TRIM ID:CD/23/6428

Decision and reasons for decision

In the matter of disciplinary action against Crown Melbourne Ltd. pursuant to 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 Hearing:	Not applicable
Date of Decision:	14 June 2023
Date of Reasons:	15 June 2023
Appearances:	Not applicable
Decision:	For the reasons attached to this decision, the Victorian Gambling and Casino Control Commission (**Commission**) has decided to: (a) take disciplinary action in respect of Crown Melbourne Ltd.'s unpaid casino tax known as Category 5 and Category 8 and impose a fine of $20 million, payable in full by no later than 31 December 2023, in instalments to be agreed; (b) instruct its officers to prepare a notice to require Crown Melbourne to pay the Commission's reasonable costs and expenses of this disciplinary action.
Signed:	
	Fran Thorn
	Chair

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Introduction

1. This is the fourth in a series of disciplinary action reasons the Commission has published, based on findings of the 2021 Royal Commission into the Casino Operator and Licence (**RCCOL**). The broader circumstances are set out in reasons published in 2022 and May 2023 and do not need to be restated.[1]

2. As the operator of the Melbourne Casino, Crown Melbourne must pay certain amounts to the State, including casino tax. The obligation to pay casino tax is imposed by an agreement ratified by Parliament and given the force of law by legislation.[2] That agreement is known as the Casino Management Agreement.[3]

3. Casino tax is a percentage of the gross gaming revenue and commission-based players' gaming revenue (together **GGR**) derived from operating the Melbourne Casino. GGR is calculated by subtracting the sums Crown Melbourne has paid out in winnings from the sums it receives from those who gamble at the Melbourne Casino.

4. Chapter 12 of the RCCOL's final report deals with the issue of unpaid casino tax. In that chapter, the RCCOL concludes that Crown Melbourne distorted GGR by inflating the sums it purportedly paid out as winnings. In particular, Crown Melbourne included the costs of certain promotional activities as amounts paid out as winnings and, in doing so, effectively, claimed deductions it was not entitled to.

5. Although the RCCOL considered eight categories of promotional activities, these reasons concern only two categories, namely what the RCCOL called Category 5 and Category 8.

6. In its closing submissions to the RCCOL, Crown Melbourne acknowledged that Category 8 deductions and some Category 5 deductions should not have been made.[4] It also submitted that its tax obligations from 2013 to 2021 had to be reassessed[5] and the proper amount paid.[6]

7. In July 2021, Crown Melbourne paid approximately $61.5 million to the State of Victoria in respect of Categories 5 and 8, representing an underpayment of casino tax of about $37.4 million and penalty interest of approximately $24.1 million.[7]

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[1] It is the Commission's expectation that anyone reading these reasons will be familiar with the content of the RCCOL-based disciplinary action reasons that have previously been published. Those reasons are publicly available on the Commission's website and are dated May and November 2022 and May 2023.
[2] Namely the *Casino (Management Agreement) Act* 1993 (Vic).
[3] Being an agreement that was first made between Crown Melbourne (which was known as Crown Casino at the time) and the State of Victoria in 1993.
[4] Being a matter that was also accepted by Crown Melbourne in the course of its closing submissions to the RCCOL – See Crown Melbourne's written closing submission, 2 August 2021, 244 [G.71].
[5] With an adjustment to be made for GST.
[6] See RCCOL Final Report, Vol 2, Ch 12, p156, para [137] and the citations referred to therein.
[7] See the Commission's Annual Report p79. These amounts were verified independently by KPMG and a further payment of about $100,000 was also later made to address certain unresolved variances arising from the Commission's validation of the accuracy of the amount initially paid. Also see generally Crown Melbourne's submissions dated 15 May 2023, p12 para17(b).

8. In its submissions for this matter, Crown Melbourne acknowledged that the RCCOL's findings in respect of categories 5 and 8 amounted to illegal conduct and serious misconduct. Crown Melbourne accepts that the Commission is empowered to take disciplinary action accordingly.[8]

9. The Commission agrees that Crown Melbourne's conduct constituted both illegal conduct and serious misconduct, including to the extent that it involved a contravention of the Casino Management Agreement, which is prohibited by legislation because the Management Agreement takes effect as if it had been enacted in the *Casino (Management Agreement) Act 1993* (Vic).[9]

Crown Melbourne's cooperation

10. In the reasons it published in November 2022, the Commission expressed its frustration about the approach Crown Melbourne had taken to the Responsible Service of Gambling (or **RSG**) disciplinary action, particularly to the extent that it involved submissions that were not supported by evidence or by a proper analysis of the law. In that matter, Crown Melbourne took an approach inconsistent with a suitable entity.[10]

11. Crown Melbourne's approach to this matter has displayed none of those issues. It has involved a level of cooperative engagement that has in the past been lacking from Crown Melbourne's dealings with the regulator.

