



INDEPENDENT LIQUOR AND GAMING AUTHORITY OF NSW

INQUIRY UNDER SECTION 143 OF THE CASINO CONTROL ACT 1992 (NSW)

**THE HONOURABLE PA BERGIN SC
COMMISSIONER**

**PUBLIC HEARING
SYDNEY**

**FRIDAY, 13 NOVEMBER 2020
AT 10.00 AM**

Continued from 12.11.20

DAY 55

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MR A. BELL SC, MS N. SHARP SC, MR S. ASPINALL and MR N. CONDYLLIS appear as counsel assisting the Inquiry
MR E. BATROUNEY appears for Crown Resorts Limited and Crown Sydney Gaming Proprietary Limited
5 **MR N. HUTLEY SC appears with MR T. O'BRIEN and MR A. D'ARVILLE for CPH Crown Holdings Proprietary Limited**
MS Z. HILLMAN appears for Melco Resorts & Entertainment Limited
MR N. OWENS SC appears for Mr Brazil

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COMMISSIONER: Yes, thank you, Ms Sharp. Mr Hutley and, I think, Mr Batrouney, you're here today for Crown; is that right? Yes. Thank you.

MR BATROUNEY: Commissioner.

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COMMISSIONER: Mr Hutley, thank you. Just before you commence, I thought I would raise a couple of things that you're probably going to deal with, but I thought that I would just highlight them. I would like to hear you in respect of each of, certainly, Mr Packer and Mr Johnston. To an extent, Mr Jalland, but not so much
20 because he was very much a later addition to the board of Crown Resorts Limited. I would like to hear what you submit in respect of the Southbank and Riverbank accounts, and then I would also like to hear you in respect of the situation that arose in respect of the threat and Mr Packer's illness and the apparent lack of notification to the board at the time of his departure, and also at the time of his seeking further
25 entrance back on to the board in '17 or – yes, January '17, and his process of getting back on the board in August through the usual notification to ILGA.

And the third aspect is one that I would like to discuss with you in respect of your submissions relating to the conflict situation. So I just highlight those three matters,
30 if I may, so we don't forget to deal with them.

MR HUTLEY: Can I ask you in respect of the third matter - - -

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COMMISSIONER: Yes.

MR HUTLEY: - - - the conflict situation - - -

COMMISSIONER: With Mr Johnston. So Mr Johnston's evidence and your submissions relating to the time at which he was receiving information from Crown
40 at the moment that he was transacting with Melco. He resisted any suggestions in relation – originally resisted any suggestions of a perception but ultimately, I think, and I need to hear you on this, did he really accept that there was a perception. I think you've put that there was no conflict so really the perception has fallen away, but I think I would need to hear you a little further on that, Mr Hutley.

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MR HUTLEY: Thank you, Madam Commissioner, for that indication.

COMMISSIONER: Yes, thank you.

MR HUTLEY: Can I come back to them.

5 COMMISSIONER: Yes, of course.

MR HUTLEY: I might at the end of the submissions because I hadn't proposed to
address in relation to the Southbank accounts because I can't recall anything
specifically being raised with my – or submitted about them in relation to my clients
10 as opposed to - - -

COMMISSIONER: I think the – yes, I think the position is this, that each of Mr
Packer and Mr Johnston were not aware of them.

15 MR HUTLEY: Quite.

COMMISSIONER: And one of the problems for the board, Mr Packer as executive
chairman and director, and Mr Johnston with the special skills that he had in finance,
etcetera, as a director of Crown not knowing and then having the publication of the
20 advertisement, and it does present as a real problem for Crown that this – can I use a
neutral term – indication of money laundering for the moment was going on
throughout the period that each of them was a chairman and director, and that's the
position.

25 MR HUTLEY: I can – I understand the point. I will seek to address it - - -

COMMISSIONER: Yes. Thank you.

MR HUTLEY: - - - at a level of generality, for reasons I will come to. Now, we
30 provided you yesterday with some observations concerning junkets at a general level.
We propose to address you briefly in relation to the advertisement placed in response
to the 60 Minutes program. That may need some further additions having regard to
that last matter you've raised in relation to the accounts, the extent that they're
adverted to in the advertisement, and I can't – but I will come back to that. After
35 dealing with the 60 Minutes program and the so-called advertisement we will next
address the criticisms of Mr Packer and Mr Johnston which counsel assisting made in
respect of junkets.

We will then deal with the credit attack which counsel assisting made in respect of
40 Mr Johnston to show that it is, with respect, unjustified and you would accept Mr
Johnston as a witness of truth. Before finally addressing those matters which you've
asked me specifically to address this morning, we will return to the topic we deferred
on Wednesday, being the answer to part C of the influence of Mr Packer's statement
of issues which is, in effect, a wrap-up. You invited me – turning to the
45 advertisement, you invited me yesterday to say something about the involvement of
my clients in the authoring of that advertisement.

As to Mr Jalland, his evidence concerning the advertisement at paragraphs 19 to 63 of his second statement, which is exhibit CH1.WIT.CPH .004.0001, that could come up because I will go to a small part of it in a little while. Mr Jalland wasn't examined about the appropriateness of any aspect of the advertisement, rather he was asked about his state of knowledge in relation to the China arrests and legal advice Crown had in that respect before the advertisement was published. It was not suggested that his knowledge was inconsistent with the advertisement. The reference to his evidence will – it's over a number of pages. If we might we will give you those references in the written submissions rather than - - -

10 COMMISSIONER: Thank you.

MR HUTLEY: - - - engaging in a bingo-like recitation of numbers.

15 COMMISSIONER: Thank you.

MR HUTLEY: No specific submissions have been made about Mr Jalland's evidence concerning the investment – the advertisement. You, Commissioner, asked a question of Ms Halton about the inclusion of a statement in relation to a junior employee.

20 COMMISSIONER: Yes.

MR HUTLEY: And that was at transcript 4284, lines 14 to 18 which bore upon the question of who prompted that observation to be included, and there was a reference then to Mr Jalland. This was adverted to in Mr Jalland's statement at paragraphs 47 to 48, which you will find in WIT.CPH.004.0001 at internal pin 0008.

30 COMMISSIONER: Yes.

MR HUTLEY: And he was not, as I said, questioned on any aspect of his statement.

35 COMMISSIONER: No, there is an email in the evidence that shows that the board wanted to – some of the members of the board wanted to remove the reference and Mr Jalland wished to retain it.

MR HUTLEY: And he explains his concern about the matter in an affidavit and no-one has suggested that's other than agreed to leave it there but, I mean, you see his reasoning process. I can't take it any further than that. There doesn't seem to be any criticism of his reasoning process. It was honestly held, obviously - - -

40 COMMISSIONER: Yes.

45 MR HUTLEY: - - - at the time. And as no observations have been made about my client, and the advertisement is the advertisement of the company, Mr Jalland – I think, that's all that's appropriate for me to submit in relation to Mr Jalland's

involvement. No doubt other matters of broader concern in respect of the Crown – the advertisement will come from Crown.

5 Can I turn to Mr Johnston. His evidence concerning the advertisement was at
paragraphs 27 to 56 of his third statement, which was exhibit CJ1,
WIT.CPH.006.0001. Mr Johnston was also asked about his state of knowledge in
relation to the China arrests and Crown Resorts' legal advice. Again, it's not been
suggested that his knowledge was inconsistent with the advertisement and, again,
we'll provide references in our written submissions. Mr Johnston was asked, at
10 transcript 3036 lines 15 to 28, why the advertisement did not address the wider and
the more nuanced allegations about the China arrests rather than simply the
imputation made that Crown Resorts knew that its employees were breaking Chinese
gambling law, to which he gave evidence, that the response we issued was
appropriate to the most, if I could say, egregious of the accusations. It's to be noted
15 that's a quote from him in the transcript which I referred to. It's to be noted that the
advertisement did not purport to respond to each allegation. He gave evidence – and
if this could be brought up, at transcript 3177 lines 20 to 31 about the distinct change
in tone of the board since the advertisement, and he explained that. You will see
that.

