the *code breach finding,* Crown Melbourne accepts that a fine is warranted for the *button pick finding.* Crown Melbourne says that there is little or no utility in the Commission taking other disciplinary action, such as issuing a letter of censure or varying Crown Melbourne's casino licence. The Commission agrees.

402. The issue that remains for resolution however is whether the fine that Crown Melbourne agrees is appropriate should be *modest*, as is urged by Crown Melbourne.

403. Just as it did in respect of the *code breach finding*, Crown Melbourne submits that the quantum of the fine it accepts should be assessed through the lens of the High Court's decision in *Pattinson* and that it is the issue of deterrence that is the primary, if not only, matter that falls for consideration.

404. Notwithstanding that it will return to the issue of the appropriateness of the application of *Pattinson* later in Part 6 of these reasons, the Commission will, in this part of its reasons, consider each of the submissions Crown Melbourne has made and the extent to which they are (or are not) supported by the evidence.

405. This process has been necessary because Crown Melbourne's submissions on the issue of deterrence insofar as they concern the *button pick finding* are largely bereft of any reference to the evidence.

406. As will become apparent from the following reasons, the matters Crown Melbourne has identified do not support a conclusion that the accepted fine should be *modest*.

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[162] Crown Melbourne's response to section 26 Notice, 1 August 2022, p3 [1.1].
[163] Crown Melbourne's response to section 26 Notice, 1 August 2022, p12 [9.5].

General deterrence and the *button pick finding*

407. Unlike its submissions on the *code breach finding*, Crown Melbourne has not, by reference to the *button pick finding,* made a specific submission on general deterrence. That is to say, Crown Melbourne has not expressly submitted that general deterrence is of little or no relevance to the *button pick finding*.

408. In the Commission's view, however, the relevance of general deterrence to the *button pick finding* must be considered.

409. In that regard, as has already been noted in Parts 1 and 2 of these reasons, Crown Melbourne is just one of several hundred licensed providers of EGMs in Victoria, All of whom have RSG obligations and are susceptible to being given statutory directions in respect of their operations.

410. Under section 23 of the CCA, statutory directions can be given to Crown Melbourne, which must be complied with as soon as they take effect. Other licensed EGM operators can be given such statutory directions under section 3.5.27 of the GRAB.

411. As has already been noted,[164] the fact that relevant obligations are imposed upon Crown Melbourne primarily by the CCA but on others by the GRA does not diminish the need for general deterrence.

412. Any differences are those of form and not substance and are readily explicable, having regard to the nature and extent of Crown Melbourne's business and the history of the establishment of the Melbourne Casino.

413. It is not the point, as Crown Melbourne submits, that it *is the only casino operator that can be subject of disciplinary action under the CCA.*

414. Crown Melbourne is just one of many hundred licensed providers of EGMs in Victoria. Those licensed providers are all regulated by the Commission through mechanisms that include the giving of statutory directions. The importance of general deterrence in this matter cannot be diminished by the artificial approach which is urged by Crown Melbourne.

415. There is undoubtedly a considerable and valid general deterrence element to the Commission's consideration of this matter, and the Commission fully expects that every one of the almost 400 licensed EGM operators throughout Victoria will be looking to these reasons to obtain insight into the Commission's views on compliance with statutory directions.

416. Indeed, just as it was in respect of the *code breach finding,* the issue of general deterrence is of additional importance in the context of Crown Melbourne and the *button pick finding* than it otherwise might be.

417. Crown Melbourne has for many years been trusted to operate some of its EGMs with fewer restrictions than those that operate elsewhere in Victoria. Although it has claimed to have the world's best practices and been a leader, it has acted contrary to those claims by engaging in egregious conduct that is constituted by its failure to properly comply with the *pick direction* in the terms that are constituted by the *button pick finding.*

418. In the Commission's view, general deterrence favours the imposition of a significant, rather than a modest, fine in respect of the *button pick finding*.

Crown Melbourne's submissions on specific deterrence

419. Similar to the approach it took to the *code breach finding*, Crown Melbourne has identified certain matters which it says are relevant to specific deterrence.

420. The Commission has considered each of those matters carefully and, in particular, considered the extent to which the evidence supports (or contradicts) the matters for which Crown Melbourne contends.

421. In the portion of the reasons which follow, the Commission considers each of the matters Crown Melbourne has advanced in turn.

[164] In Part 2 of these reasons.

The submission that Crown Melbourne *misunderstood* the *pick direction*

422. Crown Melbourne submits that:

> *[It]…failed to comply with the Pick Direction not because it failed to take **any** reasonable steps to prevent the use of picks, but because it failed to take **all** such steps. Crown [Melbourne's] understanding of the Pick Direction at the time it was made was that the Direction only applied to button picks or 'any item or device **designed** to hold down or continuously depress' an EGM button.*[165]
>
> [original emphasis]

423. In making that submission, Crown Melbourne has sought to emphasise the steps it did in fact take in attempting to comply with the *pick direction*, albeit based on its purported misunderstanding.

424. The Commission accepts that Crown Melbourne did take the steps, aimed at compliance, that are described in Crown Melbourne's submissions.[166] Indeed the Commission takes that view for reasons which include the reporting Crown Melbourne was required to undertake, as a result of the *pick direction*.

425. The Commission does not however accept that it is open for it to conclude that Crown Melbourne in any way *misunderstood* its obligations in respect of the *pick direction* and that it should proceed to impose a *modest* fine accordingly.

426. The Commission takes that view for the following reasons.

427. *First*, the terms of the direction are clear. It plainly refers to *button picks or like items.*

428. It was obviously directed at the practice of continually depressing the *spin* or *play* buttons on relevant EGMs and no reasonable reading of the *pick direction* could sensibly support it being read down in the manner which is urged by Crown Melbourne.

429. Crown Melbourne's submissions do not address the extent to which the *pick direction* on its plain reading refers to both *button picks or like items.*

430. The direction needs to be read in its entirety and it is artificial and unsustainable to identify one word (namely the word *designed*) in the manner Crown Melbourne has and proffer that as the basis for a purported misunderstanding.

431. The position might be different if the direction had referred to *button picks that bear the Crown logo,* but it does not. The direction refers to *button picks* (regardless of any logo they might bear) and also refers to *like items.*

432. The direction was clearly intended to be read inclusively rather than exclusively and that is the precise reason why it was appropriate for the then VCGLR to use the term *like items* rather than attempt to take the alternative approach of listing all of the possible things that might be used to depress the *spin* or *play* buttons on the relevant EGMs.

433. To have taken such an approach would have required the VCGLR to list all of the possible types of cards which exist in the world (e.g., credit cards, Medicare cards, driver's licenses, library cards, membership cards, myki cards, loyalty cards, and the list goes on). It would have also required the VCGLR to list every item on the planet that might be heavy enough to depress an EGM spin button continually.

434. When expressed in this way, it becomes obvious that the basis upon which Crown Melbourne says it *misunderstood* the direction is absurd.

435. *Secondly,* even if the Commission were wrong about the precise nature of the words used by the VCGLR, the *pick direction* was accompanied by the letter which appears at Annexure A to these reasons.

436. That letter explained the intended purpose of the *pick direction* and accompanied it for reasons which included ensuring that Crown Melbourne properly understood its intended purpose.

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[165] Crown Melbourne's response to section 26 notice,, 22 August 2022, p13 [28].

[166] Being matters that are described both in Crown Melbourne's response to section 26 notice on 22 August 2022 and in Crown Melbourne's responses to various questions that the Commission posed pursuant to section 26 of the CCA. The answers to those questions were provided in two tranches, with the first being dated 1 August 2022 and the second being dated 22 August 2022.

437. The letter makes it clear that the conduct to which the direction is targeted is that of preventing or curtailing *continuous gaming on an [EGM], without the patron actively exercising control over the EGM,* rather than (as Crown Melbourne would have it) only to devices that were *designed* to hold down buttons on relevant EGMs.

438. The evidence does not support that Crown Melbourne could have reasonably *misunderstood* the direction and not realised that it was aimed at eliminating the simulation of *continuous gaming on an [EGM], without the patron actively exercising control over the EGM*.

439. Crown Melbourne's submissions do not refer to the letter that accompanied the *pick direction* and also do not explain how or why the letter could be ignored in assessing whether Crown Melbourne did or did not (mis)understand the direction.

440. *Thirdly*, Crown Melbourne also does not address the extent to which the Pick Direction was accompanied by a requirement, under section 128 of the CCA, that Crown Melbourne was to provide reports to the VCGLR about its compliance with the *pick direction*.

441. Having regard to that reporting requirement and the ongoing obligation it created, it is incongruous that at no time did Crown Melbourne seek clarification from the VCGLR about its interpretation of the *pick direction* or specifically inform the VCGLR of the narrow view it had decided to take to its compliance with it.

442. Crown Melbourne could and should have specifically identified the nature of the behaviour it observed in the course of purporting to comply with the *pick direction* and asked the Commission whether specific aspects of that behaviour either were or were not intended to be included within the scope of that direction.

443. The Commission expects, as the VCGLR did before it, that Crown Melbourne will work collaboratively with its regulators to ensure it acts appropriately.

444. The RCCOL found that expectation is appropriate and in Chapter 10 of its final report, went to great lengths to explain this to Crown Melbourne.[167]

445. In the context of the narrow approach Crown Melbourne took to its compliance with the *pick direction*, the Commission considers it disingenuous for Crown Melbourne to retrospectively claim that it *misunderstood* the direction.

446. The conduct the direction was designed to address was clear, but even if it were not, Crown Melbourne could and should have proactively sought clarification about its understanding of direction, rather than waiting until after a finding was made by the RCCOL and submissions were called for by the Commission in respect of that finding[168] to claim that it *misunderstood* what was required of it.

447. *Fourthly*, Crown Melbourne also does not address the nature of the process that gave rise to the *pick direction* and the extent to which that process contradicts the possibility that there could have been a genuine misunderstanding.

448. In that regard, as Crown Melbourne well knows, the investigation which preceded the *pick direction* commenced as one directed at its practice of supplying its customers with Crown-branded button picks.

449. This much is made clear in the first paragraph of the letter at Annexure A, which expressly refers to the VCGLR's investigations into *Crown-branded plastic wedges (button picks).*

450. As matters transpired, however, the direction that was ultimately issued was not just limited to the Crown-branded picks that had been the genesis of the VCGLR's investigation. Instead, the direction expressly identified *button picks or like items.*

451. Having been involved in the investigative process and, among other things, responded to an exercise of compulsory statutory powers by the VCGLR in the course of that process, it should have been obvious to Crown Melbourne that the intention of the direction went beyond the *Crown-branded plastic wedges (button picks)* that were the genesis for the investigation and instead was designed to also address the broader issue of any *like items* that might be used to enable *a patron to conduct continuous gaming on an [EGM], without the patron actively exercising control over* that EGM.

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[167] See in particular RCCOL Final Report, Vol 2, Ch 10, p84 [4] – [7], among others.
[168] Being submissions that were received from Crown on 1 August 2022 and 22 August 2022.

452. This would, quite obviously, include the use of cards, such as credit or other cards and the use of sufficiently heavy items to continually depress the spin or play buttons.

453. The Commission is deeply concerned that Crown Melbourne could be so disconnected from its RSG obligations and its regulatory obligations more generally that it would claim to have *misunderstood* the *pick direction* in these circumstances and now also claim that it believed that the direction only applied to items that were *designed* to depress *play* or *spin* buttons on EGMs.