12. Although this remains a serious matter, it is appropriate that the Commission note that Crown Melbourne's response to this disciplinary action has been indicative of remorse. Crown Melbourne has sought to assist the Commission and has made appropriate submissions supported by the evidence.

13. In this regard, the Commission notes Crown Melbourne's submissions about the steps it has taken towards:

    a. improving its governance arrangements, appointing new independent directors, and ensuring its board and board committees have an appropriate level of involvement in its legal and regulatory obligations;

    b. implementing leadership training which seeks to address the historical prioritisation of profit over compliance with legal and regulatory obligations; and

    c. addressing its risk appetite to prioritise compliance and regulatory obligations (including in respect of the payment of taxes).

[8] Submissions dated 15 May 2023, p4, para [15].
[9] Submissions dated 15 May 2023, p4, para [16].
[10] In taking this approach Crown Melbourne perpetuated several matters for which it had been criticised by both the RCCOL and the Commission's predecessor, the VCGLR.

The objective seriousness of this matter

14. The Commission is satisfied that this matter is historic. In addition, changes to core requirements that Crown Melbourne must comply with will assist in preventing future like conduct. Recent changes to the technical requirements document require the Commission's pre-emptive approval for promotional-type activity linked to gaming at the Melbourne Casino. There are also now attestation obligations which require Crown Melbourne to identify whether proposed changes will impact on the calculation of casino tax.

15. Nonetheless, Crown Melbourne's conduct in respect of the category 5 and 8 deductions was very serious. It was both systemic and sustained and, in respect of at least category 8, involved significant efforts at concealment to the extent that, as the RCCOL noted:

    a. the category 8 deductions were made following an initial proposal that suggested they were artificial;[11]

    b. at or about the time of the initial proposal, Crown Melbourne's internal lawyers expressed concerns about the validity of these deductions;[12]

    c. having regard to the risk that the deductions were invalid, steps were taken to conceal them, which the RCCOL described in the following terms:

        The idea was to conceal the new deduction from the regulator. Crown Melbourne initially proposed to implement the deductions gradually, over a period of time. This was a risk management strategy to conceal the deductions from the regulator.[13]

    d. the most likely inference from the initial proposal, the concerns of the internal lawyers and the steps taken to conceal these deductions is that no one at Crown Melbourne believed they were legitimate. Simultaneously, however, it was considered that the risk of discovery was sufficiently limited to justify the risk;[14]

    e. the manner in which these deductions were described was a further attempt at concealment in that the meals, accommodation, and parking relevant to the Category 8 deductions were not described as "jackpots" in any other context. The use of the term "jackpots" was therefore designed to obscure the true character of these deductions;[15]

[11] See RCCOL Final Report, Vol 2, Ch 12, p136, para [21] and following.
[12] See RCCOL Final Report, Vol 2, Ch 12, p137-138, para [26]-[28].
[13] See RCCOL Final Report, Vol 2, Ch 12, p138, para [29].
[14] See RCCOL Final Report, Vol 2, Ch 12, p139, para [35].
[15] See RCCOL Final Report, Vol 2, Ch 12, p139, para [36].

f. in the period after the Category 8 deductions commenced, Crown Melbourne received advice from Senior Counsel on a related issue which made it clear that Category 8 style "benefits" should not be considered as a deduction;[16]

g. when the VCGLR sought information in 2018, Crown Melbourne was not as open as it should have been (which is a matter Crown Melbourne accepted in its submissions to the RCCOL).[17]

h. when, also in 2018, advice from an external solicitor stated that:

> *…to constitute a deductible, the amounts must be 'won' by the punter or otherwise paid out as winnings. On its terms, this definition would not seem to capture credits earned simply by repeat play, which is what the [category 8] Gaming Food Program involves.*

Crown Melbourne continued to make the deductions.[18]

16. The Commission considers these to be significant matters of aggravation.

17. The Commission also considers the chaotic circumstances in which Crown Melbourne disclosed the matters the subject of these reasons to the RCCOL to be a further matter of aggravation. In that regard, unpaid tax was the subject of detailed discussions between Crown Melbourne and its advisers during the RCCOL. Furthermore, during these discussions, Crown Melbourne was subject to a positive obligation to disclose matters that might have constituted a breach of the laws by which it is regulated.[19] However, in the circumstances described in chapter 12 of the RCCOL's final report, Crown Melbourne failed to positively disclose.