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COMMISSIONER: I think it was put to him – and he gave a rather lengthy answer
at 3180, I think – about whether the advertisement was wrong.

MR HUTLEY: Quite.

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COMMISSIONER: Yes.

MR HUTLEY: Yes, yes. Now - - -

30 COMMISSIONER: And he did refer to the Riverbank and Southbank accounts,
etcetera.

MR HUTLEY: Yes.

35 COMMISSIONER: He accepted that it would appear that Crown had dealt with
junkets that were connected and, also, that the accounts had evidence of structuring
within them.

MR HUTLEY: Yes.

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COMMISSIONER: And that the joint AML program hadn't been rolled out, and
that's all in his evidence at 3181, 3182. I know.

45 MR HUTLEY: Quite. But that, of course, is, as he makes clear, a frank assessment
of material which he had become aware of during the course of the Inquiry and was
giving - - -

COMMISSIONER: Yes. There's no suggestion, Mr Hutley, that anything other than information that was lacking was given to the board at the time that they crafted their advertisement or their statement. The report that was handed to them was lacking, to use a neutral term, in – in correct information.

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MR HUTLEY: Yes. And at a broad level, and akin to Mr – what Mr Packer conceded, there is an element, and must be an element, in respect of any company that the buck stops with the board - - -

10 COMMISSIONER: Correct.

MR HUTLEY: - - - irrespective of whether the board can be, as it were – irrespective of whether particular evidence can be pointed to, which put a board on notice of deficiencies. That's part of the element of being a board. And that Mr
15 Packer, and we say frankly and to his credit, acknowledged why he took some responsibility for things. And that could be, in effect, said of each and every board member. That doesn't, of course, prove that any one of them is unsuitable to be associated. They are, to that extent, human and failures in corporations do occur. It doesn't speak to their unsuitability. There is no suggestion with any of these – any of
20 my clients, subject to some matters of credit which I will come to in relation to Mr Johnston, that any one of them was acting other than as he perceived was bona fide in the best interests of the company and, therefore, when one's looking to their suitability at the level of integrity, character and - - -

25 COMMISSIONER: Honesty.

MR HUTLEY: - - - honesty, they would, in our respectful submission, to use a colloquialism, pass with flying colours at a past and ongoing level of future-looking assessment. But there you have it: things were happening within the company.
30 Now, in that regard, can we turn to our learned friend counsel assisting's written submissions closing remarks at paragraphs 5 and 6 it's said – that's in relation to the China – it's said:

35 *Additionally, there is evidence before the Inquiry that demonstrates a culture within Crown Resorts that is dysfunctional and includes an arrogant indifference to regulatory and compliance risk, a culture of denial and unwillingness to examine and address past failings, and a culture which prioritised the pursuit of profit above all else. These defects in culture are very well illustrated by the issue on the 31st of July 2019 on the Crown Resorts ASX media release.*
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Now, if that observation is directed towards the deficiencies in that which was put to the board, I, of course, will leave that for Crown to address. If it's directed to the members of the board, including Mr Jalland and Mr Johnston, in our respectful
45 submission that wouldn't be found and, as I've observed, none of this was put to either of those individuals about their response or participation in the preparation of the advertisement. Mr Jalland wasn't asked anything, and Mr Johnston was only

questioned in the way I've indicated, thus – and in our respectful submission, you have seen both of those gentlemen in the witness box and there was nothing to indicate an arrogant indifference to anything, a culture of denial or unwillingness to examine or address past failings.

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In fact, as you took – as you observed in taking us to the transcript which you referred to, Mr Johnston does exactly that and does it with a frankness which would commend his honesty and integrity and reliability to the Commission and, in our respectful submission, similarly, there's nothing which would involve the promotion of either of those gentlemen as promoting a culture which prioritised the pursuit of profit above all else. Nothing has been suggested to Mr Jalland of anything of the variety, nor, in our respectful submission, Mr Johnston. I will come to the submissions made in relation to Mr Packer, particularly as regards junkets in a little while. Now, can I return to those other aspects. I will return, if I might, to the aspects you've raised with me at the end, but I will now proceed, if I might, to junkets - - -

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COMMISSIONER: Yes.

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MR HUTLEY: - - - and the role of Mr Packer. Now, two – as we submitted yesterday, two matters underlying section D5.3 of the submissions of counsel assisting in respect of junkets: first, that Mr Packer wished to bring the “casino operator model” to Crown Sydney; and secondly that Mr Packer was significantly involved in the Crown Resorts VIP international business, and as a consequence that Mr Packer was responsible for the VIP international team operating with an aggressive sales culture and a higher risk appetite than the rest of the business. We address each of those propositions in turn. As to the first, bringing junkets to Sydney, Mr Packer's evidence was that he may have played a role in the introduction of Macau-based junkets at Crown Group casinos, and that's transcript 3736, lines 24 to 27, that he wished to bring the model to Crown Sydney, and that's 3710, lines 17 to 21.

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There was nothing surprising nor, more to the point, sinister about Mr Packer as chairman having visions and plans for Crown's VIP international business and that junkets formed part of those plans. They are a feature throughout the world of what might be called the VIP gambling business. It would be surprising and, in fact, contrary to what might be called the prevailing business model throughout the world, had he not developed some such plan. Junkets, as we observed yesterday, are an accepted, and we would say – and if properly managed a sensible aspect of the business. Mr Packer wished Crown Sydney to be profitable. He was duty-bound to have that wish, not only his own interests, but as executive chairman acting in the best interests of the shareholders as a whole.

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However, Mr Packer's vision for Crown Resorts did not involve disregard of compliance matters. Again, as he frankly said, with the benefit of hindsight one could do better, but he himself was shocked by some of the deficiencies. When

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counsel assisting asked Mr Packer whether it was his intention to bring a junket operating model to Crown Group's Australian casinos, his response was:

Subject to regulatory approvals, yes.

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And that's his evidence at transcript 3707, lines 27 to 30. He was of the view that he considered Mr Craigie, the then CEO of Crown Resorts, to be a compliance expert. That was his evidence at transcript 3600, lines 28 to 30. It was perfectly normal for Mr Packer, the executive chair of Crown as a whole, to rely on Mr Craigie and the management structure of the business as a whole, including in respect of compliance and specifically the VIP international business and junkets. And that is not to say he didn't have a responsibility, but he has, as part of his role, a responsibility to rely upon and utilise apparently operating appropriately structured management structures. Anything else would be irresponsible.

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That's not to say one relies upon them blindly, but if they are apparently operating, apparently set up in accordance with good management practice, are staffed by women and men of apparent responsibility and qualification, it would be irresponsible for an executive chairman or a board director not to place substantial reliance upon those organisations unless they had put before them substantial evidence that they were deficient. Anything else would lead to corporate chaos, not – and waste and an inappropriate defocusing of board directors upon their proper role.

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Now, can I now deal with Mr Packer's involvement in the VIP international business. It's submitted that he was "intimately" involved in the VIP international business. Now, we've addressed the structure of the international business yesterday and I'm not going to repeat who reported to who and how it was organised. Mr Packer's evidence was that he was interested in the VIP international business but not more so than any other aspects of Crown Resorts' business and he gave that evidence at a number of places. I need only give you one for the moment, transcript 3573, line 45 to 3574, line 1. We will give further in our written document.

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That's the most direct evidence of Mr Packer's position and, of course, one of the difficulties you confront, and this is just the nature of the Inquiry, is you no doubt have seen many emails of Mr Packer's concern with the VIP business. What you haven't been given, and I make no criticism, there's limits of what one can do, is the entirety of the email traffic of Mr Packer in relation to the whole of the business, and therefore one is in the position of, again, harking back to what Chief Justice Gleeson said, the danger of hindsight in a focused inquiry, whether it be in a court or here, is that one doesn't see the entirety. One can't because one has terms of reference and the terms of reference are what they are, but the most direct evidence of Mr Packer's position was what he has sworn.