454. *Fifthly*, something also must be said about Crown Melbourne's failure to provide evidence in support of its submission that it *misunderstood* the *pick direction*.

455. On that topic, Crown Melbourne did not, for example, seek to provide the Commission with a witness statement or affidavit from the executives or lawyers at Crown Melbourne who were charged with designing and implementing the compliance program that was applied to the *pick direction*.

456. Crown Melbourne also did not provide evidence of, for example, any consideration that was given to the *pick direction* by the board of Crown Melbourne; the identity of any lawyers or consultants who were retained to advise on the *pick direction* or the identity of the executive level staff who were responsible for implementing Crown Melbourne's response.

457. Instead, the submission that Crown Melbourne *misunderstood* the direction is made baldly and to the extent that it identifies evidence and the witnesses who may have been the relevant decision-makers merely identifies what they did in purported compliance (such as issuing memoranda and conducting briefings), rather than any evidence about the reason why they acted in the manner in which they did.

458. In the Commission's view, particularly having regard to the words of the direction; the letter which accompanied it; Crown Melbourne's obligation to work collaboratively with its regulator; the reporting obligations that accompanied the direction and the nature of Crown Melbourne's participation in the investigation that resulted in the direction, such evidence would clearly be necessary before the Commission could accept Crown Melbourne's retrospective submission that it *misunderstood* the pick direction.

459. In the absence of such evidence and also having regard to the contradictory evidence, the Commission rejects Crown Melbourne's submission that it *misunderstood* the direction.

460. Having done so it necessarily flows that Crown Melbourne's response to the *pick direction* was inadequate and was an example of Crown Melbourne seeking to ignore the intent of its obligations and reduce them to the bare minimum

461. The outcome of this matter must deter Crown Melbourne and the myriad other gambling licensees who operate EGMs from taking unjustifiably narrow approaches to their regulatory obligations, particularly insofar as they concern compliance with statutory directions.

462. In the Commission's view, the need for both specific and general deterrence justifies the imposition of the *significant* fine that the Commission has decided to impose in respect of the *button pick finding*.

The submission that the breach was not deliberate

463. Related to its submission that it *misunderstood* its obligations under the *pick direction* is Crown Melbourne's submission that its:

> *…breach of the Pick Direction was not deliberate. At the time, it genuinely attempted to comply with the Pick Direction as it understood the direction and did partially comply with it.*[169] *Crown Melbourne accepts that there are further steps that [it] could have and should have taken to ensure that button picks, or any other items used to hold down or continuously depress an EGM button were not used at the Melbourne Casino, and it regrets these failures but it was genuinely seeking to comply with the direction as it then (mis)understood it.*

[169] Crown Melbourne's response to section 26 notice, 22 August 2022, p14 [30].

464. In the Commission's view, the evidence before it does not support a conclusion that Crown Melbourne's conduct was not deliberate and indeed, on the contrary, the only finding that is open on the evidence is a finding that the breach of the *pick direction* was in fact deliberate.

465. The reason why the Commission has taken that view is *first* the matters described immediately above relating to whether Crown Melbourne *misunderstood* the *pick direction.*

466. *Secondly,* however, there is also the extent to which Crown Melbourne was rebuked by the RCCOL in several respects for its handling of regulatory matters.

467. Those matters are described throughout the RCCOL final report and particularly in chapter 10 of that report. These are matters to which the Commission is entitled to have regard for this disciplinary action by operation of section 20(15) of the CCA.

468. Furthermore, as has already been noted in Part 2, the matters that are dealt with in chapter 10 of the RCCOL report include Crown Melbourne's approach to the implementation of recommendations 3 and 17 of the VCGLR's Sixth Casino Review. In doing so, the RCCOL describes the extent to which, at about the same time as Crown Melbourne was purporting to establish compliance procedures aimed at the *pick direction*, it was also purporting to take steps to implement and/or comply with recommendations 3 and 17.

469. As the RCCOL describes, the compliance and/or implementation of recommendations 3 and 17 was inadequate and occurred in circumstances where rather than seeking to address the primary issue at which the recommendations were directed, Crown Melbourne was dismissive and uncooperative towards the then VCGLR and *falsely claimed compliance* on important matters when it had in fact failed to comply.[170]

470. Among other things, this included seeking to act on recommendation 17 in a limited way, but not to the extent of requiring junket players to provide details about their source of funds, as to do so may have caused them to take their business elsewhere.

471. These matters demonstrate an ongoing approach to regulatory matters by Crown Melbourne which might be summarised as one of complying only to the extent that it has a minimal impact on the revenue that would otherwise be derived from the segment of its business that is the subject of the regulatory action.

472. Furthermore, by reference to the matters that were identified by the RCCOL, it is difficult not to conclude that there was not a conscious business decision made to adopt a very narrow approach to compliance with the *pick direction* as that strict compliance would have both diminished the revenue stream it would have otherwise enjoyed from its EGMs and likely also increased the cost of compliance.

473. In these circumstances, the Commission is satisfied on the evidence that Crown Melbourne's non-compliance with the *pick direction* was in fact deliberate and that both general and specific deterrence requires a significant, rather than a *modest* fine.

474. There was an obvious failure by Crown to engage with the objective of preventing its customers from conducting *continuous gaming on an [EGM], without… actively exercising control over* the relevant EGM.

475. As the *button pick finding* is a matter that involves deliberate non-compliance with a statutory direction, the outcome of this matter must deter Crown Melbourne and all other licensees who operate EGMs in Victoria from adopting similar, narrow, approaches to purported compliance with statutory directions.

476. In the Commission's view, a substantial rather than a *modest* fine is called for.

Crown Melbourne's expressions of remorse and contrition

477. Just as it did regarding the *code breach finding*, Crown Melbourne has sought to express its regret and/or remorse and contrition in respect of the *button pick finding*.

478. Similar to the *code breach finding,* however, this is also a submission that is bereft of any reference to the evidence and as such is a matter which has required the Commission to make its own assessment.

[170] RCCOL Final Report, Vol 2, Ch 10, p113 [211] – [215].

479. That assessment has identified several matters which contradict Crown Melbourne's expressions of remorse insofar as they concern the *button pick finding.*

480. It has also identified that the evidence is incapable of supporting a conclusion that Crown Melbourne's expressions of remorse and contrition are genuine. They are expressions that have been made very late and have only come when Crown Melbourne has, in effect, been forced by the actions of both the RCCOL and the Commission to face up to its illegal conduct.

How the conduct was identified

481. The *first* matter relevant to Crown Melbourne's expressions of remorse on the *button pick finding* is how this illegal conduct was identified.

482. On that topic, as has already been noted in respect of the *code breach finding*, the RCCOL asked Crown Melbourne to identify matters which *might* constitute a breach of its obligations, which caused the former chairperson of Crown Melbourne to instruct her staff to *bring out their dead.*[171]

483. Crown Melbourne failed to identify the matters that are the subject of the *button pick direction* to the RCCOL.

484. Given that the RCCOL asked Crown Melbourne to identify matters which *might* have constituted a breach, and that Crown Melbourne knew that it had taken a very narrow view of the *pick direction,* the Commission is of the view that Crown Melbourne should have identified, at least the possibility, that its compliance with the *pick direction* had been inadequate.

485. Instead, were it not for the diligence of the RCCOL and its exercise of the extensive powers of a standing Royal Commission, Crown Melbourne's failure to comply with the *pick direction* may never have been identified.

486. Crown Melbourne's failure to disclose its interpretation of the *pick direction* in response to the RCCOL's invitation contradicts Crown Melbourne's expression of remorse.

Crown Melbourne's failure to accept its illegal conduct in closing at the RCCOL

487. *Secondly*, there is also Crown Melbourne's failure to acknowledge its illegal conduct in closing at the RCCOL.

488. On that matter, as has already been noted in Part 2 of these reasons, Crown Melbourne made extensive submissions following the close of evidence at the RCCOL, including specific details about those matters it was prepared to accept as constituting instances of its wrongdoing.

489. Crown Melbourne failed and/or refused to acknowledge its illegal conduct constituted by the *button pick finding* in its closing submissions notwithstanding that, by that time, it had before it all of the evidence upon which the RCCOL ultimately made the *button pick finding.*

490. It was not until late August 2022 and in response to a compulsory notice issued by the Commission, that Crown Melbourne was prepared to accept its illegal conduct constituted by the *button pick finding* and that it also finally sought to express remorse and contrition.

491. Crown Melbourne could and should have acknowledged its illegal conduct in its closing submissions. It could and should have expressed remorse at the time.

492. Instead, Crown Melbourne, just as it did in respect of the *code breach finding,* effectively put the RCCOL to its proof and then only became willing to acknowledge its wrongdoing and express remorse once findings had been made and it had become obvious that the Commission was considering taking disciplinary action based on those findings.

493. These matters not only contradict the genuineness of Crown Melbourne's expressions of remorse but are also matters that militate against the imposition of a *modest* fine.

[171] Transcript of Helen Coonan, 8 July 2021, T3773/35-36.

The October 2021 pick direction activities (including the VCGLR's concurrent investigation)

494. *Thirdly* in respect of Crown Melbourne's expressions of remorse and contrition, something must be said about the *pick direction* activities which occurred in October 2021, being a topic that Crown Melbourne has addressed in detail in the written material it provided to the Commission in August 2022.

495. In doing so, Crown Melbourne has described the additional steps it took in or about late October 2021 (i.e., at about the same time as the RCCOL was to publish its final report) which were designed to ensure its compliance with the *pick direction.*[172] Among other things, this included issuing, circulating, and displaying an additional memorandum and extending briefings to staff.

496. The Commission has considered these matters carefully and the extent to which they may or may not be matters by which Crown Melbourne may have demonstrated remorse and contrition. In doing so there are some important matters of context that must be mentioned.

497. As well as being the month in which the RCCOL published its final report, October 2021 was also the month in which the Commission's predecessor, the VCGLR, issued a compulsory notice to Crown Melbourne requiring it to produce information in respect of its compliance with the *pick direction*.

498. That notice was issued on 4 October 2021[173] for reasons which included that, separately from the work of the RCCOL, the VCGLR had identified evidence (including in the form of the photographs which were reproduced earlier in these reasons) that Crown Melbourne was not complying with the *pick direction*.

499. That evidence included[174] that the practice of using not only Crown branded picks that were *designed* to hold down EGM buttons but also other methods such as the use of credit cards for the same purpose continued after the *pick direction* was given in March 2019.

500. Among other things, Crown Melbourne's responses to the notice that was issued on 4 October 2021 confirmed that Crown Melbourne had continued to identify the use of *button picks or like items* on EGMs at the Melbourne Casino, after 7 March 2019, when the Pick Direction had been issued.

501. In the context of the various events that occurred in October 2021 Crown Melbourne does not say in its submissions whether the motivation for the additional actions it took at this time was one, some or all of:

    a. the VCGLR's investigation;

    b. the findings of the RCCOL;

    c. Crown Melbourne's own decision that additional steps were necessary for it to comply with the *pick direction*.

502. On balance, the Commission considers it most likely however that it was the VCGLR's investigation and the notice that was issued on 4 October 2021 that was the reason why the additional steps Crown Melbourne has pointed to were taken. Furthermore, the Commission has taken that view because based on the evidence before it, the notice that was issued on 4 October 2021 occurred before either the RCCOL published its final report (on or about 21 October 2021) and/or Crown Melbourne commenced taking the additional steps that it has referred to in its submissions.