18. Instead, the issue only came to light when a spreadsheet setting out the quantum of unpaid casino tax was inadvertently noticed by counsel assisting the RCCOL amongst voluminous documents that were produced for other purposes.[20]

19. This matter might have remained unknown were it not for the diligence of counsel assisting the RCCOL. This matter should have been expressly disclosed to the RCCOL, even if that disclosure was merely based on a potential, rather than an actual, breach.

[16] See RCCOL Final Report, Vol 2, Ch 12, p140, para [39].
[17] See RCCOL Final Report, Vol 2, Ch 12, p143, para [50], citing Crown Melbourne's closing submissions to the RCCOL, p251 [G.105].
[18] See RCCOL Final Report, Vol 2, Ch 12, p144, para [55].
[19] In the form of a notice to produce issued by the RCCOL.
[20] See RCCOL Final Report, Vol 2, Ch 12, p155, para [121].

What outcome is appropriate?

20. In the RSG disciplinary action, Crown Melbourne submitted that there should be a departure from the approach the Commission, its predecessors, and Crown Melbourne had historically taken to determining disciplinary actions under the CCA. In particular, Crown Melbourne submitted by reference to the High Court's decision in *Australian Building and Construction Commissioner v Pattinson*[21] that the issue of deterrence was the primary and perhaps only matter that the Commission should consider when determining disciplinary outcomes.

21. The Commission expressed reservations about that submission in its reasons for decision in two previous disciplinary actions against Crown Melbourne relating to the RSG Code Breaches and non-compliant Cheque Practices.

22. In this matter, Crown Melbourne has not sought to further agitate its submissions based on *Pattinson.* It has also not sought to advance an argument that deterrence is the primary or only matter the Commission should consider. Instead, Crown Melbourne has acknowledged that the Commission has broad-ranging powers to take disciplinary action and that it may consider a range of matters in exercising those powers.[22]

23. In doing so, Crown Melbourne has, in effect, accepted the appropriateness of the historical approach the Commission, its predecessors, and Crown Melbourne (before the RSG matter) have all taken to determining the outcome of disciplinary action under the CCA.

24. The Commission confirms that it has proceeded on that basis and considered this matter by reference to the approach that has historically been taken. Those matters are described in detail in previously published reasons and do not need to be restated.

Crown Melbourne's position

25. Crown Melbourne says that a substantial fine and a letter of censure should be imposed. It says that notwithstanding that this matter involved several individual instances of illegal conduct and serious misconduct, a single fine, rather than multiple fines, should be imposed.

26. The Commission has decided that a letter of censure would be of no utility. Both the RCCOL report and these reasons are a detailed record of Crown Melbourne's wrongdoing on Categories 5 and 8 casino tax. Furthermore, to the extent that the RCCOL report censured Crown Melbourne, its response to this disciplinary action demonstrates that it has reflected on and understood the seriousness of this matter.

[21] (2022) 96 ALJR 426; [2022] HCA 13.
[22] Written submissions of Crown Melbourne, 15 May 2023, p11, para[15].

One or multiple fines?

27. As to whether one or multiple fines should be imposed, Crown Melbourne says the Commission should take the same approach as it took in respect of the CUP process, the RSG Code Breach and the RSG Button Pick matter and impose a single fine for the multiple instances of illegal conduct and serious misconduct that have occurred.

28. In those matters, the Commission decided to impose a rolled-up fine for multiple breaches reasons which included:

    a. the obvious financial burden individual fines would place on Crown Melbourne;

    b. the impact separate fines might have on:

        i. Crown Melbourne's current reform program;

        ii. the totality of the legislative objectives of the CCA;

        iii. the extent to which the Parliament has expressly precluded the Commission from suspending or cancelling Crown Melbourne's casino licence based on disciplinary action arising from the RCCOL;

        iv. the regulatory burden that would be placed on the Commission in deciding on quantum by reference to each individual breach that occurred.[23]

29. For the same reasons, the Commission has decided that single fine is also appropriate in this case.

Quantum of fine

30. On the issue of the quantum, Crown Melbourne's *central submission [is] that a substantial fine is warranted.*[24] It acknowledges that the deductions were concealed and also that its conduct:

    a. caused real and immediate harm to the Victorian community;

    b. extended over almost ten years and involved depriving the Victorian public of funds to which it was entitled;

    c. was deliberate and carried out by persons who were (at the time) senior executives;

[23] See further the Commission's published CUP reasons at p22 and RSG reasons at p64 and following.
[24] Written submissions of Crown Melbourne, 15 May 2023, p12, para[18].