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Mr Felstead's evidence about his perception of Mr Packer's interests was similar and that's at transcript 1117, lines 11 to 17, and Mr Johnston's evidence was also consistent with Mr Packer's evidence at transcript 2938, lines 22 to 39. The only

evidence suggesting Mr Packer had some more intense level of interest in the VIP business was by Mr Craigie by reference to a VIP update which was discussed with Mr Packer. Mr Craigie gave that evidence at transcript 1450, lines 38 to 1451, line 2. However, Mr Craigie's evidence at its highest was evidence of Mr Packer receiving briefings in respect of "an area of interest". Mr Packer as a director and major shareholder cannot be criticised for receiving a detailed update on a particular matter.

That is not evidence of Mr Packer becoming involved in the operational matters or of setting strategy in relation to the VIP business or taking any more detailed role. Indeed, Mr Craigie's evidence was that Mr Packer's interest in the VIP business was focused on the mathematical or financial aspects rather than operational aspects of the business. That was his evidence at transcript 1451, line 4 to 14 and 1462, lines 11 to 15. That was consistent with Mr Packer's evidence that he did not set the strategy for Crown Resorts VIP international and that his contribution on that topic was marginal. That's transcript 3718, lines 1 to 13.

Counsel assisting refer in their written submissions to a proposal that Mr Packer take an executive role which would have included setting the VIP strategy, and that's in the submissions in relation to junkets at paragraph 336. Mr Packer, of course, did not take that role up. As you know, Commissioner, Mr Packer stepped down as executive chair in August 2015 and resigned as a director in December of that year. Prior to that, Mr Packer's role in the VIP international business was to assist from time to time in building relationships with junket operators. However, his interactions with junket operators were rare and superficial. You can see in Mr Packer's statement, which is exhibit CM1, WIT.CPH.005.0001 at 0004 to 5, paragraphs 21 to 22, he deals – I'm sorry, the internal pin is 0004 to 0005. If both could be brought up. Thank you.

COMMISSIONER: Yes.

MR HUTLEY: 21 and 22, Madam Commissioner.

COMMISSIONER: Yes. Thank you.

MR HUTLEY: He gave oral evidence to the same effect at transcript 3718, lines 33 to 43 and 3719, lines 25 to 26. In total, Mr Packer only recalled two or three instances of meeting with representatives of junket operators. That's transcript 3735, lines 41 to 47. Mr Packer also sometimes had telephone calls with junket operators arranged by Mr Ratnam. Mr Packer described these as courtesy calls at transcript 3718, lines 36 to 38. The Inquiry should conclude that these fell into the same category as Mr Packer's meetings with junkets. They were of the nature of meet and greet interactions, and again, quite properly, no investigation was made as to whether in respect of other aspects of the business he met and greeted people who were significant for other aspects of the business.

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And you would probably infer with your knowledge of the position of chairpersons that they tend to be wheeled out, as it were, in respect of commercial events to do exactly that which Mr Packer was doing here. The Inquiry - - -

5 COMMISSIONER: That's why he put Mr Ratnam in place to meet with the junkets and the junket representatives because if you meet with the chairman it's a very special arrangement, but what they put on Mr Ratnam's card enabled Mr Ratnam to convince the junket operators that they were meeting with the special representative of the chairman.

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MR HUTLEY: I accept that readily but, I mean, that's no different to what many organisations do - - -

COMMISSIONER: Yes, quite.

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MR HUTLEY: - - - in all aspects of their business to make, frankly, people who they're doing business with feel somewhat special.

COMMISSIONER: Yes, of course.

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MR HUTLEY: Now – and we're going to deal with the detail with respect to Mr Ratnam, if we can, in writing rather than take time before you now.

COMMISSIONER: Yes, all right.

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MR HUTLEY: The evidence does not lead to a conclusion that Mr Packer had any real involvement in the day-to-day operational matters or setting the strategy in relation to the VIP international business. Now – and quite appropriately, at paragraph 340 of counsel assisting's written submissions a series of what are described as concessions are set out – now, those matters are set out at paragraphs A to F and reflect the fact inter alia that Mr Packer relied on others for compliance matters in respect of junkets, quite appropriately, we say. And the concessions are frankly made and obviously appropriate. Now, however, when asked to look at matters with hindsight, Mr Packer acknowledged that he may have not placed sufficient weight on having business associations with good repute, and his frank evidence at transcript 3739, line 38 to 3740, 11. In other words, acknowledging that contacts with all the knowledge of what occurred and took place with and opportunities for money laundering and the other matters which you've adverted to, Madam Commissioner, took place, he frankly conceded, with the benefit of

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hindsight, perhaps a stricter approach would have been appropriate – would have been better. And in a sense one can always do better, and if a flaw of that has occurred, with the benefit of hindsight any responsible director of integrity and responsibility would take that view because the optimum is that it doesn't take place and that it be avoided.

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But that gets back, of course, and again, to the problem which I adverted to yesterday which we see as a regulatory problem as to how to deal with this area, an important

area, and it is difficult and it is nuanced, but Mr Packer made that acknowledgment. Now – and it’s an acknowledgment, we would submit, that every director of this organisation would make, and every responsible executive would make. Now, none of those matters indicate any involvement by Mr Packer in the detail of determining
5 strategy or operational matters carried out by that team. Now – so one comes back to the submissions put against Mr Packer at paragraph 327 of the submissions which I’ve taken you to. The first proposition is that Mr Packer – I’ve got the wrong paragraph. I do apologise

10 COMMISSIONER: That’s all right.

MR HUTLEY: I’ve just got to get the right paragraph. I’ll find the paragraph number.

15 COMMISSIONER: Yes, that’s all right.

MR HUTLEY: Understandably, in this large amount of material somebody got the numbering wrong. But the submission was made that Mr Packer set – and the quote is “a dubious tone from the top”; we will just get the paragraph in a minute. That
20 characterisation is, we submit, with respect - - -

COMMISSIONER: Yes, we’ve dealt with that.

MR HUTLEY: It is 327. I do apologise.
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COMMISSIONER: That’s all right. Yes, in the last sentence, or thereabouts, and I think we’ve dealt with that on Wednesday.

MR HUTLEY: Quite. And we submit that that’s unfair. The next proposition is
30 that Mr Packer monitored closely – we dealt with that. The third proposition is it drove a culture that put the pursuit of profits above all else, and we submit that’s not fair to Mr Packer, with all due respect. He didn’t. There’s no evidence that he did. It was not put to Mr Packer. The only question asked of Mr Packer on this topic was the passage to which we referred a moment ago where Mr Packer agreed the VIP
35 international ran on an aggressive sales culture with a higher risk appetite than the rest of the business and said he took some responsibility for that. That’s transcript 3742, lines 20 to 33.

Now – and the risk there is a risk which is, in effect, a credit risk. That was what he
40 was referring to, that they – and you will recall the evidence that they competed for business with junkets by, in effect, the leverage – a leverage arrangement of some aggression, but that is engaging in normal competitive conduct. It’s not, in effect, abdicating, as it were, concern for the issues which lie at the heart of this Inquiry. Now, that’s all we wish to say about Mr Packer’s – can I now turn to the role of Mr
45 Johnston in relation to junkets. There are a number of matters of detail set out in respect of Mr Johnston in relation to junkets in the submissions which we will address in our written submissions and not take up time before you orally, however,

can we address the point which is at paragraph 279 of the written submissions of counsel assisting.