503. That is to say, Crown Melbourne only took the additional steps it now seeks to rely upon in this matter because of the additional regulatory scrutiny that was being placed upon it by the VCGLR in respect of its compliance with the *pick direction*.

504. As such, and in the absence of direct evidence from Crown Melbourne about the reason why it took additional steps aimed at compliance in October 2021, the Commission does not consider it open to conclude that these additional steps are evidence of remorse and contrition on behalf of Crown Melbourne.

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[172] Which had been issued in March 2019.
[173] That is before the RCCOL published its final report.
[174] As will be evident from the photograph reproduced earlier in these reasons.

505. Based on the evidence[175] the Commission must conclude that the additional steps aimed at compliance that Crown Melbourne took in or about October 2021 are incapable of supporting Crown Melbourne's submissions on remorse and contrition.

506. They are also incapable of having a material impact on the nature of the fine that would otherwise be necessary in this case to achieve both specific and general deterrence.

The information produced about the nature and extent of the illegal conduct

507. *Fourthly* in respect of Crown Melbourne's purported expressions of remorse,[176] the Commission must also address how Crown Melbourne has gone about producing information in respect of the nature and extent of its illegal conduct.

508. On this topic, similar to the approach that the Commission took to compelling information on the nature and extent of the *code breach finding*, the Commission also compelled information on the nature and extent of the *button pick finding*. Having done so, the Commission expected that Crown Melbourne would, as an entity that was recently counselled by the RCCOL about the level of assistance it must provide to the Commission,[177] make a genuine attempt to seek to quantify the nature and extent of this illegal conduct. Crown Melbourne has not done so.

509. Instead, it has taken the same unhelpful approach as it took with the *code breach finding* and limited its response to a superficial identification of the following matters:

> *The RCCOL did not make any findings concerning the nature and extent of the conduct found in the passage of the RCCOL Report [being a reference to the finding that '…where players used picks or similar devices that did not carry a Crown [Melbourne] brand, the players were discouraged from using them but were not stopped from playing in that way, and the use of these devices continues]…beyond those set out in the passage itself.*[178]

510. Crown Melbourne is well aware that it is expected to assist the Commission. It is also aware that it purported to keep logs and other information in purportedly complying with the *pick direction*. Some of that information was included in the documents that were produced to the Commission in the course of this matter.

511. For example, there is the document entitled *Button Pick Reclaim Tracking Log.*[179] This document includes details of interactions between Crown Melbourne staff and its customers after the *pick direction* had been issued.

512. Concerningly, it includes references to gamblers who appear to have had their Crown-branded button picks returned to them because they did *not agree with the new regulation.*

513. It also includes references to customers using a *fly buys card* to play multiple machines and another who refused to remove *a key card* from an EGM. It also refers to yet another gambler who was observed continually depressing the button on an EGM using a visa card *cut into the shape of a pick.*

514. Having kept such information and included at least some of it in the material produced to the Commission, it is incongruous that Crown Melbourne would not have at least attempted to use the records it has kept as a basis for assessing and quantifying the nature and extent of its illegal conduct.

515. Crown Melbourne,[180] was specifically asked a question that was designed to allow it to do so.

516. It is difficult to comprehend that, in all of the circumstances, Crown Melbourne would decline that opportunity and again adopt an obstinate and insolent approach with the Commission.

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[175] And regardless of whether, in the period immediately after October 2021, the use of items to depress EGM buttons (as Crown Melbourne pointed out in its submissions) now appears to be, finally, trending downwards – see generally Crown Melbourne's response to section 26 notice, 1 August 2022, p42 - 43.
[176] Insofar as it concerns the *button pick finding.*
[177] RCCOL Final Report, Vol 2, Ch 10, p84 [4].
[178] Crown Melbourne's response to section 26 notice, 22 August 2022, p2.
[179] CRW.512.300.0001.
[180] Via a formal exercise of a statutory power by the Commission.

517. Alternatively, if there is a reason why Crown Melbourne says that the material it has available to it is incapable of being used to provide details of the nature and extent of its illegal conduct (even if it were just the type of *best estimate* that was provided in the course of the CUP process disciplinary action that occurred earlier in 2022) then Crown Melbourne should have identified why it has taken that position.

518. Instead, the Commission has been left with an entirely unhelpful and unsatisfactory response to a question that was so obviously designed to assist the Commission by providing it with relevant information.

519. In the Commission's view, Crown Melbourne's response to the requirement that it provide details of the nature and extent of its illegal conduct constituted by the *button pick finding* contradicts Crown Melbourne's expressions of remorse and contrition and also favours the imposition of a significant, rather than a *modest* fine.

Further matters arising from Crown Melbourne's position

520. As well as the matters that have been described above, it is appropriate that the Commission also identify the extent to which Crown Melbourne's approach to its compliance with the *pick direction* has and will continue to require additional regulatory steps to be taken.

521. Those matters have, to date, been constituted by an amendment to rule 10 of the casino rules which was recently made for the specific purpose of providing that Crown Melbourne EGM customers must not use any item, device, or other things to hold down or continuously depress EGM buttons.

522. This amendment has been necessary to, colloquially, close the loophole upon which Crown Melbourne had previously purported to rely when narrowly interpreting the *pick direction* and thereby remove the possibility of a future *misunderstanding.*

523. This amendment has placed an additional regulatory burden on the Commission which would not have been necessary, had Crown Melbourne taken an appropriate approach to its compliance with the *pick direction* in the first place.

524. Crown Melbourne and other licensees must be deterred from placing additional regulatory burdens on the Commission by failing to properly comply with statutory directions that are issued.

525. Furthermore, having regard to the evidence that has been produced by Crown Melbourne in the course of this matter, the Commission has formed the view that, likely, the use of devices or items to continually depress EGM buttons at the Melbourne Casino is continuing.

526. The Commission expects Crown Melbourne to remain vigilant in respect of the use of these items (whatever they are and however they are used) and to act appropriately if or when instances of this conduct are identified.

527. The Commission will instruct its Casino Inspectors to be vigilant on the use of *button picks or like items* at the Melbourne Casino and, where necessary, take steps to consider the adequacy of Crown Melbourne's response to any future instances of their use that might be identified.

PART 4 – OTHER DETERRENCE CONSIDERATIONS

528. In Parts 2 and 3 above, the Commission has addressed the specific submissions Crown Melbourne has made which it says justify the imposition of a *modest* fine for the *code breach finding* and the *button pick finding.*

529. The matters that have been identified by Crown Melbourne do not however represent the totality of the matters that should be properly considered by the Commission.

530. On the contrary, there are several matters relevant to the issue of deterrence, both specific and general, that have not been referred to by Crown Melbourne.

531. In this Part 4 of its reasons, the Commission identifies those matters and explains the reasons why, in the Commission's view, they justify the imposition of significant rather than *modest* fines for the *code breach finding* and the *button pick finding.*[181]

Crown Melbourne's recidivism

532. In *Pattinson*, the High Court was essentially asked to consider two slightly different approaches to determining what, if any, civil penalty should be imposed in that particular case.

533. On the one hand, the Court had before it the reasons of the first instance judge, Snaden J and on the other the reasons of the Full Court of the Federal Court.

534. The High Court preferred the approach taken by Snaden J at first instance and in doing so endorsed the extent to which his Honour had, among other things, identified the recidivism of the CFMMEU in that case as a matter that was open for consideration to determine the appropriate penalty to be imposed. The judgment of the majority put the matter in these terms:

> *The primary judge observed that the CFMMEU was, notoriously, a 'serial offender' in that it had historically acted in disregard of the law and appeared to treat the imposition of pecuniary penalties in respect of those contraventions as 'little more than the cost of its preferred business model.*[182]

535. Being an issue that falls for consideration by reference to the very authority that Crown Melbourne has invited the Commission to consider it is appropriate that the following matters are identified in respect of Crown Melbourne's recidivism, insofar as they are relevant to the issues of general and specific deterrence.

Previous disciplinary action taken by the Commission and its predecessors

536. Crown Melbourne is, as the CFMMEU was in the *Pattinson,* a *serial offender.*

537. The history of disciplinary action that has been taken against Crown Melbourne is considerable and includes that which was taken in:

a. September 2011, when a letter of censure was imposed for a failure to comply with certain internal controls in respect of junket operations;

b. July 2016 when a letter of censure was issued for a failure to have in place a relevant pre-commitment system with set time/loss limits;

c. December 2017, when a fine of $150,000 was imposed in respect of 13 contraventions of audit requirements relating to junket operations;

d. April 2018, when a fine of $300,000 was imposed for contraventions of the GRA arising from alterations that were made to the usual operation of 17 EGMs;

e. May 2019, when a fine of $25,000 was imposed for a further failure to comply with internal controls in respect of junket operations;

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[181] And the imposition of a fine which is at the statutory maximum insofar as the *code breach finding* is concerned.
[182] *Pattinson* at [21] referring to the first instance decision of Snaden J reported as *ABBC v Pattinson* (2019) 291 IR 286 at 297 [33].

f. April 2021, when the then maximum fine of $1 million and a ban on junket operations at the Melbourne Casino was imposed;

g. December 2021 when the then maximum fine of $1 million was again imposed for, among other things, Crown Melbourne's failure to comply with a direction it had been given to cease dealing with a convicted criminal with whom Crown Melbourne was doing business;

h. May 2022, when a fine of $80 million was imposed in respect of an elaborate scheme that had been devised to create false bills for hotel room charges as a mechanism for circumventing Chinese currency restrictions.[183]

538. Furthermore, the conduct that constitutes the *code breach finding* and the *button pick finding* was current and ongoing at the time that the RCCOL published its report in October 2021.

539. As such, by the time these findings were made, Crown Melbourne had already been the subject of disciplinary proceedings which had involved the imposition of the maximum penalty that was available to the relevant casino regulator at the time.

540. Evidently, the imposition of that maximum fine did little to cause Crown Melbourne to change its behaviour.

541. That history of past contraventions is a matter that is relevant to deterrence is well settled and is a matter that has been made clear not only by the High Court in *Pattinson* but also by the Full Court of the Federal Court in the earlier decision of *CFMMEU v ABCC*[184] (**Broadway on Anne**).

542. In *Pattinson* it was also a matter that Edelman J referred to in his dissenting judgment these terms:

> *An example of past contraventions being used to establish both the seriousness of instant contraventions and the need for deterrence is [Broadway on Anne]. In the Full Court of the Federal Court, Tracey J in the majority referred to the history of contraventions by the CFMEU*[185]*and said that repeated contraventions 'emphasise the objective seriousness of the CFMEU's conduct, acting through its officials. They bespeak deliberate abuse of the CFMEU's privileged position as a registered organisation in the Federal industrial relations system.' Also in the majority, Logan J, after referring to the 'disgraceful and shameful' history of the CFMEU's contraventions of the Fair Work Act, said that 'once the contraventions on the day, deplorable in themselves, are viewed in context, they are, in my view, of the worst possible kind. Their Honours imposed the maximum available penalty for each of the six contraventions.*[186]

543. There are striking similarities between the phraseology used by the Courts to describe the conduct of the CFMMEU in both *Pattinson* and *Broadway on Anne* and those that were used by Commissioner Finkelstein AO KC in describing the conduct of Crown Melbourne in the course of the final report of the RCCOL, including to the extent that, among other things, that RCCOL final report included the following:

> *…the [RCCOL] discovered that for many years Crown Melbourne had engaged in conduct that is, in a word, disgraceful. This is a convenient shorthand for describing conduct that was variously, illegal, unethical and exploitative.*
>
> *The catalogue of wrongdoing is alarming, all the more so because it was engaged in by a regulated entity whose privilege to hold a casino licence is dependent upon it being, at all times, a person of good character, honesty and integrity.*
>
> *…Some [of Crown Melbourne's misconduct] was so callous that it is hard to imagine it could be engaged in by such a well-known corporate whose Melbourne Casino Complex is visited by millions annually.*

544. The ongoing need for deterrence, Crown Melbourne's status as a serial offender and its obstinance to changing its ways require that significant fines be imposed.