d. involved prioritisation of profit at the expense of compliance and its obligations to the State and the former regulator;

e. involved matters that are both complex and involve self-assessment, and as such, the fine in this matter must send an appropriate message to all in the gambling industry that the Commission will not tolerate the underpayment of casino tax or dishonesty and concealment in its regulatory dealings;

31. These are matters that justify the imposition of a substantial fine.

32. On the other hand:

a. as the Commission has already noted, Crown Melbourne has expressed remorse and cooperatively engaged with the Commission. This has enabled the Commission to resolve this disciplinary proceeding efficiently;

b. Crown Melbourne has already repaid the outstanding tax and more than $20 million in penalty interest. Those payments were made in July 2021, even before the RCCOL made the findings of illegal conduct and serious misconduct on which this matter has now proceeded;

c. in less than 18 months, the Commission has imposed $230 million in fines on Crown Melbourne;

d. as well as the significant penalties the Commission has levied, Crown Melbourne also faces considerable pecuniary penalties in concurrent AUSTRAC regulatory enforcement proceedings in the Federal Court;

e. as the Commission has already explained in the course of previous disciplinary reasons, the Commission does not consider that it should impose fines (or payment terms) that are so onerous as to threaten the ongoing viability of Crown Melbourne and thereby inadvertently frustrate the decision that must be made in 2024 on whether Crown Melbourne is suitable to operate the Melbourne Casino.

33. In addition to these matters, the Commission has also considered the methodology for calculating penalty tax that is prescribed by the *Taxation Administration Act 1997* (Vic) (**TAA**).

34. Although that methodology is not binding on the Commission and is not a matter that Crown Melbourne addressed in its submissions, the Commission considers it to be of assistance to the extent that it provides that, when it comes to the non-payment of Victorian State-based taxes:

a. penalty tax is payable in addition to any unpaid tax and interest that might have been paid following a default;

b. the base rate of penalty tax is 25 per cent of the amount of the tax that was unpaid;

c. that base rate may be increased to 75 per cent of the amount of unpaid tax if the default was caused wholly or in part by the intentional disregard by the taxpayer of a taxation law (as occurred here);

d. that amount may be increased again by a further 20 per cent (that is to a total of 95 per cent of the unpaid tax amount) if an investigation has been conducted and the taxpayer took steps to prevent or hinder the nature or extent of the default from becoming known.[25]

35. The Commission has formed the view that, although the TAA is not binding in disciplinary actions under the CCA, in this case, it provides a reasonable basis upon which the Commission should proceed, including to the extent that this was a matter that was expressly identified by the RCCOL.[26]

36. In particular, the Commission considers that this case clearly involved an intentional disregard by Crown Melbourne for its taxation obligations. Furthermore, although the chaotic and inadvertent disclosure to the RCCOL may have hindered the nature and extent of the default from becoming known to the RCCOL, there can be little doubt that Crown Melbourne's conduct has been appropriate since these matters became known, including to the extent that Crown Melbourne has sought to assist the Commission during this disciplinary action.

37. In these circumstances, the Commission would be justified in imposing a fine of around $28 million, being approximately 75 per cent of the $37,432,258.89 unpaid tax amount Crown Melbourne has acknowledged.

38. However, weighing the matters set out in paragraph 30 against those set out in paragraph 32 above, the Commission has decided to impose a fine of $20 million. This is an amount that is more than 50 per cent of the unpaid tax which Crown has now repaid in full and with penalty interest. As such, the Commission considers that a fine of this magnitude will not be regarded as "a cost of doing business" and will be effective in deterring Crown Melbourne from this type of conduct in the future. It will also send a strong deterrent message to other licensees who have an obligation to pay gaming taxes. However, were it not for Crown Melbourne's remorse and cooperation, the Commission would have imposed an even higher fine.

Time to pay

39. Crown Melbourne has sought until June 2024 to pay the fine the Commission has decided to impose.

40. The Commission has decided to allow Crown Melbourne until 31 December 2023 to pay the fine. This allows Crown Melbourne around six months to make payment of the fine while ensuring that it makes payment in

[25] See generally sections 29-31 inclusive of the TAA.
[26] See RCCOL Final Report, Vol 2, Ch 12, p160-161, paras [167]-[178] and Recommendation 16.

advance of the Commission's decision on the suitability of Crown Melbourne. However, the Commission has also decided that the issue of time to pay should be further discussed with Crown Melbourne to ensure that regular and appropriate instalment amounts are paid between now and 31 December 2023.

Costs

41. Crown Melbourne accepts that it is liable to pay the Commission's reasonable costs.

42. The Commission will instruct its officers to prepare a notice which requires Crown Melbourne to pay the Commission's reasonable costs of this disciplinary action accordingly.