5 There it was said that the junkets' decision-making team, comprising Mr Preston, Mr Johnston and Mr Felstead was essentially biased by reason of other positions they held or that a tension or perceived tension existed between those decision-makers' other roles and their "final say" on the vetting of junket operators. Now, in relation to Mr Johnston, it's submitted that:

10 *Mr Johnston, as a CPH nominee being nominated by Mr Packer to support the VIP international business, also had a vested interest in driving the profitability of Crown Resorts.*

15 Now, that, with respect, is a strange submission. Mr Johnston, whether he's a CPH nominee or a director of the company so far as it's consistent with acting lawfully and in accordance with the proper dictates for the business would have a vested interest in driving the profitability of Crown Resorts. If you put the negation that he had no vested interest in driving the profitability of Crown Resorts, one might ask why he's actually on the board of Crown Resorts; he should resign immediately.
20 Now – but if – and I don't use this offensively – the sting is by reference to CPH's interest, CPH is a shareholder, as are all shareholders, and if the profitability is improved it's improved for everyone, but I won't – now, there's nothing to suggest that Mr Johnston was acting, in our respectful submission, other than with what he perceived to be bona fide the best interests of Crown Resorts' shareholders as a
25 whole.

And nothing was ever put to him that he was, in effect, disloyal to the shareholders as a whole to the benefit of CPH because that would, in a sense, be a contradiction in terms. Now, we've dealt with his – and we've made the submission he had no
30 operational oversight in relation to the VIP business and I don't propose to go through it. Of course, his work in relation to junket approvals arose from a request by Mr Craigie in the aftermath of the China arrests and was, again, a discrete set of tasks performed under the services agreement between CPH and Crown Resorts, and he refers to that in exhibit CJ1, WIT.CPH.006.0001 at paragraph 97. It remained the
35 case that Mr Johnston did not acquire any general managerial or operational or decision-making role in respect of the business by taking up that role, and that was his evidence at transcript 3092, lines 27 to 42 and at various other places which will be in our written submissions, and Mr Jalland confirmed that at transcript 3306, lines
40 34 to 3307, line 12.

The fees payable were payable to CPH at rates previously agreed, and importantly, the rates payable under that agreement did not turn on the profit performance of Crown Resorts or any aspect of its business, and you know that from exhibit O44. Mr Johnston gave unequivocal evidence that his role was to apply an independent
45 mind as he had no profit accountability for the results of Crown. That was at transcript 3125, lines 17 to 19. That evidence was never challenged. When asked to elaborate by you, Commissioner, Mr Johnston agreed with the proposition that any

director would conduct the review provided they weren't part of the management structure of the VIP business. That's transcript 3131, lines 7 to 13.

5 He had previously explained he was not part of the management structure of that business and therefore not responsible for its trading performance, 3131, lines 3 to 5. In short, there was no incentive operating on Mr Johnston to give rise to a vested interest other than the appropriate interest of any director to improve the performance of the company. Now, the review of the junket operations in which Mr Johnston was involved resulted in Crown Resorts seeking to deal with over 100 junket operators with which it formally dealt. That's at paragraph 98 of Mr Johnston's exhibit CJ1. 10 Now, it's difficult to reconcile that outcome with the proposition that Mr Johnston was in any way encouraging the chasing of profits at the expense of proper checks.

15 He also gave evidence that following the China arrests Crown took a very conservative approach on how it does business. That's transcript 3182, line 29 to 3183, line 7. From November 2016 onwards there was a shift in the criteria such that they applied a stricter lens going forward when it came to the revised review process concerning junket operators, transcript 3150, line 9 to 3150, line 12. And these processes were refined over time and continued to be so, and there's no suggestion 20 that Mr Johnston was other than an enthusiastic participant in the application of the tests as developed.

Mr Jalland, in his evidence, also gave his view in relation to the resolution of what "tension" that exists between financial incentives and probity of the junkets. Among 25 other things, he said at transcript 3333, lines 14 to 16"

There should not be a tension on financial matters. The probity and propriety of the junkets we deal with is paramount and any financial tension is irrelevant.

30 That is evidence is inconsistent with CPH and its nominees chasing profits over probity. Now – so that's what I wish to say about Mr Johnston in relation to junkets. Can I now deal shortly with what remains of the submissions made in relation to Mr Johnston's credit. The submission is made in counsel assisting's submissions in relation to Melco at paragraph 83 to 90 that Mr Johnston's evidence should be 35 treated with caution based on three matters. Now, we submit that none are warranted. Firstly, Mr Johnston's recollection about the email in respect of the employee in Wuhan, and we've dealt with that. Secondly, various criticisms of Mr Johnston's evidence about the minutes of various meetings and we've already dealt with that.

40 In respect of the question of what Mr Johnston told others about the Korean arrests in a meeting of 12 August, the position is that various witnesses have different recollection of what transpired, principally, about when it transpired, whether it was before the first board meeting, during the first board meeting, after the first board 45 meeting, in the second board meeting, in both meetings and the like. Now, it's fair to say that there was a large array of recollections. There's an irony in pointing to Mr Johnston's disagreement with various witnesses who disagree amongst themselves as

a basis for impugning Mr Johnston's credit, but not impugning the credit of those who have the different recollections even amongst themselves. What one has is simply the quotidian occurrence of a difference of recollection, but the heart of the matter is consistent. Mr Johnston disclosed the question and raised a question of the
5 China arrests – Korean arrests. I do apologise. And, of course, the interesting thing in that regard is it was raised relatively shortly and dealt with relatively shortly because advice had been given that the position of Crown was different to - - -

10 COMMISSIONER: Yes, yes.

MR HUTLEY: - - - all else.

COMMISSIONER: Yes.

15 MR HUTLEY: So – now - - -

COMMISSIONER: I think the Korean arrests aspect of this submission is relative – or relevant to the failure to identify the questioning of the young man in Wuhan, but you've dealt with that, Mr Hutley, and I understand your submissions on that.

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MR HUTLEY: All I'm dealing with is – a submission is made that this goes to his credit. We say it simply can't. Thirdly – the third matter is Mr Johnston's evidence about the reasons for the Melco transaction being terminated and being different from that of Mr Jalland and Mr Packer, and that's referred to in our – the
25 submissions of counsel assisting concerning Melco at paragraphs 87 to 89. Now, this, with respect, is a strange – that their recollections are different is undoubted. Slightly different, not materially different, and I'm not going to go through the detail, but the odd thing is no criticism is made of Mr Packer and Mr Jalland in respect of their explanation of the reasons. That is – and no reason is given why Mr Johnston,
30 if that was the true explanation, would depart from it. It's just a difference of – it may have been that Mr Johnston – and the likelihood is, as we will submit, that Mr Johnston may not have participated in some of the discussion between Mr Packer and Mr Jalland about the circumstance and came to his own view as to the reasons, perhaps on inadequate information, but it doesn't matter. There can't be any rational
35 reason to suggest that Mr Johnston is not giving his best recollection, because absolutely no – neither motive nor rational reason to depart from the truth is observed on.

Now, thus, for all those reasons, you would appreciate Mr Johnston was asked
40 questions over three days covering a wide range of topics. He made numerous and appropriate concessions. And we'll give you a list of those. I'm not going to take you through them. He accepted limitations on his memory, and we will give you references to that. He was careful to ensure the evidence he gave was correct, taking time to correct inaccuracies in his statements that come to his attention. He gave –
45 he was precise in his answers. He was, in our respectful submission, a model witness before the Commission seeking to give frank, responsive questions to a prolonged – and appropriately prolonged – close interrogation by counsel assisting.

Now, it's relevant also, on any broader consideration of Mr Johnston's performance of his role as a director and his character, honesty and integrity, to consider the evidence of his present and former colleagues on the Crown board. Ms Coonan described Mr Johnston as a very, very fine, diligent and dedicated board director in terms of his general contribution to the board, "I value it"; that was her evidence at transcript 4448 lines 3 to 4 and 4448 line 12. Professor Horvath indicated he had "full confidence" in Mr Johnston as a colleague on the board due to his "enormous commitment and ability as a director". That was his transcript at 4139 lines 11 to 15 and 4139 lines 21 to 22. He noted that Mr Johnston's work under the service agreement "were of significant value to Crown and all its shareholders"; that's his evidence at transcript 4133, lines 26 to 27. Mr Dixon told the Inquiry that Mr Johnston is "a very good executive"; that's his evidence at transcript 4695 line 25, and Mr Mitchell described Mr Johnston as outstanding in tax advice; that's his transcript at 3882 lines 47.