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[183] Details of other disciplinary actions taken in respect of matters such as the unauthorised presence of minors in gambling areas are described in detail in the VCGLR's Sixth Casino Review Report.
[184] (2018) 265 FCR 208.
[185] Noting that in this passage Edelman J described the relevant union as the *CFMEU* rather than by the longer acronym of the *CFMMEU* that was used in other parts of the judgment in *Pattinson.*
[186] *Pattinson* at [100], citations omitted.

Submissions that are unsupported, or contradicted, by the evidence

545. The second aspect of Crown Melbourne's recidivism is the extent to which it has and continues to make submissions that are unsupported, or contradicted, by the evidence.

546. Although this is a matter that has already been considered in detail earlier in these reasons, for present purposes it is sufficient to note that Crown Melbourne's primary response to the *code breach finding* and the *button pick finding* is an assertion that its misconduct is historical, it has changed its ways and it intends to do better in the future.

547. Regrettably, however, the evidence does not support that position.

548. Instead, this matter has clearly demonstrated that Crown Melbourne is not doing better and instead continues to attempt to make submissions that are either unsupported or contradicted by the evidence.

549. Doing so is a matter that contradicts Crown Melbourne's assurances that it has changed.

550. Having been forced to confront this issue in this matter, it is appropriate for the Commission to say something about the previous attempts Victorian Casino regulators and the RCCOL have made to dissuade Crown Melbourne from making submissions that are either unsupported or contradicted by the evidence.

551. In that regard, as Crown Melbourne is well aware, in the course of the reasons that were published by the then VCGLR in April and December 2021, Crown Melbourne was strongly rebuked for making submissions that were not supported by the evidence.

552. In doing so, the VCGLR went to some lengths to identify the extent to which it expected Crown Melbourne to produce evidence in support of its submissions and not just make bald, unsupported assertions. For example, in its April 2021 decision, several of Crown Melbourne's submissions were rejected on the basis that they were either unsupported by evidence or what evidence there was contradicted the submissions Crown Melbourne had made.

553. After it had delivered its reasons in April 2021, those reasons were reviewed by the RCCOL, which agreed that Crown Melbourne's approach of making submissions that were not supported by the evidence was inappropriate in that:

> *Crown Melbourne's approach to the [April 2021] disciplinary proceeding can be described as obstructionist, aggressive and involving submissions that had little or no evidentiary support or were inconsistent with positions taken elsewhere.*[187]

554. Meanwhile, shortly after the RCCOL published its findings (in October 2021), the VCGLR took further disciplinary action against Crown Melbourne.

555. In that matter (which was the subject of reasons that were published in December 2021), Crown Melbourne again made submissions that were unsupported by the evidence, and it was again rebuked by the VCGLR accordingly.[188]

556. Notwithstanding the rebukes it has received from the VCGLR and the RCCOL, Crown Melbourne has, in this case, again persisted in making submissions that are unsupported or contradicted by the evidence.

557. It must assist the Commission by making proper reference to the evidence and only making submissions that are properly supported. It should not expect the Commission to make findings of fact in the absence of evidence.

558. It is appropriate, as the RCCOL has noted, that the Commission should expect as much.[189]

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[187] See RCCOL Final Report, Vol 2, Ch 10, p116 [236].

[188] Among other things, the VCGLR's reasons for decision dated 22 December 2021 identify that Crown Melbourne made submissions which variously sought to mischaracterise the facts in an attempt to support a submission that they were part of the same factual substratum as had been considered by the VCGLR in April 2021; mischaracterise the process by which the VCGLR had reached its decision in April 2021; purported to advocate an unsupportable construction of Crown Melbourne's relevant obligations; sought to mischaracterise secondary interpretative aides it said supported its position and sought to rely on authorities that did not support its submissions.

[189] RCCOL Final Report, Vol 2, Ch 10, p84 [4] – [7].

559. Crown Melbourne must stop making submissions, as the RCCOL put the matter, *that [have] little or no evidentiary support.*

560. This decision must serve to deter both Crown Melbourne and other licensed providers of gambling products in Victoria from doing so.

Unsupported submissions about the law

561. The *third* matter that must be addressed on the topic of Crown Melbourne's recidivism is its ongoing tendency to make unsupported submissions about the law.

562. On that topic, in Parts 2 and 3 above, the Commission has already noted the submissions that Crown Melbourne has made in respect of the issue of general deterrence and the extent to which they do not properly consider the nature of the regulatory environment in which this matter falls to be considered.

563. Later in Part 6 of these reasons the Commission also describes the extent to which Crown Melbourne has submitted, without detailed analysis, that *the fine that the Commission may impose under s 20 of the CCA is a form of civil pecuniary penalty.*[190]

564. Although the Commission deals with this submission in detail in Part 6, for present purposes, it is sufficient to note that the Commission is concerned about the extent to which this matter has again involved Crown Melbourne making assertions about the law in the absence of also providing the basis upon which those assertions are made. This is a further aspect of Crown Melbourne's recidivism, including to the following extent:

565. In disciplinary action in April 2021, Crown Melbourne made submissions on the law that were rejected by the VCGLR in the following terms:

> *…the Commission rejects Crown [Melbourne's] submission that the question of whether Crown [Melbourne] implemented a robust system should be determined subjectively. Crown [Melbourne] pointed to no authority to support that proposition.*
>
> *…*
>
> *The Commission also rejects the submission that the relevant standard has changed since the matters referred to in the show cause notices occurred.*
>
> *In that regard…the objectives of the Casino Control Act, the Commission and the [internal control statement that was relevant in this instance] have always been to ensure that the Melbourne Casino remains free from criminal influence or exploitation. That is an objective or standard that has been set for both the Commission and Crown [Melbourne], by Parliament.*

566. Furthermore, in the course of disciplinary action, the Commission itself took in May 2022; Crown Melbourne again made submissions that were bereft of an appropriate level of analysis and were wrong.

567. Those submissions related to the issue of the extent to which the fine that should be imposed in the disciplinary action that was taken in May 2022 should be assessed through the lens of the maximum that had been available at the time the relevant conduct occurred, rather than the maximum fine that was available at the time the matter came to be considered.

568. In furtherance of that submission, Crown Melbourne purported to rely on an authority that did not stand for the proposition contended.[191] It referred to a constitutional case, in a racial discrimination context, that concerned a legislative amendment that was designed to retrospectively cure an inconsistency between Commonwealth and State laws.[192]

569. Crown Melbourne also failed to identify and consider the authorities which made plain that its submissions that the fine should be assessed by reference to the historical maximum were wrong.

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[190] Crown Melbourne's response to section 26 notice, 22 August 2022, p8 [6].
[191] Namely *University of Wollongong v Metwally* (1984) 158 CLR 447 [at 472].
[192] See generally the Commission's reasons for decision dated 30 May 2022 at paras [71] – [88].

570. Quite properly, in this case, Crown Melbourne has not sought to repeat its submissions that the fines it accepts are warranted should be assessed by reference to the maximum that was available at the time the wrongdoing occurred.

571. However, for reasons which include the matters that were identified earlier in Parts 2 and 3 and later in Part 6, Crown Melbourne has again persisted in (at least) making superficial assertions about the law that are not properly considered and (at most) perhaps also making submissions about the law that are wrong.

572. In doing so, Crown Melbourne has again imposed an additional and unnecessary burden on the Commission in considering this matter.

573. Crown Melbourne is a well-resourced entity. The Commission expects it to only make careful and appropriate submissions about the law. It also expects that when assertions are made about the law, the basis upon which those assertions are made is provided in a manner that demonstrates that they have been properly analysed so that they might be efficiently considered by the Commission.

574. An example of an instance where Crown Melbourne has acted appropriately in that regard is the helpful and cogent submissions it provided about the distinction between the concepts of *illegal* and *serious misconduct* in the course of this matter.

575. Crown Melbourne and other licensed gambling providers must be deterred from making superficial and unsupported assertions about the law. Crown Melbourne's recidivism in doing so justifies the imposition of significant rather than *modest* fines.[193]

The RCCOL findings that were a repeat of concerns previously raised by the VCGLR

576. The *fourth* element of Crown Melbourne's recidivism is the extent to which the findings of the RCCOL, insofar as they concern the *code breach finding* were as has already been noted in Part 2 of these reasons, a repeat of concerns that had previously been raised by the VCGLR, but not acted upon by Crown Melbourne.

577. On that topic, the Commission is deeply troubled about the extent to which Crown Melbourne failed to act on the guidance it received from the VCGLR (and before it the VCGR) in respect of matters that are now directly relevant to the *code breach finding*.

578. Furthermore, the Commission considers that it is appropriate to note that the Commission is not the only one who has considered it necessary to express concern and frustration about that matter.

579. For its part, the RCCOL also noted the previous attempts of the VCGLR and VCGR to cause Crown Melbourne to relevantly alter its approach in respect of RSG in ways that are relevant to the *code breach finding*. It put the matter in these terms:

> *Many of the concerns voiced [by the RCCOL in respect of RSG at the Melbourne Casino] were previously raised with Crown Melbourne by the VCGLR. In its [June 2018] Sixth Review, the VCGLR noted that Crown Melbourne's approach to responsible gaming was 'essentially unchanged' since [the] Fifth Casino Review five years earlier. Its report noted:*
>
> - *…*
> - *The amount of time patrons were left unattended before staff intervention as mandated by the Play Periods Policy was not conducive to responsible lengths of play for local players.*
> - *Crown Melbourne's use of player data analytics to support interventions was still in a trial phase five years after being recommended as part of the Fifth Review and 10 years after first being raised with Crown Melbourne [by the then VCGR].*
> - *…*[194]

[193] And in respect of the *code breach finding* the imposition of a fine which is at the statutory maximum.
[194] RCCOL Final Report, Vol 2, Ch 8, p 55 [303].

580. Crown Melbourne did not say in its submissions why it did not act on the guidance it had received from the VCGLR. It also did not say why it was appropriate for it to make the submissions it has in this matter without taking into account what had been identified by the RCCOL. It should have.

581. These findings by the RCCOL were, in effect, an endorsement of the regulatory steps that had been taken by the VCGLR and are matters that plainly contradict several aspects of the submissions Crown Melbourne has now made, particularly in respect of the *code breach finding*.

582. The evidence of Crown Melbourne's recidivism is extensive. In the Commission's view, they (adopting the words of the RCCOL) *reflect a flawed organisational structure, a dysfunctional culture [and] failures of leadership….*[195]

583. Regrettably, the Commission's experience in this matter suggests that far from reforming, the matters identified by the RCCOL at least to the extent that they have been demonstrated to the Commission in the submissions Crown Melbourne made (which were delivered to the Commission by the leadership of Crown Melbourne as it existed on 22 August 2022) are continuing.

