MinterEllison

4 August 2021

PRIVATE & CONFIDENTIAL
BY EMAIL

[redacted]

and

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[redacted]

Solicitors Assisting the Royal Commission

Dear Colleagues

Royal Commission into the Casino Operator and Licence

1. We refer to your letter dated 27 July 2021, stating that the Commissioner would be assisted by submissions on the following issues:

    1.1. *Whether it is open to the Commissioner to conclude that MinterEllison was* responsible, *or partly responsible, for the manner in which Crown Melbourne conducted itself [during the course of the VCGLR's investigations into several matters involving Crown Melbourne, including the China arrests and Crown Melbourne's dealing with junket operators].*

    1.2. *If* such *a finding is open, whether MinterEllison acted improperly.*

2. For the reasons set out in more detail below, our responses to those issues are:

    2.1. *No. Crown Melbourne was, at all times, responsible for the manner in which it conducted itself in connection with the VCGLR's investigations. Crown was a sophisticated commercial client capable of reaching its own decisions as to the proper strategy, approach and attitude to such investigations. Crown's hand was neither forced nor constrained by MinterEllison.*

    2.2. *No.*

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A. Preliminary matters

Non-publication

3. Given that the subject matter of these submissions covers legal advice provided to Crown, in respect of which legal professional privilege belongs to Crown, these submissions are provided on a confidential basis, and a non-publication order is sought to the extent necessary to protect that privilege. For the avoidance of doubt, we have no difficulty with these submissions being provided to Crown, or to the directors of Crown.

Scope of terms of reference

4. The permissible scope of the Commission's inquiry is subject to the letters patent establishing the Commission.[1] We make the following submissions on the scope of the Commission's terms of reference, not as the basis for resisting paragraph 4(b) of the 27 July 2021 letter (indeed, we have addressed the question posed in paragraph 4(b) in some detail in these submissions), but because we are concerned that the Commission appears to be contemplating a finding that would damage MinterEllison but lie outside those terms of reference.

5. Paragraph 4(b) of the 27 July 2021 letter asks, by reference to certain assumed facts, whether MinterEllison or Richard Murphy "acted improperly". (Similarly, a letter from solicitors for the Commission dated 24 July 2021, relating to advice said to have been given by Mr Murphy about the conduct of Crown staff in Malaysia, asks whether Mr Murphy's conduct was "improper".) We reject the suggestion of improper conduct at a factual level, for the reasons given in paragraphs 19 to 25 below.

6. We also submit that the Commission's terms of reference do not identify, as one of the matters into which the Commission is to inquire or on which the Commission is to report, the possible impropriety of any conduct on the part of MinterEllison, or on the part of any of Crown's advisors. Such an inquiry cannot be described as "necessary to satisfactorily resolve" the matters that are within the terms of reference, within paragraph 10(K) of the Letters Patent.

7. The prejudice that would flow from the publication[2] of such a finding is a further and powerful reason against construing the terms of reference to permit such a finding to be made, even if the prejudice would not involve a disciplinary finding against MinterEllison or any of its partners or employees.

8. That proposition is illustrated by *Brinsmead v Commissioner, Tweed Shire Council Public Enquiry*.[3] The New South Wales Supreme Court held that the Commissioner in that case did not have the power to make findings that the plaintiff had engaged in criminal or professional misconduct. That conclusion was reached based on the Court's construction of the relevant legislation, the terms of reference and having regard to the reasoning of the High Court in *Balog v Independent Commission Against Corruption*.[4] Of particular relevance to the present matter, Price J said this (emphasis added):[5]

> These legislative provisions suggest that the functions of the first defendant were confined to inquiring, reporting, recommending and in cases of breach of law communicating with the appropriate authority. Confirmation, in my view, that it was not intended that the first defendant have the power to make findings of criminal or professional misconduct is found in the terms of reference [supra] which provide for the Commissioner "to inquire, report and provide

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

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

3 (2007) 69 NSWLR 438.

4 (1990) 169 CLR 625.