Now, the evidence of his colleagues on the board should be given substantial weight in respect of his credibility, character, honesty, integrity and his performance as a director and we submit all those assessments are consistent with the overwhelming conclusion you would have from Mr Johnston's performance as a director of this board and, in effect, in his advisory role obtained under the services agreement.

Now, can I now turn to the bad news hypothesis and statements about accepting Mr Packer's evidence. We made our submissions yesterday to the effect of the actions of CPH parties having said to compromise formal reporting lines for the VIP international business or compromise Crown Resorts governance structure. It was suggested in counsel assisting's submissions that these gaps can be explained by Crown Resorts management not wanting to bring Mr Packer "bad news"; that was at transcript 4910 lines 36 to 40 and counsel assisting's submissions in relation to China arrests at paragraph 337.

With respect, the hypothesis does not withstand scrutiny. There is no evidence from anyone, no director, employee or otherwise, who has given evidence before you that he or she was reticent in providing bad news to Mr Packer. You've heard from every senior employee, for that matter, directors, other than those who have not assisted the Commission, and you have heard from all the directors and no one has said that or intimated it. The important thing to note also, beyond that, is that Mr Chen didn't give O'Connor bad news,; Mr O'Connor didn't give Mr Felstead bad news and Mr Felstead didn't give Mr Craigie bad news and Mr Craigie didn't give the board bad news and Mr Neilson didn't give anyone bad news, and no one seemed to have given bad news to the risk committee where neither Mr Packer nor any representative/director of CPH was present. Now, it's just not – in those circumstances, the thesis simply can't be right.

COMMISSIONER: Well, you've got Mr Chen not wanting to alarm people. You've got a situation where there was quite a deal of bad news, had they reflected on it, and it just wasn't elevated.

MR HUTLEY: I accept that completely, but that's not – but you – that cannot be put, in our respectful submission, down to the presence of CPH or Mr Packer. There's no evidence - - -

5 COMMISSIONER: Yes. I understand your submission, but the problem that you face that Mr Felstead was communicating with Mr Packer, he was communicating with Mr Packer's, in effect, assistant, Mr Ratnam, and there was just – the rational explanation for not indicating to a board of the kind that you've described, who are competent and reasonable people, and telling them of the real problems that existed
10 for their staff in China, for instance, that's one example. The next example is the accounts and the banks closing accounts all over the world because of alleged money laundering, that not getting through to Mr Packer. I mean, it is unbelievable that Mr Barton would not have said to Mr Craigie and Mr Craigie to Mr Packer, "We've got some problems with these accounts. We've had three banks shut us down for money
15 laundering concerns." Now, there has got to be an explanation somewhere that these things can be going on in a casino operator with a licence in Melbourne and in Perth and now in Sydney, and it's just – it's almost inexplicable, Mr Hutley.

MR HUTLEY: But the difficulty is – and you will have to deal – you are obviously
20 dealing with that, Madam Commissioner. But you can't construct a causal relation – not that you would construct, I'm dealing with our learned friends' submissions – in the absence of evidence. And the difficulty is - - -

COMMISSIONER: Well, I think I put it to Mr Packer, actually. But I think it was
25 me that may have been the genesis of this approach that you're criticising. I did suggest to Mr Packer that it may have been they didn't want to give him bad news and he – and I referred to his strong personality, and he reflected on that.

MR HUTLEY: But one has then got to turn to the question of, as it were, positive
30 evidence rather than - - -

COMMISSIONER: Quite.

MR HUTLEY: And in our respectful submission, what it doesn't explain is how
35 can CPH – Mr Packer's character affect Mr Chen telling Mr O'Connor?

COMMISSIONER: Well, that's where you get back to this ridiculous structure, if you will pardon the expression. I withdraw that. A structure that was dysfunctional, where you have a director of a public company coming in to management – and,
40 rightly, he went in to assist at the chairman's behest, but you've got him there with – he's got a hat on for Crown Resorts limited, he's got a hat on for CPH Crown Holdings, he's got a hat on as an advisor to Crown. It is – and you've got underlings who look to him, and what would they look to him as, a director of Crown Resorts, and so I'm very pleased to hear that that's all stopped.

45 MR HUTLEY: But none of – with respect, why wasn't anything said to the risk committee? Nobody - - -

COMMISSIONER: That's a very good question, Mr Hutley. What's the answer to it?

5 MR HUTLEY: We can't give that to you. We don't know. But what we can't say is - - -

COMMISSIONER: I don't think anyone has told me in all the months I've been here, and so I look for these explanations.

10 MR HUTLEY: Quite.

COMMISSIONER: It is almost inexplicable that someone could not have told the functionaries on that committee what was going on. And so the option is they didn't want to give them bad news; they wanted to do it, as Mr Felstead said "on the
15 ground" and be praised for making a profit, so that's one view.

MR HUTLEY: Quite. But that's not wishing to give – but that's not not wishing to give bad news to Mr Packer. That's not wishing to give bad news to the board as a whole. Now, it wouldn't be the first - - -
20

COMMISSIONER:

MR HUTLEY: It may well be they didn't wish – and employees have, as you say, from time to time decided, "I'm going to prove that I can do it on my own."
25

COMMISSIONER: Yes.

MR HUTLEY: But that's not because of – and my only concern is a submission that it's the influence of Mr Packer or CPH which was creating that.
30

COMMISSIONER: Yes.

MR HUTLEY: That's consistent with an organisation – a culture at a certain level of certain individuals of not wanting to go to their board. Not because Mr Packer's
35 on the board, not because Mr Johnston's on the board, because they just don't want to tell bad news – just don't want to tell bad news. That might be it, but one has to have evidence. And the difficulty is there is no evidence it's because – or whatever – whatever these deficiencies were – I will leave that to Mr Young to deal with that in detail – but accepting there were serious deficiencies, it can't, with respect, be
40 attributed – in our respectful submission, there is no evidence to attribute it to the presence of CPH or its nominees. It doesn't make logical sense.

Because there were so many routes of communication, even allowing for the hypothesis, with respect, to the VIP committee for employees to inform people above
45 them who were not CPH and that didn't occur. It just didn't occur. And you know that at every level. It may be just a – anyway, there are a number of possible explanations, and it's not necessarily the same explanation for each individual.

These are individuals and they're individuals with, perhaps, separate motivations, separate characters, separate concerns. Mr Chen is a different man to Mr O'Connor, etcetera, etcetera. It's not - - -

5 COMMISSIONER: But you see, if I were to read – if I were just going to open the newspaper and read the advertisement that was published 18 months ago now and look at what I now know, there is a vast difference. And it's not just the employees who failed to notify the board, the committees and others. You have got, as I've said elsewhere, Mr Hutley, the investigative journalists doggedly putting this to the public
10 domain that Crown had problems in 2009, 2014, 2017 and then 2019. And so when you speak about logic, I do understand a touch of logic, but when you see time after time after time, and it doesn't seem that the focus went inwards, and that, be they CPH directors and Crown directors or CPH nominees or any other nominee, the board is where the buck stops, and they didn't look backwards. They don't like
15 looking backwards in this organisation I'm told. Ms Siegers told me that she didn't think it was worthwhile. The absurdity of not learning from your past is really breathtaking, but I understand what you say: CPH is a different category and Mr Packer's role has got to be looked at only as the chairman of Crown. I understand that. As for Mr Johnston and Mr Jalland, Mr Johnston has more complexity than Mr
20 Jalland, because Mr Jalland's services that he provided under the services agreement didn't come into play in respect of junkets. So it's really Mr Johnston, as you've so rightly focused on, and I understand your submissions.

MR HUTLEY: Now, the – that was – now, can I deal with, before I come to
25 returning to part C - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - the Packer influence, which I left because – at your suggestion
30 until the end.