584. In the Commission's view, these matters strongly suggest that Crown Melbourne has and is continuing to take an approach to its dealings with the Commission which demonstrates little or no understanding of what is expected of it as an entity that aspires to suitability.

585. Crown Melbourne and the other licensed purveyors of gambling products who have similar obligations to serve their gambling products responsibly must be deterred from adopting similar strategies in their dealings with the Commission.

Deriving revenue from those vulnerable to gambling harm

586. In addition to its recidivism, there is also the extent to which the *code breach finding* and the *button pick finding* are constituted by conduct that resulted in Crown Melbourne deriving revenue from those who are vulnerable to gambling harm.

587. On that topic, it has been well-accepted for many years that significant revenue may be derived by gambling operators, from those who are vulnerable to gambling products.[196]

588. In those circumstances, it is beyond argument that Crown Melbourne would have derived considerable revenue from the same vulnerable segment of the community that should be protected by the RSG regime, including to the extent that it required intervention with gamblers who gambled for long periods and required that gamblers be prevented from continuously depressing EGM play buttons.

589. Crown Melbourne's submissions do not address the issue of the vulnerability of the persons who were the *victims* of the conduct that constitutes the *code breach finding* and the *button pick finding*.

590. As has already been noted, Crown Melbourne has not attempted to quantify the number of relevant breaches for either of the findings the subject of these reasons. Similarly, it has also not attempted to calculate the revenue it has derived as a result of that conduct.

591. In the Commission's view, the need to deter both Crown Melbourne and all other licensed operators of EGMs in Victoria from engaging in conduct that has the effect of deriving revenue from those who are vulnerable to gambling harm is an important matter.

592. In the Commission's view substantial rather than *modest* fines are necessary to deter Crown Melbourne and other licensees from engaging in conduct that has the effect of deriving revenue from those who are vulnerable to being harmed by gambling products.

Deterrence and indirect harm

593. As well as being deterred from deriving revenue from those who are vulnerable to gambling harm, the deterrent effect of this decision must also reflect the extent to which the *code breach finding* and the *button pick finding* caused harm beyond that which was caused to the gamblers themselves.

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[195] RCCOL Final Report, Vol 2, Ch 8, p 56 [306].
[196] See for example Productivity Commission Report 1999 as cited with approval by Crown Melbourne's RGAP Report, p13.

594. On that matter, the RCCOL said:

> *Concentrating attention on the financial cost of harms caused by gambling problems ignores the larger picture. Many of the most profound impacts of gambling defy quantification. The true impact of a life lost to suicide on the person's family and friends is incalculable. The same is true of the personal cost to a life of irrecoverable years spent overwhelmed by addiction, uncertainty and hopelessness, or of a childhood marred by violence or homelessness.*

595. The specific and general deterrent effect of this decision must consider the indirect harm that is caused by the irresponsible service of gambling products accordingly.

596. The cost of that indirect harm is significant and, according to a March 2021 report referred to by the RCCOL, prepared by the Victorian Auditor General, is a cost that far exceeds the monetary losses of the relevant gamblers themselves.

597. According to that report, the total cost to the community of gambling that is served irresponsibly is around $7 billion a year. Among other things, this includes the costs of damaged relationships, health and wellbeing and other social costs.[197]

598. The fines that are imposed for the *code breach finding* and the *button pick finding* must be significant to deter Crown Melbourne and other gambling licensees from contributing to these costs by serving their gambling products irresponsibly.

Public protection and the primacy of RSG regulation

599. The deterrent effect of this decision must also recognise that the RSG regulation for which the Commission is responsible is the primary mechanism by which the public is protected from gambling licensees who provide gambling services irresponsibly.

600. On that topic, the law in Australia is that those who provide gambling products do not generally owe their customers a tortious duty of care and several judgments have been published in the area of tort law which confirm that.[198]

601. Similarly, gambling customers have also been unsuccessful in invoking statutory protections such as those contained in the *Australian Consumer Law* in their dealings with those who provide gambling products (see for example *Guy v Crown Melbourne Ltd (No 2)*).[199]

602. In these circumstances, the need to ensure that the regulatory regime in respect of RSG is effective and sufficient to deter gambling providers from taking advantage of the vulnerable is particularly acute.

603. In *Pattinson,* the High Court identified the public interest in that case as being one of ensuring the maintenance of the right to association in the workplace. The High Court also said that it was the interference with those rights, by the making of false or misleading representations that was the gravamen of the contravention.

604. For its part, this matter concerns ensuring that vulnerable members of the public and their families and friends are protected from the harm that gambling products can inflict.

605. Furthermore, it is the interference of those protections by failing to ensure that gamblers at the Melbourne Casino do not *often gamble for long periods without a break* and/or are not prevented from continually depressing relevant EGM buttons with *button picks or like* items is the gravamen of the conduct in this case.

606. The public interest in protecting the vulnerable, their families and friends, and the need for deterrence to be considered in the context of that public interest militates strongly against Crown Melbourne's submission that only a *modest* fine should be imposed.

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[197] RCCOL Final Report, Vol 2, Ch 8, p8 [43], citing report by the Victorian Auditor General's Office, *Reducing the Harm Caused by Gambling,* March 2021, p3 and 11.
[198] See for example *Preston v Star City* (1999) NSWSC 1273; *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, among others.
[199] [2018] FCA 36.

An important French factor not addressed

607. As has already been noted in Part 2, in respect of the *code breach finding*, Crown Melbourne identified several *French* factors (being a reference to the matters identified in the course of the judgment of French J in *Trade Practices Commission v CSR Ltd*)[200] as being relevant to the Commission's consideration of this matter.

608. In addition to those matters however[201] there is one further *French* factor that the Commission considers appropriate to be addressed in detail.

609. That is the extent to which the *code breach finding,* and the *button pick finding* must have involved directors or senior managers of Crown Melbourne, being a topic, about which two issues must be addressed.

610. The *first* is the extent to which the conduct constituted the *code breach finding* and the *button pick finding* would (or should) have involved the board or senior management and the *second* is the extent to which Crown Melbourne's specific response in this matter (inadequate as it has been) must also have involved the board and senior management.

611. On the first issue, Crown Melbourne's submissions are bereft of any details about the involvement of the board and senior management in the *code breach finding* and the *button pick finding*.

612. That is not to say however that there is no basis upon which it should be concluded that these matters did in fact involve Crown Melbourne's directors and senior managers.

613. On the contrary, these are matters of considerable importance and, as such, were inevitably matters that would (or should) have required consideration by the directors and senior managers on multiple occasions. In the course of the Sixth Casino Review, Crown Melbourne and its parent company Crown Resorts were anxious to impress upon the VCGLR the extent to which matters relevant to RSG were considered at board level, including at the level of Crown Resorts Ltd.

614. This much is clear from the VCGLR's Sixth Review report which records the close and detailed involvement of Professor John Horvath, John Alexander and Andrew Demetriou in matters of RSG who both constituted the *Responsible Gaming Committee* of the Crown Resorts and were closely involved, to varying degrees with the senior management and board of Crown Melbourne. Similarly, the Sixth Casino review report also records that Helen Coonan (who later became the chairperson of Crown Melbourne) was also the chairperson of the *Corporate Social Responsibility Committee* of Crown Resorts.[202]

615. Crown Melbourne's approach to the observable sign *often gambles for long period without a break* was a matter which involved compliance with a ministerial direction and its approach to the *pick direction* involved compliance with statutory direction.

616. Compliance with both the observable sign of *often gambles for long periods without a break* and the statutory *button pick direction* were matters that were the subject of formal written policies, procedures, and other documents within Crown Melbourne.

617. Those documents have been referred to earlier in these reasons. Having regard to them, in the Commission's view, the evidence plainly supports that these are matters that were, in fact, considered by the board and senior management of Crown Melbourne.

618. As such, the evidence also supports that the serious misconduct and illegal conduct constituted by these matters was thereby endorsed by the board and senior management of Crown Melbourne and had been considered at the highest levels of the business.

619. Alternatively, if (notwithstanding the considerable body of evidence to the contrary) they were not considered by the board and senior managers, then Crown Melbourne must be deterred from adopting an approach that results

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[200] [1991] ATPR 41-076.

[201] And notwithstanding that the Commission agrees with Crown Melbourne's submission to the extent that it identifies that the French Factors are not to be applied as some type of rigid catalogue or legal check list.

[202] See Sixth Casino Review Report at p55. Also see p88 and 89 where the VCGLR describes the work of the Crown Resorts Responsible Gambling Committee and the extent to which, since 2013 in response to a recommendation that had been made in the course of the Fifth Casino Review, RSG had been a standing agenda item for all Crown Melbourne board meetings.

in its leaders not considering such important matters as those that are constituted by the *code breach finding* and the *button pick finding.*

620. The deterrent effect of this decision must deter the directors and senior managers of Crown Melbourne (and other gambling licensees) from adopting policies and procedures which are inadequate and fail to comply with Crown Melbourne's regulatory obligations.

621. The significant fines referred to in the decision to which these reasons are attached are necessary to achieve such deterrence.[203]

622. *Secondly*, something must also be said about the extent to which the current directors and senior management[204] endorsed or approved Crown Melbourne's submissions and other responses to the Commission specifically in respect of this matter.

623. On that topic, as the Commission has already noted, it is deeply concerned about the extent to which Crown Melbourne has continued to make submissions that are not supported (or contradicted) by the evidence. Later in Part 6, the Commission also provides a detailed explanation of its concerns about the extent to which this matter has involved Crown Melbourne making unjustifiably superficial submissions about the law.

624. There can be little doubt that Crown Melbourne's submissions in this matter were approved by the board and senior managers. That is for reasons which include that the production of material in respect of this matter occurred undercover of letters that were signed by the then chief executive officer and chief financial officer of Crown Melbourne.

625. If they were not approved by the board, they should have been.

626. The board and senior executives of Crown Melbourne cannot disassociate themselves from the inappropriate and unhelpful submissions that have been made in this matter. The board also cannot disassociate itself collectively from the conduct of senior executives or lawyers insofar as its approach to this matter is concerned.

627. It is the board of Crown Melbourne that controls each of these segments of Crown Melbourne's operations. Indeed, as the RCCOL put the matter in the context of how the former board and executives of Crown Melbourne had responded to disciplinary action that was taken by the former VCGLR in April 2021:

> *It may well be – indeed, it is likely – that the Crown Melbourne board and Crown Melbourne's lawyers were responsible for the manner in which the show cause notice was handled. That is not an excuse. It merely identifies the persons for whose conduct Crown Melbourne is responsible. At least in the case of the lawyers, the company was not obliged to go along with their approach. It does seem that it willingly did so.*[205]

628. The board of Crown Melbourne as it exists today must do a better job of ensuring not only compliance with regulatory obligations but furthermore that Crown Melbourne's official responses to disciplinary actions and exercises of compulsory powers are appropriate and in keeping with the standards of conduct that are expected of an entity that aspires to suitability.

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[203] Including to the extent that the Commission has decided to impose the statutory maximum in respect of the *code breach finding.*
[204] As at 22 August 2022 when the submissions were received.
[205] RCCOL Final Report Vol 2, Ch 10, p 117 [240].

PART 5 – THE FINES

629. In this Part 5 of its reasons, the Commission considers the specific issue of the fines that are appropriate to be imposed in this matter.