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

recommendations to the Minister". The defendants point to the width of the terms of reference and make specific mention of clause 5 which provides for any line of inquiry which "warrants mention". **The Commissioner's powers were limited, to my mind, by the governing words of inquire, report and provide recommendations. Absent from the terms is a specific authority to express a finding of criminal liability or professional misconduct. The Commissioner was obliged to exercise all his powers in good faith and be guided by the terms of reference:** *Ross v Costigan (No 2)* [1982] FCA 73; (1982) 64 FLR 55.

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

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

Procedural fairness

9. The manner in which a Royal Commission conducts its inquiry is subject to the requirements of procedural fairness.[6]

10. It is well-established that the fairness of the procedure depends on the nature of the matters in issue.[7] Here, the proposed finding of "impropriety" on the part of Mr Murphy and/or MinterEllison would amount to serious censure by the Commissioner, which censure would inevitably cause significant damage to MinterEllison and Mr Murphy's professional reputation and public good standing.

11. It follows that fairness in this case requires that MinterEllison and Mr Murphy be offered an adequate and reasonable opportunity to address all the allegations, evidence and submissions put forward to support such findings as are proposed.[8] Because it was not made apparent until very recently that findings of "improper conduct" by MinterEllison or Mr Murphy were within the Commissioner's contemplation, we submit that it would be grossly unfair to them now to make a finding that they acted improperly. In particular, we note the following:

    (a) MinterEllison would have participated in the Commission's process in a different way had it known that the firm or Mr Murphy might be the subject of adverse findings – for example, to the extent that MinterEllison and Mr Murphy disagree with the factual premises now put concerning Crown's conduct and the characterisation of that conduct, those premises are based on evidence from witnesses who MinterEllison did not have the opportunity to cross-examine, notably including Mr Tim Bryant, Ms Michelle Fielding, and Ms Jan Williamson.

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

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

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

(b) Despite the Commissioner's statement on 24 March 2021, that witnesses "will be asked to prepare a written statement and will be guided as to the subject matter with which their written statements should deal", Mr Murphy was not given the opportunity to provide a written statement addressing a possible finding of "improper conduct".

(c) During the course of his examination before the Commission, it was not put to Mr Murphy that he (or MinterEllison) had engaged in conduct that was improper, wrongful or that might amount to professional misconduct. Nor was it put to him that evidence before the Commission might allow such a finding to be made.

(d) Counsel Assisting's closing submissions did not suggest any impropriety or professional misconduct on the part of MinterEllison or Mr Murphy.

(e) MinterEllison has now been given a matter of days to respond to very serious allegations (framed in the broadest terms) which, if found to have been made out, would have significant adverse reputational and professional consequences and (even if they fell within this Commission's terms of reference) were not put to Mr Murphy in advance of, or during, his examination.

B. Summary of Position

12. Broadly stated, the 27 July 2021 letter:

(a) sets out certain possible conclusions about the conduct of Crown Melbourne and its effect on VCGLR investigations: paragraph 3;

(b) asks whether MinterEllison is responsible for any such conduct: paragraph 4(a); and

(c) asks, if such a finding of responsibility is open, whether MinterEllison acted improperly: paragraph 4(b).

13. MinterEllison makes the following submissions in response to those matters.

14. First, we understand that the Commission, in its use of the word "responsible" in paragraph 4(a) of the 27 July letter, means to convey that MinterEllison is implicated in, and can properly be held accountable for, Crown's conduct – on the basis that the firm should have given, but did not give, certain advice to Crown that (it is assumed) would have avoided conduct of the kind set out in paragraph 3 of that letter. For the reasons set out in Section D. of this letter, MinterEllison does not accept that it was "responsible" for Crown's conduct, including any conduct of the kind described in paragraph 3 of the 27 July letter. In that regard, MinterEllison notes that Crown Melbourne was a sophisticated client, which was capable of reaching, and did reach, its own decisions as to how to conduct itself vis a vis the VCGLR.

15. Secondly, and in any event, at no time did MinterEllison advise or encourage Crown Melbourne to:

(a) be uncooperative;

(b) adopt a highly adversarial attitude;

(c) make unsupportable submissions; or

(d) refuse to concede issues that plainly ought to have been conceded.