COMMISSIONER: Yes.

MR HUTLEY: Can I turn to the Southbank and Riverbank?
35

COMMISSIONER: Yes, please.

MR HUTLEY: In respect of the Southbank and Riverbank accounts, we will address it in detail in our written submissions, and we note that Mr Packer, Mr
40 Jalland and Mr Johnston are not referred to by counsel assisting on that topic. In summary, the evidence of my clients was to the following effect: Mr Johnston understood that the accounts were part of Crown Resorts' normal AML procedures, but accepting knowing what he does now, there was evidence of structuring in the accounts. Similarly, Mr Jalland believed that the accounts were part of Crown
45 Resorts' normal AML procedures. Mr Packer was not aware of the structure concerning the two companies. As to the more general criticisms of the board in respect of those accounts, that's a matter which we should leave to Crown's

representatives and those who are closer to the dealing with it. Now, can I deal with, next, your question in relation to Mr Packer's resignation. He stood down on - - -

5 COMMISSIONER: Can I just come back to Mr Johnston's position because he was aware of the accounts, as you point out, but he had an understanding in relation to what was happening with those accounts, as he told me, and when he became aware of the money laundering allegations and the publication on the 5th of August of that article that drew attention to the problems within the accounts, so he told me that he was constrained from discussing the accounts with the Inquiry because of
10 AUSTRAC provisions. And as you know, what I've done is to assume that Crown reported under the legislation in respect of them in accordance with Mr Howell's evidence, but so far as the Southbank and Riverbank accounts are concerned and Mr Johnston's awareness of them, it does appear, is this right, that Mr Johnston did not have any understanding of the detail other than that to which he referred as being
15 appropriately reported on.

MR HUTLEY: That's – can – that is my understanding of the position. I will be quite frank, we hadn't planned to deal with this today. That's my understanding, Madam Commissioner.

20 COMMISSIONER: I see. I see.

MR HUTLEY: That's why we will deal with this in more detail, if we can, in writing.

25 COMMISSIONER: Yes. All right.

MR HUTLEY: We will directly sense that question.

30 COMMISSIONER: Yes. Thank you.

MR HUTLEY: I don't want to – now, can I deal with your next issue about - - -

35 COMMISSIONER: Yes, please.

MR HUTLEY: - - - Mr Packer's resignation. As you know he stood down from the board on the 15th of December.

40 COMMISSIONER: Yes.

MR HUTLEY: The evidence was that he did so because he was unwell, and transcript 3570, line 44 to 3586, line 44 and 3586, line 6 to 9.

45 COMMISSIONER: Yes.

MR HUTLEY: Crown's ASX announcement at the time did not mention his illness and Mr Packer said he had hoped at the time that his treatment could stay a private matter.

5 COMMISSIONER: Yes.

MR HUTLEY: Transcript 3586, line 44. Now, he acknowledged in his evidence that something should have been included in the announcement in respect of his health at transcript 3587, lines 1 to 2. That was, in my respectful submission, an
10 overinclusive acknowledgment. One does not have to, on a resignation, explain why one is resigning. Often one is resigning for deeply personal reasons, and it's not an occasion to do so. He left quite appropriately when he felt – recognised that he was not, at that stage, up to the job. And it was not incumbent upon him, in my respectful submission, as a matter of law to explain the reason why.

15 COMMISSIONER: Let me tell you what's troubling me, Mr Hutley. What Mr Packer told me was that the – what he described as his disgraceful conduct in threatening the businessman was more to do with his status of health at that time than what he accepted was an unsuitability for a close associate of a casino operator. So
20 he put forward to the Inquiry an explanation that one of the reasons that I should look to, I suppose, in making an assessment of what he did was his ill-health and that the threat that he made was in part caused by that. So we have a combination of two pieces of conduct, or one conduct and one presence of an illness. The board knows neither of those things, except for Mr Rankin.

25 Now, Mr Rankin as the chairman at that time, is dealing with a director who is leaving the board. He knows of the threat because he was copied in on the email. I think Mr Packer gave evidence, and you will correct me if this is wrong, that he doesn't recall any discussion about the threat with Mr Rankin. Be that as it may. So
30 here we have a very serious matter and an illness combined. The board is ignorant of it and never, as I understand Mr Packer's evidence, is the board aware of it until this Inquiry. So when Mr Packer comes back on to the board a year later after the tragic circumstances of China, there is no disclosure of either the threat or, alternatively, the presence of the illness triggering it or, indeed, the fact of the illness. So the board
35 is kept ignorant, and I presume the regulator is also.

MR HUTLEY: His illness - - -

40 COMMISSIONER: So my trouble is – I'm sorry?

MR HUTLEY: His illness was publicly announced in March 2018.

COMMISSIONER: Yes, after he left the board.

45 MR HUTLEY: Yes. Quite.

COMMISSIONER: What I'm saying to you is that after the China arrests, Mr Packer came on to the board and Mr Rankin went off in circumstances where Mr Packer informed me that he blamed Mr Rankin and Mr Craigie. So Mr Rankin departs, Mr Packer then comes back on; the board is still ignorant of these problems.
5 And I'm just concerned that in assessing all of the things that I have to assess in respect of suitability, why it would not have been, firstly, appropriate for Mr Rankin to inform the board of the threat that had been made. The illness I understand your submission about, but it is that threat that was made, that Mr Rankin was copied in on, that concerns me that it was apparently kept from the board but known by the
10 chairman and Mr Packer.

MR HUTLEY: Can I - - -

COMMISSIONER: Should I make a finding that the board should have been
15 informed by Mr Rankin of that matter? And then Mr Packer?

MR HUTLEY: I don't wish to get into the confidential detail of the content.

COMMISSIONER: That's all right.
20

MR HUTLEY: You will recall how that email chain ended.

COMMISSIONER: Yes.

MR HUTLEY: And that, from the point of view of Mr Rankin anyway relieved them of informing the board.
25

COMMISSIONER: I can't understand that submission. I really can't.

MR HUTLEY: Well, I would have to go into private session to deal with that.
30

COMMISSIONER: No, I think it's appropriate, Mr Hutley. This is of concern. See, what Mr Rankin knew was that there was some serious conduct that had occurred, and Mr Packer left the board within two and a-half to three weeks.
35

MR HUTLEY: Mr Rankin would have been justified, having regard to how the matter concluded, in concluding that it was aberrant conduct, wholly aberrant conduct, produced by the condition that Mr Packer was experiencing. The public nature – did –
40

COMMISSIONER: It's on the basis that you believed that Mr Rankin may have known about the health issue. I don't know that, you see.

MR HUTLEY: We haven't heard from Mr Rankin, but - - -
45

COMMISSIONER: No.

MR HUTLEY: - - - as to why he didn't think he should, but he might – you might infer that he thought that it was aberrant conduct, totally out of character, personality from Mr Packer and his leaving meant that it didn't have to be raised with the board. It then became public - - -

5

COMMISSIONER: Well - - -

MR HUTLEY: - - - Madam Commissioner, that Mr Packer had had difficulties - - -

10 COMMISSIONER: That's two years later.

MR HUTLEY: Quite.

15 COMMISSIONER: I'm talking about the time, and Mr Rankin and Mr Packer are, in fact, promoting a position that Mr Packer will become a global president at the time that he is leaving the board for illness – and this is what I've got to find, because he told me that that's the reason he left, and I've got to assess this because what was being promoted by Mr Rankin and Mr Packer in the departure was that Mr Packer would become a special envoy, effectively, doing global business for Crown. Now,
20 we know it didn't happen, but at the time the board was given the information, it was, "Mr Packer is leaving but he will become this special person to drive our international business". Now, I'm finding those facts difficult to reconcile and that's why I'm asking for your submissions on this.

25 MR HUTLEY: Mr Packer was obviously not well. Mr Packer very shortly went into treatment and became, as you know – am I now in confidential – and was treated - - -

30 COMMISSIONER: Yes.

MR HUTLEY: - - - for the difficulties.