630. In doing so, Part 5 commences with a consideration of what *Pattinson* says about the circumstances in which the maximum (or one approaching the maximum) is appropriate. This is an issue that is appropriate to identify because the Commission has decided to impose the statutory maximum in respect of the *code breach finding.*

631. As well as considering that issue, Part 5 also considers the issue of whether the Commission should act in accordance with Crown Melbourne's submission and impose just one, rolled-up, fine for each of the *code breach finding* and the *button pick finding* or whether it should instead proceed to impose fines for each of the individual instances of wrongdoing that occurred each time Crown Melbourne allowed one of its customers to gamble for a long period without a break and/or failed to prevent one of its customers from simulating *auto play* on an EGM, through the use of a *button pick or like* device.

632. It is those matters that the Commission will consider next in its reasons.

When will the maximum penalty be appropriate?

633. As well as being authority for the proposition that deterrence is the primary (if not only) consideration that should be applied for civil pecuniary penalties, *Pattinson* is also an authority that considers the circumstances in which it is appropriate for the maximum fine that has been set by the Parliament to be imposed.

634. In that regard, the majority in *Pattinson* specifically referred to and approved the earlier decision of the High Court in the *Agreed Penalties Case*[206] in the following terms:

> *This Court's reasoning in the Agreed Penalties Case is distinctly inconsistent with the notion that the maximum penalty may only be imposed in respect of contravening conduct of the most serious kind. Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of an adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor's affairs as unattractive as it is open to the Court to reasonably do.*

635. Having been urged by Crown Melbourne to apply *Pattinson,* the Commission considers it appropriate for it to consider the question of whether it can be said that Crown Melbourne, is in the same category as the CFMMEU was found to have been in *Pattinson.*

636. That is to say, do considerations of deterrence and the protection of the public interest justify the imposition of the maximum penalty because it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind?

637. In the Commission's view, insofar as the *code breach finding* is concerned and for the reasons described in detail earlier in these reasons, they do.

638. Similarly, for the reasons referred to earlier, the Commission is also of the view that the *code breach finding* is an example of an adherence to a strategy of choosing to pay a penalty in preference to obeying the law. Such an approach would have no doubt been an attractive option in the past, when one considers that, until recently, the statutory maximum fine that could have been imposed in respect of a matter such as this was $1 million.

639. The High Court has made clear that the statutory maximum is not reserved for the most serious instances of misconduct and the Commission has considered weighed the relative seriousness of the conduct in this case accordingly.

[206] (2015) 258 CLR 482.

640. There can be no doubt that Crown Melbourne, just as it is a recidivist or serial offender as the CFMMEU was found to be,[207] is also an entity that has persistently adhered to a strategy of choosing to pay a penalty in preference to obeying the law.

641. The matters that support such a conclusion have been described earlier in these reasons, but, in summary, include:

    a. the catalogue of wrongdoing that was found by the RCCOL; the manner in which those instances of wrongdoing were described and the finding of unsuitability that was made, based on those findings of wrongdoing;

    b. the matters that are described in Part 4 above, by reference to Crown Melbourne's recidivism, namely the frequency, nature and intensity of the disciplinary actions that have been taken by the Commission and its predecessors against Crown Melbourne;

    c. the nature of Crown Melbourne's responses to regulatory action (including most recently its response to this disciplinary proceeding) which are described in the various reasons and reports the Commission and its predecessors have published over time;

    d. Crown Melbourne's history of its dealings with the Commission and its predecessors more generally, particularly in respect of its:

        i. belligerence and the lengths it has gone to frustrate the orderly operations of the Commission and its predecessors (including to the extent that those matters are described in Chapter 10 of the RCCOL's final report);

        ii. failures to act on attempts by the former VCGLR to guide it specifically in respect of the matters that are now the subject of this proceeding, insofar as they concern the *code breach finding*;

        iii. failure to comply with the statutory direction that is relevant for the *button pick finding* and the extent to which that failure is not the first time that Crown Melbourne has failed to comply with a direction from its regulator (its previous failure having been the subject of disciplinary action that was taken by the VCGLR in December 2021);

642. The totality of matters that support an assertion that Crown Melbourne's conduct is an example of persistent adherence to a strategy of choosing to pay a penalty in preference to obeying the law is overwhelming. In the Commission's view, it establishes that this disciplinary action is just the latest example of a system of deliberate non-compliance by Crown Melbourne.

643. In the Commission's view, Crown Melbourne is in the same position as the CFMMEU in *Pattinson.* Significant penalties are required for specific and general deterrence and the maximum penalty is required in respect of the *code breach finding* accordingly.

644. Crown Melbourne has and continues to personify a systemic culture of positive defiance. That defiance was displayed most recently on 22 August 2022 when Crown Melbourne's submissions in response to this matter were received and it again proceeded to display the same approach of making submissions unsupported by evidence and legal submissions without proper analysis against which it had been warned by each of the Commission, the VCGLR and the RCCOL.

645. Crown Melbourne's defiance of the law is made worse by the fact that it aspires to enjoy the privilege of the licence to operate the Melbourne Casino, unsupervised, which is a matter which is at all times conditional upon suitability.

646. In the Commission's view, *Pattinson* supports the imposition of significant fines in respect of this matter and the imposition of the maximum for the *code breach finding*.

647. Indeed, so serious and systemic are these matters that, were it not precluded from doing so in the specific circumstances of this particular disciplinary action, the Commission would have considered cancelling Crown Melbourne's licence to operate the Melbourne Casino.

[207] For the reasons that are explained in detail in Part 4 of these reasons.

648. The question then remains, whether the Commission should accede to Crown Melbourne's submission and impose a rolled-up fine for the *code breach finding* and a separate rolled-up fine for the *button pick finding* or whether it should instead proceed to impose a fine for each instance of wrongdoing that is constituted by each individual occasion that Crown Melbourne failed to intervene with its customers who were gambling for long periods without a break and/or those who were using button picks or like items on EGMs to simulate *auto play.*

649. It is that issue that the Commission will consider next.

How many fines?

650. As is obvious from the decision to which these reasons are attached, the Commission has decided that it is appropriate, in specific circumstances of this case, to impose a single, rolled-up, fine for the *code breach finding* and also a separate, single, rolled-up, fine for the *button pick finding.*

651. The Commission has taken the view that proceeding in this way is appropriate because, not only are the fines that are referred to in the decision those that are necessary to achieve deterrence, the alternative approach of imposing a fine for every single contravention may have the potential to produce an outcome which threatens the very existence of Crown Melbourne.

652. For example, if one assumes for the sake of the exercise that, based on the evidence that was described in Part 1 of these reasons,[208] Crown Melbourne failed to comply with its obligations to intervene with those of its customers who were gambling for long periods without a break approximately 1,594,320 times in the roughly 12-year period of its non-compliance.

653. Also assume that, in respect of each of those individual instances of non-compliance, the Commission proceeded to impose an average fine of $100 (that is a fine which is 0.0001 per cent of the $100 million maximum). Such an approach would have resulted in the Commission imposing fines on Crown Melbourne for the *code breach finding* alone which totalled almost $160 million.

654. Alternatively, assume that the Commission imposed an average fine of $1 million for each instance of wrongdoing (that is a fine that is 1 percent of the $100 million maximum that the Commission is empowered to impose). In that example, such an approach would have resulted in the Commission imposing fines for the *code breach finding* alone which totalled more than one and a half trillion dollars.

655. That is a fine that would threaten the viability of Crown Melbourne.[209]

656. Instead, therefore, the Commission has decided to impose a single fine for the *code breach finding* and a separate single fine for the *button pick finding.*

657. In proceeding in this way, the Commission has also, in effect, proceeded in accordance with Crown Melbourne's submission on the point.[210]

658. That should not however be interpreted as indicating an acceptance of Crown Melbourne's submissions on the reasons why it says single fines are appropriate for each of the *code breach finding* and the *button pick finding,* and it is appropriate that the Commission explain why.

659. Crown Melbourne says that a single fine in respect of the *code breach finding,* and the *button pick finding* is appropriate because:

    a. for the *code breach finding* Crown Melbourne says that *the number of relevant breaches of the RG Code is…not possible to determine;* and

[208] In respect of the *code breach finding.*
[209] The same could also be said if the Commission had taken the alternative approach described in Part 1 and proceeded on the basis of the evidence that the concentration of those with a gambling problem who attend the Melbourne Casino is 3 times higher than the overall Victorian population. If the Commission had proceeded on that basis and also proceeded to impose an average fine for each individual contravention that was 1 percent of the maximum, such an approach would have resulted in a basic calculation of 4,782,960 x $1 million. That calculation would in turn have resulted in fines being imposed for the *code breach finding* alone which is almost four times larger than the number which is referred to in the example that has been provided. It would have also resulted in the imposition of a quantum of total fines for the *code breach* which is, in effect, incalculable.
[210] Crown Melbourne's response to section 26 notice, 22 August 2022, p15 [34] – [35].

b. both the *code breach finding,* and the *button pick finding*, are a finding by the RCCOL that Crown Melbourne engaged in one particular type of conduct, namely failing to comply with one particular aspect of its code and one statutory direction that had been given to it.

660. The Commission does not accept that these matters are capable of supporting a submission that the Commission will always be limited to imposing only one fine in respect of each RCCOL finding for the following reasons.

661. *First,* in respect of the purported *impossibility* of determining the number of breaches of the *RG code* (and the nature and extent of the *button pick finding),* the Commission has already noted in Parts 2 and 3 when dealing with Crown Melbourne's purported statements of remorse, the reasons why it is highly sceptical, based on the evidence, that it is genuinely *impossible* for Crown Melbourne to determine the number of breaches of its *RG code* that are relevant to the misconduct that is described in these reasons.

662. Furthermore, even if it is genuinely impossible to determine that issue with certainty, Crown Melbourne could and should have provided the Commission with its best estimate of at least the number of times it failed to intervene with its customers, insofar as it is relevant to the *code breach finding,* consistent with the approach it took to quantification in the CUP proceeding that was the subject of the Commission's reasons in May 2022.

663. This information should have been provided so that the Commission could have, at least, considered in detail the appropriateness or otherwise of proceeding to impose separate fines in respect of each instance of wrongdoing.

664. *Secondly,* however (and quite apart from the issue of quantification) the Commission also does not agree that because both the *code breach finding,* and the *button pick finding*, were findings that Crown Melbourne had engaged in one particular type of conduct that only a single fine can be imposed in respect of those findings.

665. On the contrary, as the Commission identified in the reasons it published in May 2022 in respect of the CUP Process, there may be circumstances in which it is appropriate for the Commission to proceed to impose multiple fines, based on specific parts or aspects of matters that constitute a finding of illegal conduct or serious misconduct by the RCCOL.

666. The Commission takes that view for reasons which include the extent to which circumstances might exist where deterrence can only be achieved by imposing fines for each instance of non-compliance that are relevant to a particular finding of the RCCOL.

667. Nothing in the submissions that Crown Melbourne has provided has altered the Commission's view on that topic.

668. Crown Melbourne's submission that *there cannot be more than one fine in respect of a given RCCOL finding* is a submission made without reference to authority and in the absence of any analysis of the regulatory regime whatsoever.

669. If Crown Melbourne intends to persist in adopting that position, further submissions would be necessary before the Commission could be persuaded.

670. Indeed, the Commission particularly takes that view in circumstances where *Pattinson* makes clear that multiple fines can be imposed based on a single finding of wrongdoing.

