

3 June 2021

Hon. Raymond Finkelstein AO QC
Commissioner and Chairperson
Royal Commission into the Casino Operator and Licence

By email only: contact@rccol.vic.gov.au

Dear Commissioner,

Submission to the Royal Commission into the Casino Operator and Licence

The Office of the Victorian Information Commissioner (**OVIC**) is pleased to provide a submission to the Royal Commission into the Casino Operator and Licence (**Royal Commission**). This submission responds to items J and K of the Royal Commission's Terms of Reference.

OVIC is the primary regulator for freedom of information, information privacy and data protection in Victoria, administering both the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) and the *Privacy and Data Protection Act 2014*.

As Victorian Information Commissioner, and along with the Public Access Deputy Commissioner, one of our key functions under the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) is to promote understanding and acceptance by agencies of the FOI Act. The object of the FOI Act, found in section 3, is to extend as far as possible the right of the community to access information in the possession of the Victorian Government and its agencies.

OVIC has a strong interest in promoting and enhancing transparency and access to information in Victorian agencies. The object of the FOI Act makes it clear that access to government held information is only to be limited by exceptions and exemptions that are necessary for the protection of essential public interests, and the private and business affairs of individuals whose information is collected and held by the government. Of relevance to this submission is the exemption in section 38 of the FOI Act, which permits an agency to refuse access to a document or parts of a document if information in the document is protected by a secrecy provision in another legislative instrument.

The *Gambling Regulation Act 2003 (Vic)* (**GR Act**) contains a secrecy provision in section 10.1.30(1) that meets the elements of the exemption in section 38 of the FOI Act. This submission highlights OVIC's concerns about the breadth of information caught by the secrecy provision, and the resulting lack of transparency into the licencing and operation of casinos in Victoria. Similarly, the submission draws the Royal Commission's attention to another, related, confidentiality obligation in section 10.1.31(1) of the GR Act, that further contributes to poor visibility of gambling regulation in Victoria.

To improve transparency, accountability, and public trust in the government's regulation of the gambling industry, OVIC encourages the Royal Commission to recommend legislative change to the GR Act.

The secrecy provision and confidentiality obligation

Secrecy provision

Section 10.1.30(1) of the GR Act prohibits 'regulated persons' from disclosing 'protected information' acquired in the performance of functions under the GR Act, *Casino Control Act 1991* and regulations made under these two enactments. Failure to discharge this duty is a criminal offence carrying 60 penalty units.

Commissioners and staff of the Victorian Commission for Gambling and Liquor Regulation (VCGLR), the Minister, Secretary, Department employees and other nominated persons, are 'regulated persons' under the GR Act and are therefore prohibited from disclosing protected information.¹

'Protected information' is information with respect to the affairs of any 'person', or information with respect to the establishment or development of a casino.²

'Person' is defined to include not only individuals, but also a body (whether incorporated or not), a partnership and the Trustees.³

As can be seen, the definition of 'person' is broad, in that it includes business entities as well as natural persons. The definition of 'protected information' is also broad in that there is no qualifier to the word 'affairs'. As a result of these broadly defined terms, the secrecy provision prevents regulated persons from releasing to the public, *any and all* information relating to the affairs of *any and all* persons involved in the gambling industry that fall within the ambit of government regulation. This includes *all* information relating to business entities, such as Crown Melbourne, irrespective of whether the information is innocuous, relates to the regulation of the business entity, or is in the public interest to disclose.⁴

Confidentiality obligation

In addition to the secrecy provision, section 10.1.31(1) of the GR Act also prevents regulated persons from disclosing protected information to a 'court'. The only exceptions to this confidentiality obligation are firstly, if the Minister certifies that it is necessary in the public interest that the information should be disclosed, and secondly if the person to whose affairs the information relates has expressly authorised it to be disclosed to a court.⁵

'Court' is defined to include any tribunal, authority or person having power to require the production of documents or the answering of questions.⁶

This broad definition of 'court', to include authorities or persons with power to require the production of documents or answer questions, captures independent statutory regulators and office holders who would not in ordinary terms be considered a court. For example, OVIC is a 'court' for the purposes of the GR Act because it has power to require the production of documents during the review of an agency's decision to refuse access to documents under the FOI Act.⁷ Consequently, when undertaking an independent review⁸ of a decision of the VCGLR to refuse access to documents under the FOI Act, OVIC is not able to view the documents to which it has to make a decision on whether access is to be granted or refused under the FOI Act.

¹ *Gambling Regulation Act 2003* (Vic) ("GR Act"), section 10.1.29 'regulated person'.

² *GR Act*, section 10.1.29 'protected information'.

³ *GR Act*, section 1.3 'Person'.

⁴ Noting that the Minister or the Commission may disclose protected information (except to a court) if the Minister or the Commission considers that disclosure is in the public interest: See *GR Act*, section 10.1.32(2) and (3).

⁵ *GR Act*, section 10.1.31(2).

⁶ *GR Act*, section 10.1.29 'Court'.

⁷ *Freedom of Information Act 1982* (Vic) ("FOI Act"), sections 49KB and 49I.

⁸ Conducted under Part VI of the FOI Act.

OVIC's concerns about the secrecy provision and confidentiality obligation

OVIC acknowledges the legitimate need for and use of secrecy provisions in Victorian legislation. There will always be classes of government information that it is necessary to exclude from public release. The FOI Act itself recognises this need, through the inclusion of various exemptions from access.

However, in situations such as this one, where there is an identified public need for government intervention and regulation of what is otherwise a free-market, private industry, it is critical that any law prohibiting the government from being transparent about its regulatory action, is limited only to what is legitimately necessary to keep secret.

The GR Act came into force on the premise that Victorians were entitled to expect transparency and accountability from the gambling industry and the VCGLR's regulation of the gambling industry.⁹ OVIC is concerned that this may not be borne out in practice, due to the breadth of information caught by the secrecy provision and the number of entities caught by the word 'court' for the purposes of the confidentiality obligation in the GR Act.

The blanket coverage in the secrecy provision of *all* information with respect to a business entity's affairs, necessarily includes information about the VCGLR's regulation of that business entity and other business information that is not sensitive in nature. This does not appear to strike the right balance between the interests of the gambling industry in having its business affairs remain private, and the public interest in transparency and accountability from the gambling sector and Victorian government agencies. By way of contrast, the exemptions in ss 33 and 34 of the FOI Act draw a careful balance between the public's right of access, and the public interest in protecting personal affairs information and confidential business interests, recognising that not all personal affairs information and all business information should be exempt from release.

One of the objects of the GR Act is to ensure that gambling is conducted honestly and that the management of gambling is free from criminal influence and exploitation.¹⁰ Access to information is an important tool that can be used to bolster integrity and to expose corruption and criminal behaviour. Openness of information enhances accountability and increases public trust in government actions. The current secrecy provisions in the GR Act have the opposite effect.

We encourage the Royal Commission to focus on the benefits of transparency to improving accountability and public trust, and to ultimately recommend legislative change to Chapter 10, Part 1, Division 6 of the GR Act.

Thank you for the opportunity to provide a submission to the Commission. I have no objection to this submission being published without further reference to me. If you would like to discuss this submission, please do not hesitate to contact me or my colleague, Emma Stephens, Senior Policy Officer, at emma.stephens@ovic.vic.gov.au.

The Public Access Deputy Commissioner and I would also be happy to address the Royal Commission on the issues raised in this submission, should that be of assistance.

Yours sincerely



Sven Bluemmel
Information Commissioner

⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 November 2003, 1595.

¹⁰ *GR Act*, s 1.1(2)(d).