16. Thirdly, no particulars have been provided of the conduct described, in very general terms, in paragraph 3. However, during the course of Mr Murphy's examination, several suggestions or propositions were put to Mr Murphy as to what MinterEllison ought, or ought not, to have advised Crown to do (or refrain from doing). We address those propositions in Section E of this letter. Beyond that, given both the lack of particulars and limited time allowed by the Commission for the preparation of these submissions, MinterEllison will leave to Crown Melbourne the defence of its conduct in its dealings with the VCGLR.

17. Lastly, it is submitted that MinterEllison and Mr Murphy's conduct was not, on any view, "improper", wrongful or inappropriate in the circumstances. No conduct has been identified that would "reasonably be regarded as disgraceful or dishonourable" judged against the ethical standards of the profession,9 or otherwise could be regarded as "improper".[10]

C. Characterisation of Crown's conduct

18. As stated in paragraph 16 above, in the absence of particulars, we have found it difficult to understand precisely what conduct on the part of Crown was intended to be captured by paragraph 3 of the 27 July 2021 letter. Taking into account both that difficulty and the fact that Crown is separately represented before the Commission, it is more appropriate for us to leave to Crown the response to paragraph 3 of the 27 July 2021 letter.

D. MinterEllison's "responsibility" for Crown conduct

19. Assuming that the Commission, in its use of the word "responsible", means to convey that MinterEllison is implicated in and accountable for its client's conduct, MinterEllison does not accept that it was responsible (in any relevant sense), in whole or in part, for that conduct.

20. Crown was (and remains) a sophisticated entity. It was more than capable of making its own commercial and strategic decisions, including in connection with its dealings with the VCGLR. It had an in-house legal team and a compliance team. It also sought and obtained advice from a range of professional advisors, including other law firms, members of counsel (including senior and eminent counsel), accountants, compliance consultants, business advisory consultants and others. The evidence before this Commission reflects that many of Crown's decisions (including the ultimate decision on how to engage with the VCGLR) were made, as was appropriate, by the Board of Crown.

E. Propriety of MinterEllison's conduct

21. During the course of Mr Murphy's examination, the following suggestions or propositions were put as to what MinterEllison ought, or ought not, to have advised its client to do (or refrain from doing):

(a) REDACTED - PRIVILEGE

(b) MinterEllison ought to have formally reported on the informal interviews with China-based staff rather than merely taking notes of those interviews;[12]

(c) MinterEllison ought to have formally reported on the informal interviews with China-based staff rather than merely taking notes of those interviews;[13] MinterEllison ought to have provided a copy of those interview notes to the VCGLR[14](presumably after advising Crown to waive its privilege over those notes or negotiate a regime to permit confidential disclosure and run the risk that disclosure might constitute waiver);

(d) MinterEllison ought to have advised Crown that Crown had a responsibility, as a specially regulated entity, to inform the VCGLR of "everything – all information in your possession

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9 *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 750; cited with approval in *Re A Solicitor* [1960] VR 617 at 620, 622; *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201 at 203; *Pham v Legal Services Commissioner* [2016] VSCA 256 at [77].

10 See paragraphs 24-25 below.

11 T2768/1-39; T2770/12-25.

12 T2770/41-45.

13 T2770/41-45.

14 T2795/1-5.

at the time" and to "offer anything … whatever information it had to the regulator";[15] and REDACTED - PRIVILEGE

22. The suggestions made to Mr Murphy, as to what he should properly have advised Crown to do, are fraught with difficulty, as acknowledged by this exchange:

> COMMISSIONER: And it is probably inconsistent with the client's interests in the immediate, or what was immediately happening, but it might be in its long-term interests to actually cooperate with the regulator, fully, openly and honestly. Would you agree with that as a proposition?
>
> A. Yes, I would, Commissioner.
>
> COMMISSIONER: Including making available information which might be contrary to interest.
>
> A. Well, potentially, but that would need to be thought about carefully.
>
> COMMISSIONER: …
>
> It is dangerous territory, Mr Murphy, I know that, but I'm trying to get to the grips of really what sort of institution you were dealing with back then; an institution that was interested in REDACTED - PRIVILEGE REDACTED - PRIVILEGE with the regulator conducting its statutory obligations and conducting inquiry into events that happened which were very serious and had very serious consequences to a whole lot of people …
>
> Is it fair to say that the Crown Board, or the people who you were dealing with at Crown would answer when they had to cooperate in that sense, i.e., meet their legal obligations under notices to produce and notices to attend for examinations and so on, but not volunteer anything more than that? Is that the mindset of the company you were dealing with?
>
> A. No, I couldn't say that, Commissioner.