671. In that regard, *Pattinson* was a case that relevantly involved a single union official making a single misleading representation to two employees of a subcontractor. Notwithstanding that the relevant finding was that only one representation (that of *no ticket no start*) had been made, the Court imposed multiple civil penalties because:

a. the single misleading representation had been made, simultaneously, to two separate employees of the sub-contractor;

b. when the union official made the impugned representation, he was acting in his capacity as a representative of the relevant union.

672. In these circumstances, the first instance judge in *Pattinson* proceeded to impose a total of four individual fines constituted by two civil pecuniary penalties in respect of each of:

a. the union official who made the misrepresentation (namely one penalty for each of the two sub-contractors to whom the misrepresentation was simultaneously made); and

b. the union itself (also constituting one penalty for each of the two sub-contractors to whom the misrepresentation was made, on the basis that it was the union's *no ticket no start* policy that the union official was implementing when he made the single representation).

673. The approach of the first instance judge was later endorsed by the High Court on appeal for reasons which included that such an approach was necessary to achieve the specific and general deterrence that was relevant in that case.

674. *Pattinson* supports that there may be circumstances where it is appropriate to impose multiple fines, based on a single finding. The Commission should not be taken to have decided that there could never be circumstances where the imposition of multiple fines, based on a single finding of the RCCOL, would not be appropriate.

The difference in the fines imposed

675. Although the Commission has formed the view that almost all of the matters relevant to deterrence that apply to the *code breach finding* are also, equally, appliable to the *button pick finding* that is not to say the Commission has formed the view that the same fine should be imposed in respect of both of these instances of wrongdoing.

676. On the contrary, as will be obvious from the decision to which these reasons are attached, the Commission has formed the view that a more significant fine should be imposed for the *code breach finding* than should be imposed for the *button pick finding.*

677. The Commission has taken that view primarily because the misconduct that is constituted by the *code breach finding* was far more extensive than that which constituted the *button pick finding.*

678. It extended for more than a decade and as was described earlier in Part 1 of these reasons, is conduct that is likely to have involved in excess of a million failures by Crown Melbourne to intervene with those of its customers who were gambling for long periods without a break.

679. After 2018, it also involved an express failure to act, at all, on advice that was given by the VCGLR which, if it had been acted upon, would have avoided the *code breach finding* being made by the RCCOL and this disciplinary action being taken by the Commission.

680. It justifies a more significant fine than the conduct that was the subject of the *button pick finding*.

681. For its part, and even though the Commission has concluded by reference to the evidence that the conduct which constituted the *button pick finding* was deliberate and thereby included a significant element of disobedience and defiance, there are two elements that make it less serious than the *code breach finding.* Those elements are the extent to which the Commission is satisfied that Crown Melbourne did take some (albeit inadequate) steps aimed at compliance and also that it was (mis) conduct that only stretched from March 2019 (when the *pick direction* was given) until approximately October 2021 (when the *button pick finding* was made by the RCCOL and Crown Melbourne changed its relevant policy).

682. Although the need for deterrence remains strong, the Commission has formed the view that these two factors be reflected in a fine that is lesser for the *button pick finding* than that which is imposed for the *code breach finding.*

PART 6 – THE INSISTENCE THAT *PATTINSON* BE APPLIED

683. In this Part 6 of its reasons, the Commission deals with a legal issue that has arisen in considering this matter.

684. That legal issue is the question of whether, in fact, the *Pattinson* case can or should be applied to disciplinary actions taken under the CCA, in the manner that has been urged by Crown Melbourne. On that topic, as will be evident from the foregoing matters, Crown Melbourne's submissions are predicated on an assertion that the Commission should apply *Pattinson* because, Crown Melbourne says, disciplinary action that is taken by the Commission involves the imposition of a civil pecuniary penalty.

685. Although the Commission has acted in accordance with that submission in Parts 2, 3 and 4 above, there remain aspects of an unfettered application of *Pattinson* that the Commission considers appropriate to formally record in these reasons.

686. In summary, those matters are:

a. although it has applied *Pattinson*, the Commission does not accept based on the submissions that Crown Melbourne has made to date that *Pattinson* will always constitute the sole basis upon which disciplinary action under the CCA could properly be determined;

b. although in this specific case, it has been appropriate for the Commission to impose fines on Crown Melbourne, the Commission's powers in taking disciplinary action under the CCA are not limited to the imposition of fines. The other actions it can take include those of varying the casino licence, issuing letters of censure and (in other contexts which are not based on findings of the RCCOL) suspending or cancelling the licence to operate the Melbourne Casino. It misstates the nature of the Commission's task to proceed on the assumption (as Crown Melbourne has) that the imposition of a fine is the *always and only* approach to disciplinary action that the Commission might take;

c. notwithstanding these matters, in the specific context of this disciplinary action, the Commission would have come to the same conclusion and imposed the fines that are referred to in the decision to which these reasons are attached, regardless of whether it applied *Pattinson* or had taken the same approach as it has historically taken to determining the question of what, if any, fine should be imposed in the course of disciplinary action, including to the extent that its historical approach has recognised that:

   i. in making its decisions, the Commission is part of the executive arm of government, rather than the judiciary;

   ii. the law (including insofar as it is constituted by *Pattinson* itself) makes clear that there are subtle differences between the circumstances in which superior courts of record are called upon to impose civil pecuniary penalties and those that arise when executive or administrative bodies such as the Commission are called upon to take disciplinary action under regulatory regimes which provide for multi-faceted responses, of which the imposition of a fine is just one aspect.

687. Given that these matters are likely to remain relevant if it becomes necessary for the Commission to take disciplinary action in the future, the Commission considers it necessary and appropriate that these reasons include further details about why it is that the Commission has taken this view.

688. It is this issue that the Commission will proceed to consider in this next part of its reasons.

The proposed departure from the settled approach

689. Crown Melbourne's submissions are predicated on deterrence being the primary matter the Commission should consider to determine the quantum of the fines that it accepts ought to be imposed.

690. According to Crown Melbourne:

> *It is a critical error to consider that the penalty must be proportionate to the seriousness of the conduct. Criminal law concepts of punishment, retribution and rehabilitation are also irrelevant. Notions of just deserts and that the punishment should fit the crime also have no part to play.*[211]

[211] Crown Melbourne's response to section 26 notice, 22 August 2022, p9 [11].

691. In taking this approach, Crown Melbourne has, in effect, advocated that there should be a departure from the basis upon which the Commission and its predecessors have determined the outcome of disciplinary proceedings concerning the Melbourne Casino. In doing so, Crown Melbourne has acknowledged that this matter represents the first occasion upon which it has suggested that there should be a departure from the historical, accepted, approach that has been taken by both the Commission and Crown Melbourne.

692. To that end, Crown Melbourne's written submissions included the following as a footnote:

> *The submissions that Crown [Melbourne] made in response to the Commission's proposed disciplinary action in respect of the "CUP process" were made very shortly after the High Court's judgment in Pattinson was handed down. Crown [Melbourne] accepts that any statements in those submissions which suggest that the seriousness of relevant conduct or notions of punishment or retribution are relevant in assessing the quantum of penalties do not reflect the law as now stated in Pattinson.*[212]

693. Before this submission, the approach that the Commission and its predecessors had taken to determine what, if any, disciplinary action ought to be imposed against Crown Melbourne had been well settled. They are described in detail in several of the previous reasons for decision that have been published by the Commission and its predecessors and have at no time been the subject of an objection by Crown Melbourne.

694. Although they did not include all of the matters that Crown Melbourne identifies in its written submissions as being matters that, if they were considered, would constitute *critical errors,*[213] they nevertheless have historically not proceeded on the basis that disciplinary action fines are pecuniary penalties and that deterrence is effectively the only matter that should be considered by the Commission.

695. In this case, however, Crown Melbourne says that there should be a departure from the historical approach that has been taken because it says:

> *The fine that the Commission may impose under s20 of the CCA is a form of civil pecuniary penalty.*[214]

696. In making that submission, Crown Melbourne has not sought to engage in a specific and detailed assessment of the relevant regulatory regime.

697. Rather, in the absence of such a detailed analysis, Crown Melbourne seeks to invoke the High Court's decision in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*[215] and in particular an *obiter dicta* passage from the judgement of French CJ, Kiefel, Bell, Nettle and Gordon JJ in that case which describes civil pecuniary penalties as being:

> *…part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ("the regulator") with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest.*

698. In making that submission and invoking this passage, however, Crown Melbourne has failed to address several of the unique features of the regulatory environment which exists here, including:

699. *First*, the extent to which the Commission is not a superior court of record, such as the Federal Court or one of the State Supreme Courts, who are generally the first instance decision makers to determine what, if any pecuniary penalties, ought to be imposed.

700. On the contrary, the Commission is part of the executive arm of government and is exercising what are generally known as administrative, rather than judicial, powers.

701. Having regard to those matters, Crown Melbourne does not say, for example, how or why it is that the Commission could ignore the significant body of authority which has evolved in the context of administrative decision-making, including the extent to which, as Brennan CJ put it in *Kruger v Commonwealth* (1997) 190 CLR 1 at 36:

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[212] Crown Melbourne's response to section 26 notice, 22 August 2022, p9, footnote 32.
[213] Crown Melbourne's response to section 26 notice, 22 August 2022, p9 [11].
[214] Crown Melbourne's response to section 26 notice, 22 August 2022, p8 [6].
[215] (2015) 258 CLR 482 at [24].

[W]hen a discretionary power is statutorily conferred on a repository [such as the Commission], the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised…

702. *Secondly*, Crown Melbourne also does not address the extent to which *Pattinson* itself identifies that there is a distinction between civil penalties that are imposed by Courts on the one hand and fines that are imposed by administrative bodies or the administrative arm of government on the other.

703. In that regard, one of the authorities referred to in *Pattinson* is the 2019 decision of the High Court in *Comcare v Banjeri*[216] (***Banjeri***).

704. *Banjeri* was a case that had several similarities to this one, including that it involved:

    a. consideration of a statutory provision[217] which, similar to section 20 of the CCA, conferred powers on an administrative arm of government, rather than a mechanism for invoking judicial processes within superior courts of record;

    b. a regulatory regime which provided for a range of different outcomes, only one of which was a fine;

    c. breaches of an administrative code.

705. *Banjeri* was also a case in which (as Edelman J noted in his dissenting judgment in *Pattinson*) Kiefel CJ, Bell, Keane and Nettle JJ identified the extent to which administrative decision-making required:

    …a 'lawful, proportionate response to the nature and gravity of [the] misconduct' governed by the principle that a '[b]reach of the impugned provisions renders an employee of the APS liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct.'

706. Rather than address this distinction, Crown Melbourne has (unhelpfully) left it to the Commission to attempt to reconcile this tension, without the type of detailed and considered submissions that should have been made in circumstances where it has advocated a departure from the well-settled approach that has been applied to determining disciplinary proceedings under the CCA for more than a decade.

707. Regrettably, the approach that Crown Melbourne has taken to this aspect of its submissions is another example of a matter that has made the Commission's task in considering this disciplinary proceeding more difficult than it otherwise might have been.

708. That is because Crown Melbourne's submissions have made it necessary for the Commission to both consider the appropriate outcome of this matter by reference to the specific way in which Crown Melbourne has sought to put its case, and also the additional issue of whether the outcome of the Commission's decision would have been altered if Crown Melbourne's submissions on the application of *Pattinson* are wrong, as they, at least *prima facie,* maybe.