COMMISSIONER: He said he was being treated in the public session, yes.

35 MR HUTLEY: Because he was being treated.

COMMISSIONER: Yes.

40 MR HUTLEY: It may well have been anticipated by Mr Rankin that Mr Packer's difficulties would not inhibit him taking on such a role should he overcome his difficulties. I cannot speak for Mr Rankin in that regard.

COMMISSIONER: And I don't think you should.

45 MR HUTLEY: I can't. I simply don't know, and you haven't heard from him. But one shouldn't infer that he was being other than, perhaps, hopeful and expressing a desire that there could be a role for Mr Packer despite his evident position, and that's

how it should be treated, nothing more, with respect, than that. Then when Mr Packer returned, he had been treated, and there is no suggestion during his period of return that he otherwise than performed his duties as one would expect of a director.

5 COMMISSIONER: Well, let me say explicitly and carefully, Mr Hutley, that I don't see any impediment to a person with bipolar acting in any capacity so long as they're treated, and there should not be a need to deal with that. I'm speaking of the circumstances of the departure and the failure to notify the board of these other serious matters at the time.

10

MR HUTLEY: As to the failure to notify the board of the emails, that ultimately would be a question for Mr Rankin and for Mr Rankin to determine having regard to the resignation of Mr Packer.

15 COMMISSIONER: And so just applying the approach that where this does call for an explanation, assume that it does call for an explanation where a chairman has seen this, the director has departed, that the chairman has seen it, and the chairman chooses – the former chairman chooses not to give the explanation. As a matter of application of legal principles, there is the possible adverse finding that whatever
20 explanation Mr Rankin could have given me would not have assisted his reputation as a chairman of Crown. Is that consistent with legal principle?

MR HUTLEY: No. He may well have taken the view that the conduct of which we are speaking was not conduct performed in a capacity as a director or chairman of
25 Crown and was in a personal capacity and therefore was not a matter which he was duty-bound to bring to the attention of the board of Crown Resorts. That would be a perfectly legitimate value judgment to make.

30 COMMISSIONER: But that's one - - -

MR HUTLEY: For example - - -

35 COMMISSIONER: That's one that he would not have any difficulty explaining. The fact that he has remained silent, and I'm asking you about the legal principle - - -

MR HUTLEY: Silent in not coming forward and giving evidence - - -

COMMISSIONER: Yes. Yes.

40 MR HUTLEY: - - - before – well, to answer that – and giving evidence here – to answer that one would have to look at the conspectus of matters which might be of concern to Mr Rankin about giving evidence before you, Madam Commissioner.

COMMISSIONER: Yes.

45

MR HUTLEY: Now, if one concluded that the only matter of concern about Mr Rankin might conceivably be that with which we are speaking - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - you might come to that view. But if there are a range of matters which you might think someone might be concerned about, you couldn't
5 conclude that this was because there is a perfectly, what might be called "innocent" explanation why he might not have considered he was duty-bound to inform the board of Crown Resorts about that.

10 COMMISSIONER: Yes. Thank you for your assistance on that, Mr Hutley.

MR HUTLEY: And – thank you. Now, as to returning to the board, you asked should Mr Packer have informed the board of his illness. In my respectful submission, he was under no obligation to do so.

15 COMMISSIONER: And what about the threat?

MR HUTLEY: And in my respectful submission, he was under no obligation to do so.

20 COMMISSIONER: Thank you.

MR HUTLEY: A board – it was – that was a personal judgment of his to make and it was well within the realm of his entitlement to make it.

25 COMMISSIONER: I suppose, in any regime, where you have conducted yourself in a way that you regard as not befitting, as Mr Packer said, a close associate of a licensee, it may well have been, as I apprehend what you're telling me, that that was not a judgment that he would have made at the time when he was applying to return to Crown at a time of high controversy and concern about the China arrests. Is that
30 the submission?

MR HUTLEY: Quite. And - - -

35 COMMISSIONER: Yes, all right.

MR HUTLEY: - - - if that test is forward-looking, as it must be - - -

COMMISSIONER: Yes.

40 MR HUTLEY: - - - and if one was of the view that one's – that which had produced that event had been contained by treatment - - -

COMMISSIONER: Yes.

45 MR HUTLEY: - - - it would not be a matter which bore upon that evaluation. It's only if you believed that there was a risk of repetition that one would be duty-bound

to bring it to the attention, and almost if one thought there was a risk of repetition to that one would wonder why one would be taking on a position on any organisation.

COMMISSIONER: Yes, of course. Yes, of course.

5

MR HUTLEY: And therefore, that's why I referred at the beginning, the way the matter ended up was relevant to an assessment of its character.

COMMISSIONER: Yes.

10

MR HUTLEY: Because the way it ended up reflected an acceptance, we say, by all – by the participants to the communication on its aberrant and unreal nature, if I might - - -

15

COMMISSIONER: I think it might have been accepted as a conclusion that's what could be put neutrally, Mr Packer – Mr Hutley for Mr Packer.

MR HUTLEY: Yes. But put it this way, if one – if one believed in the predicate it's odd that one would have a conclusion, might I put it that way.

20

COMMISSIONER: Yes, all right. And so that then leads us to the question of the conflict.

MR HUTLEY: Now, conflict of interest was the third matter - - -

25

COMMISSIONER: Yes. Can I just raise with you this, Mr Hutley. I've listened very carefully to your submissions on all days, but in respect of Mr Johnston, Mr Johnston has a number of aspects to his evidence in relation to the information that was received by him in May when he says that he was acting as an adviser, an executive adviser under the services agreement in providing to Crown services in relation to the usual budgeting arrangements.

30

MR HUTLEY: Yes.

35

COMMISSIONER: And that was inclusive of a document that Mr Barton sent to Mr Packer because Mr Packer requested it, to use your term, rather than instructed it, and Mr Packer wanted to see a report that Mr Barton believed in, that line of communication.

40

MR HUTLEY: I recall it - - -

COMMISSIONER: And, in that process, Mr Johnston made some suggestions which he said were for discussion to change the figures in that process.

45

MR HUTLEY: A figure in, I think – the two out years.

COMMISSIONER: No. There were five suggestions and one or two were taken up. I understand the evidence. So when he made those suggestions, he made them for discussion with each of the other participants in the email process and with Mr Packer in due course. He was asked about his understanding of conflict. He told me
5 that he gave – he was very sensitive to conflicts and he gave deep consideration to it at the time. It was put to him that, as a director of Crown and as a director of the vendor of the shares to Melco, he should have said to Crown, “I can’t receive this at the moment and I can’t advise you, because – I don’t need to tell you, but I just can’t accept it.”

10 The position, ultimately, that concerns me is that there was not (1) turning his mind to the fact of a perception of contact and (2) proceeding to receive the information when he was in the middle of a transaction selling his shares. Now, that seems to me to need some submissions, Mr Hutley, because it’s clear as a bell, is it not, that if a
15 bystander looked at Mr Johnston receiving the information and telling Mr Barton to turn the dial up on one bit and down on another while he’s selling the shares to a company, even if that material was not price-sensitive, is a real problem and, indeed, how could he know what the conditions were, because he was suggesting changes to the numbers. And so that is the evidence that concerns me, and I need some
20 assistance with from you.

MR HUTLEY: Could I ask – and I understand the question. Firstly, he had a role in budgeting, and that was a role. He did not have a role in relation to the sale of the shares in the setting of the price. That was dealt with solely - - -

25 COMMISSIONER: Well, he says that. He said that. He said he - - -

MR HUTLEY: It was said by Mr Packer and by Mr Jalland, the price was checked – set at \$13 between - - -

30 COMMISSIONER: Yes, I know that.

MR HUTLEY: - - -

35 COMMISSIONER: But he was kept informed of the process, and he accepted that.

MR HUTLEY: But that’s the first question.

COMMISSIONER: Yes.