23. Mr Murphy accepted that he did not advise Crown in the manner set out in paragraph 21 above. However, his evidence was that he accepted that:

(a) it was important for Crown to have an open, honest and co-operative relationship with the VCGLR;[17]

(b) Crown had an obligation to be forthright in its dealings with the VCGLR;[18]

(c) it was in Crown's interests to co-operate with a regulatory investigation;[19] and

(e) in some instances, it might be in Crown's long-term interests to disclose to the VCGLR information that was, in some more immediate sense, against interest — including in circumstances where Crown was not compelled to disclose that information (for example, privileged information) or where that information had not been sought by the regulator.[20]

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15 T2794/15-21; T2795/28-30; T2815/9-15.

16 T2815/9-15.

17 T2761/40-44.

18 T2794/30-31.

19 T2794/40-42.

20 T2796/11-36.

24. It is submitted that, having regard to each of the above matters, Mr Murphy provided legal advice to Crown based on what he considered to be in his client's best interests, applying his professional skill and judgement. Moreover, it is submitted that the failure to give the kinds of advice listed in paragraph 21 above cannot be described as "improper conduct".

    (a) A finding of "impropriety" necessarily involves something more than an error of judgment as to the best approach to identifying and protecting, within the proper limits of the law, a client's immediate and long term legal interests.[21] Equally, a finding of impropriety requires more than negligence or holding a *bona fide* but mistaken view as to the law.[22]

    (b) For conduct as lawyer in a professional capacity to be "improper", the conduct must be such that it would "reasonably be regarded as disgraceful or dishonourable" judged against the ethical standards of the legal profession.[23]

25. Assuming for the sake of argument that legal and strategic advice provided by MinterEllison or Mr Murphy was ill-advised, ill-judged or plainly wrong (propositions that are denied), that conduct could only be regarded as "improper" if such advice or assistance was given to carry out some ulterior purpose, or arose from some serious dereliction of duty or gross lack of reasonable care and attention to the materials and the law.[24]

F. Conclusion

26. If, contrary to the submissions in paragraphs 4-8 above, the Commission concludes that its terms of reference permit it to make findings of the kind foreshadowed in paragraphs 4(a) and 4(b) of the 27 July letter, the Commission should find that:

    (a) MinterEllison was not responsible, or partly responsible, for the manner in which Crown Melbourne conducted itself in the course of investigations by the VCGLR; and

    (b) there is no basis on which MinterEllison could be found, whether or not it bore all or part of that "responsibility", to have "acted improperly".

Should the Commission be assisted by any further material regarding the above topics, please let us know.

Yours faithfully
MinterEllison

[redacted]

Partner: Nick Anson T: [redacted]

Contact: Greg Carfoot T: [redacted]

OUR REF: NJA 1339153

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21 *R v Tighe and Maher* (1926) 26 SR (NSW) 94 at 108 (Street CJ); *In the matter of Moage Ltd (in liq) v Jagelman* (1998) 153 ALR 711 at 718 (Burchett J). See also, in the context of the medical profession, *Qidwai v Brown* [1984] 1 NSWLR 100 at 102 (Hutley JA), cited in *Cranley v Medical Board of Western Australia* (Supreme Court of Western Australia, Ipp J, 21 December 1990) at 6-8.

22 *Re a Solicitor* [1960] VR 617 at 108 (Dean J), quoting *Myers v Elman* [1940] AC 282 at 288-289 (Viscount Maugham).

23 *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 750; cited with approval in *Re A Solicitor* [1960] VR 617, 620 at 622; *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201 at 203; *Pham v Legal Services Commissioner* [2016] VSCA 256 at [77].

24 *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* [1998] FCA 806; 156 ALR 169 (Goldberg J), especially at 230-231.