709. In any event, having been required to engage in such a process, the Commission confirms that its decision in this matter would have been the same, regardless of whether it had taken any of:

    a. the approach it has historically taken (consistent as it is with authorities such as *Banjeri* and/or *Kruger*); or

    b. the approach which is now urged by Crown Melbourne, namely that *Pattinson* be applied and the additional considerations that have historically been applied, including those that are identified in *Banjeri* and/or *Kruger* should thereby be ignored.

710. In doing so, the Commission notes there is nothing irregular in reaching the same conclusion on alternative bases and indeed that is precisely what happened in the dissenting judgement of Edelman J in *Pattinson*, including to the extent that Edelman J said:

    The conduct of the CFMMEU would have required a very substantial penalty on a view of the law based on either desert or deterrence…The circumstances of the CFMMEU's breaches were serious…As the CFMMEU has significant resources, a small penalty would have little or no effect. The primary judge imposed a

[216] (2019) 267 CLR 373.
[217] Namely section 15 of the *Australian Public Service Act 1999* (Cth).

substantial penalty: for the two contraventions together, the CFMMEU was ordered to pay the maximum penalty for a single contravention…[218]

711. In the Commission's view, the same can be said in this case.

712. Put simply, Crown Melbourne's conduct requires the very substantial fines that are referred to in the decision to which these reasons are attached, irrespective of whether that is based on the historical approach that has been taken to determining the outcome of disciplinary action[219] or whether it is based on a strict application of *Pattinson.*

713. The Commission will however expect Crown Melbourne to revisit and consider further its submissions in respect of the application of *Pattinson* if similar submissions are necessary in the course of future disciplinary action.

714. Among other things, the Commission will expect further submissions to address matters such as the:

    a. extent to which disciplinary action under the CCA involves an administrative, rather than judicial, decision;

    b. application of *Banjeri, Kruger* and the other authorities that have been identified in earlier CCA disciplinary action reasons;

    c. nature of the specific provision by which disciplinary action is taken under the CCA and the extent to which it requires consideration of several matters, namely those of whether the Commission should:

        i. cancel the casino licence;

        ii. suspend the casino licence;

        iii. issue a letter of censure;

        iv. vary the terms of the casino licence;

        v. impose a fine.[220]

[218] Pattinson at [81].

[219] Which consistent with authorities such as *Banjeri* have included consideration of issues such as proportionality which, according to *Pattinson,* has *no place* in a civil penalty regime (see *Pattinson* at [10]).

[220] Although, noting that in the specific circumstances of this case where the Commission is considering disciplinary action based upon findings of the RCCOL that the matters of cancelling or suspending the casino licence are not available by operation of section 20(11) of the CCA.

PART 7 – OTHER MATTERS

715. In this final, Part 7, of its reasons, the Commission considers two issues that do not relate to the fines the Commission has decided to impose but are nevertheless appropriate for inclusion in these reasons.

716. Those issues are the matter of costs and also the additional matter of prohibiting the reintroduction of certain programs by Crown Melbourne that were voluntarily discontinued as a result of their potential inconsistency with its RSG obligations.

Costs

717. In the course of exercising its compulsory powers in this matter the Commission formally advised Crown Melbourne that it was considering whether disciplinary action should be taken and that, if it decided to take such action, it may also require Crown Melbourne to pay the Commission its reasonable costs and expenses.

718. Crown Melbourne has submitted that it has no objection to the Commission serving a notice under section 20A of the CCA requiring it to pay the Commission's reasonable costs and expenses in investigating whether grounds for disciplinary action are made out, considering these submissions, and preparing for and taking this disciplinary action.[221]

719. The Commission has decided that it is appropriate that Crown Melbourne pay the Commission's costs of this disciplinary action and it will direct its staff to prepare a notice or notices in accordance with section 20A of the CCA accordingly.

Prohibiting the reintroduction of certain programs

720. Historically, Crown Melbourne has operated programs at the Melbourne Casino that have been designed to attract certain segments of the community to the Melbourne Casino.

721. The RCCOL expressed concern about these programs and the extent to which they may have constituted mechanisms that, in essence, facilitated the attendance of at-risk gamblers at the Melbourne Casino.

722. The *Red Carpet* and *Bingo* programs were of particular concern, including to the extent that they facilitated the attendance of the elderly.

723. During the RCCOL, Crown Melbourne voluntarily discontinued these programs.

724. As such, in the course of exercising its compulsory powers in this matter, the Commission decided to require Crown Melbourne to produce information relevant to these programs.

725. In particular, the Commission sought information from Crown Melbourne in respect of:

    a. the current status of these programs (that is, whether they had been reintroduced following their discontinuation during the RCCOL);

    b. Crown Melbourne's future intentions on whether these programs or like programs, might be reintroduced;

    c. if it was not intended to re-introduce these programs, whether Crown Melbourne had any objection to the Commission issuing a direction to prohibit the re-introduction of these, or similar, programs.

726. In response to those enquiries, Crown Melbourne advised the Commission that it:

> *…has not given consideration to the re-introduction of [these programs]. Crown [Melbourne] does not intend to re-introduce these programs and has no objection to the Commission issuing a direction to that effect (subject to discussing the wording of any such direction).*[222]

727. In these circumstances, and in particular, having regard to the extent to which they are likely to have facilitated the attendance of vulnerable gamblers at the Melbourne Casino, the Commission has decided that it is appropriate for it to issue a direction to Crown Melbourne under section 23 of the CCA.

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[221] Crown Melbourne's response to section 26 notice, 22 August 2022, p16 [42].
[222] Crown Melbourne's response to section 26 notice, August 2022, p36 [15.2].

728. The purpose of that direction is to prohibit the reintroduction of the *red carpet* and *bingo* program and also prohibit the establishment of other programs that might have the effect of facilitating or targeting the attendance of at-risk gamblers or particular segments of the community at the Melbourne Casino.

729. Before the Commission proceeds to impose a form of that direction, however, the Commission has decided (noting, in particular, the issues that have arisen in respect of both the direction that was the subject of the VCGLR's disciplinary action in December 2021 and Crown Melbourne's purported *misunderstanding* of the *pick direction* referred to earlier in these reasons) that it should, as an initial step to giving a statutory direction, direct Crown Melbourne to propose the form the direction should take.

730. In doing so, the Commission has also decided that Crown Melbourne should, in providing a proposed direction, ensure that it is accompanied by such explanatory information as may be necessary to ensure that Crown Melbourne can satisfy itself and its staff that they properly understand the direction and their obligations under it.

731. Any direction and explanatory material that is proposed by Crown Melbourne should have regard to the extent that it will be the intention of the Commission in finalising the direction to ensure that programs such as the *red carpet, bingo* or similar programs do not (either intentionally or otherwise) become a mechanism by which at-risk gamblers or particular segments of the community are either incentivised, facilitated or targeted to attend the Melbourne Casino to gamble.

732. Crown Melbourne should provide the Commission with a proposed form of direction and any explanatory material by no later than two weeks from the date of the decision to which these reasons are attached.

ANNEXURE A – The *pick direction* and accompanying letter

Annexure A

Victorian Commission for
Gambling and Liquor Regulation

Level 3, 12 Shelley Street, Richmond VIC 312
GPO Box 1988, Melbourne VIC 3001
T: 1300 182 457
www.vcglr.vic.gov.au

7 March 2019

Our ref: CF/18/951

Mr Barry Felstead
Chief Executive Officer, Australian Resorts
Crown Resorts Limited
8 Whiteman Street
SOUTHBANK VIC 3006

By Email

Dear Mr Felstead

Use of Button Picks and like items in the Melbourne casino

I refer to the investigation by the Victorian Commission for Gambling and Liquor Regulation (**VCGLR**) regarding the use of Crown-branded plastic wedges (button picks) which are able to be used by patrons to hold down buttons on electronic gaming machines in the Melbourne casino operated by Crown Melbourne Limited (**Crown**).

The VCGLR has completed its investigation and determined to issue a direction pursuant to section 23 of the *Casino Control Act 1991* (**the Act**) directing that:

- Crown must not issue or supply to patrons any button picks or like items (being any item or device designed to hold down or continuously depress an electronic gaming machine button) to patrons for use on electronic gaming machines in the Melbourne casino

- Crown must take all reasonable steps to ensure that button picks or like items (as described above) are not used by patrons for gaming on electronic gaming machines in the Melbourne casino.

Please find the direction attached to this correspondence.

The VCGLR has made this direction after considering information gathered during the investigation, and concluded:

- Button picks are considered gaming equipment under the Act, and section 62 of the Act requires that all gaming equipment must be approved by the VCGLR. The VCGLR has not approved button picks as gaming equipment under the Act

- The VCGLR had regard to the Casino Rules made in 1997 provided by Crown, however those Casino Rules do not constitute an approval for button picks as gaming equipment for use in the Melbourne casino under the Act. In addition, those Casino Rules are no longer in force as new Casino Rules were issued in 2003 and subsequently

- Under section 64 of the Act Crown is responsible for ensuring that gaming equipment must not be used for gaming in the casino unless it has been approved by the VCGLR. This means Crown has responsibility for ensuring that button picks are not used for gaming in the casino, including ensuring patrons are not using button picks for this purpose.

The VCGLR will monitor compliance with this Direction on an ongoing basis.

To facilitate compliance monitoring by the VCGLR, the VCGLR requires Crown, in accordance with section 128 of the Act, to provide a report to Mr A Ockwell, Director, Compliance by **8 April 2019** detailing the steps taken by Crown to comply with the Direction attached.

The VCGLR acknowledges that one of its objects under the Act is to foster responsible gambling in order to minimise harm caused by gambling. The use of button picks by patrons at the casino effectively enables a patron to conduct continuous gaming on an electronic gaming machine, without the patron actively exercising control over the electronic gaming machine. The VCGLR considers that practice may increase the risk of gambling harm to members of the community and is not consistent with other harm minimisation strategies, such as the pre-commitment scheme. For this reason, the VCGLR has acted to make clear to Crown that button picks are not approved and cannot be permitted in the future.

The VCGLR also had regard to its Regulatory Approach in determining the appropriate regulatory response. The VCGLR took into consideration various factors, including that button picks have been in existence for an extended period, and there was previously a lack of clarity about whether their use was authorised, and that in February 2018 Crown voluntarily ceased making button picks available to patrons and destroyed all remaining stocks of button picks. In all the circumstances, the VCGLR considered that a direction under s23 is the most appropriate regulatory outcome in order to make clear the VCGLR's expectations, to clarify the regulatory requirements and to minimise potential harm to patrons at the casino.

Should you require any further information, please do not hesitate to contact Mr Adam Ockwell on 9098 5274.

Yours sincerely

Alex Fitzpatrick
Acting Chief Executive Officer

Victorian Commission for
Gambling and Liquor Regulation

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WRITTEN DIRECTION TO CROWN MELBOURNE LIMITED

The Victorian Commission for Gambling and Liquor Regulation gives the following Direction to Crown Melbourne Limited (**Crown**) pursuant to section 23 of the *Casino Control Act 1991* (**the Act**).

Under section 23 of the Act the Victorian Commission for Gambling and Liquor Regulation hereby directs:

1. Crown must not issue or supply to patrons any button picks or like items (being any item or device designed to hold down or continuously depress an electronic gaming machine button) for use on any electronic gaming machine in the Melbourne casino.

2. Crown must take all reasonable steps to ensure that button picks or like items (as described above) are not used by patrons for gaming on electronic gaming machines in the Melbourne casino.

This Direction will take effect on ..7th.... March 2019.

Dated: ..7th...March 2019

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Mr Ross Kennedy
Chairperson

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