40 MR HUTLEY: And, secondly, the question is unless – to change the figures internally, as it were, on a draft budget to go to a board can have no sensible effect upon the outcome of a negotiation unless those figures are promoted to the counterparty in circumstances where the counterparty is likely to believe them.

45 COMMISSIONER: But you’re not looking at it from the perspective of what – I’m sitting over here on the sidelines. I’m looking at the board. I know this man is about

to sell his shares, and he's suggesting changes to the very figures that go to aspects of the corporation that he shouldn't be dealing with at that time. Can that not be seen?

5 MR HUTLEY: And you know that he is not passing those on to the counterparty who's being negotiated with.

COMMISSIONER: Well, I don't know that, because he's sitting there as a director dealing with it.

10 MR HUTLEY: But if one's talking about a bystander, what a bystander might think
- - -

COMMISSIONER: Yes.

15 MR HUTLEY: - - - one can't limit the knowledge of the bystander, otherwise one creates a false inquiry. One's got to, in effect, if one's going to have this judgment by reference to an manage reasonable bystander, he or she has to be fully informed, otherwise - - -

20 COMMISSIONER: At clause 11.1 – clause 11.1 requires that, as you pointed out in your submissions, because it's the perception under clause 11.1 of the services agreement, and you took me to that.

25 MR HUTLEY: But it's his perception. Crown Resorts, CPH, or CPH perceives any actual potential bias in certain things.

30 COMMISSIONER: And that's the point. How on earth could he have not had a view that there was a – that he should perceive it in the circumstances of what he was up to?

MR HUTLEY: In my respectful submission, if I'm being asked to put myself in the position of Mr Johnston - - -

35 COMMISSIONER: Yes.

MR HUTLEY: - - - as to whether he would perceive a conflict - - -

COMMISSIONER: Yes.

40 MR HUTLEY: - - - he would perceive this situation: I am taking place in a usual budgeting procedure, and I am dealing with, at the moment, draft budgets which will not be taken up unless it goes to a board. I am using my financial acumen for the benefit of the company as a whole in circumstances where there's a transaction on foot which will result, if it takes place, in my company, my – CPH remaining a very
45 substantial shareholder. I know that this activity – that there is going on a negotiation with respect to price involving Melco.

COMMISSIONER: My company.

MR HUTLEY: I know that's being conducted – my company.

5 COMMISSIONER: That's my company.

MR HUTLEY: I know that's being – quite. Yes, I understand – my company, and I know it's being taken place by Mr Jalland and Mr Packer. I also know that nothing I am doing here is or is ever likely to be communicated to the counterparty to this
10 transaction, insofar as I am increasing the budget. Thus, this negotiation will take place with the counterparty being in complete ignorance of what is happening here in the ordinary course of running a business. Therefore, by hypothesis, what am I doing by, as you say, tweaking the figures in the out years and one thing or another, can have no influence at all upon my client's – my company's ability to seek a price.
15 None. It can have no influence upon the counterparty. I am not using, likely to use or capable of using, what I am doing here to advance my interests of the company in conflict to my duty to Crown Resorts to put forward an appropriate budget. There's simply - - -

20 COMMISSIONER: And when he's sitting there, he does have the capacity; he is seen as having the capacity, and he has – and he's going to be advised to, in fact, give Melco information in due course – obviously for good reason – and the perception of a director of a public company selling his own shares, his company's own shares, at a time when he's advising that company on the structure of its budget
25 just – I just fail to – it's a masterful submission, Mr Hutley, but, really, I do fail to see how it could be that a director could not immediately see the perception of a bystander that that would be a potential conflict of interest and, ultimately – ultimately, Mr Johnston, I think, may have accepted it, but the concern that I have is that it took quite a deal of time for him to see it.

30 MR HUTLEY: But in my respectful submission, if one was seeking to injunct this conduct - - -

COMMISSIONER: Yes.
35

MR HUTLEY: - - - the answer to B is that there is no risk of what I'm doing, which has to be done in the interests of a company as a whole, ever coming to the attention of the counterparty; it's not going to happen before the price is set. So what possible conflict - - -

40 COMMISSIONER: Well, he's sitting on a board – he's sitting on a board who knows nothing about his transaction. That board would have a big interest in the price. That board would want to know that the price is going to be a good one if it knew about the transaction. There are a whole layer upon layer of things that are
45 going on in the board, and my concern is that Mr Johnston – and he's a very clever man, I accept that. He actually probably fell into your category of hindsight bias here because, look, this was a situation where he should have virtually got up from

the board table and said look, “I won’t help you on this occasion. It’s not a good look for the public company that I’m a director of. I will go and do my own business quietly away from you. When I’ve done it I will come back and help you then.” Simple as that. Simple as that.

5

MR HUTLEY: In my respectful submission, he was not in that position for the reasons I’ve advanced. Now, it’s theoretically possible that he could have done what you have suggested, Madam Commissioner, but the question is did he? So I just want to ask the question firstly: was there any breach of fiduciary duty? In my respectful submission, there clearly was not. There clearly was not.

10

COMMISSIONER: Yes, all right.

MR HUTLEY: And there clearly was not, because he did not utilise any information to set a price. He did not utilise this information in any way, and there’s no suggestion he did. And there’s no suggestion that these figures in any way impacted upon the outcome of the price, because it was removed from that exercise. As Mr Packer said, “I didn’t care about these figures. I knew the figures a hell of a lot better than Mr Barton ever did.”

20

COMMISSIONER: That’s a different point. That’s a different point.

MR HUTLEY: But – no. But the price controller in the sale, despite the position of Mr Johnston, was Mr Packer. You will recall that Mr Johnston was, in effect, sidelined from the transaction. He wanted Mr Packer to look at a broader transaction. Mr Johnston was effectively sidelined.

25

COMMISSIONER: He wasn’t sidelined. He was the sole director of the vendor. And this is the problem - - -

30

MR HUTLEY: But in striking the price, with respect, Madam Commissioner, he was sidelined. That was dealt with by Mr Packer and Mr Jalland, and the only - - -

COMMISSIONER: He was not supine. He was a director. He could have said, “I don’t accept that I’m going to sell my shares, my company’s shares, for \$13.” He could have said that. So he wasn’t, as a matter of law – he wasn’t, as a matter of law, prohibited from doing anything. It was a matter of choice for him, and so – but I understand your submission.

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MR HUTLEY: And can I address that. Madam Commissioner would say that a unanimous decision of the shareholders as to what the transaction should be to sell its shares would overcome any concern of the board, and Mr Johnston, although a director – and I accept what you say - - -

40

COMMISSIONER: Yes.

45

MR HUTLEY: - - - would be immediately overturned by the shareholder saying, “I am selling at that price.” Now, that - - -

5 COMMISSIONER: He said that. He said that he couldn’t – if he had resisted the suggestion, he might have been removed. He did say that.

MR HUTLEY: But he couldn’t, as a matter of law. I mean, it’s an 100 per cent wholly owned company. He simply, unless it’s a breach of fiduciary duty, he could be directed by the general meeting, that is, Mr Packer, to do this.

10 COMMISSIONER: Yes. Yes, but that didn’t happen.

MR HUTLEY: Well, it - - -

15 COMMISSIONER: He was in a position – he was in as a sole director to say, “Well, I’ve got an obligation to this company, and this company should have 13.5 cents.” But coming back to the point that really worries me – and that’s why I’ve raised it with you – is the fact that Mr Johnston, as a director of the – sole director of the company, is engaging with Crown, knowing that Crown are not going to be told about the transaction, they’re going to be kept secret from it, and engages with the numbers, it’s very concerning, Mr Hutley.

MR HUTLEY: In my respectful submission, you know this: those engaging with those numbers was not adverse to Crown and there’s no suggestion that they were. You know as a fact that those numbers played no part in the determination of the price. So you know as a fact that those numbers were never, ever relevant to the sale. So you know as a fact Mr Johnston was wholly loyal to Crown Resorts in the advice he gave. And you know as a fact that there was, thus, no breach of fiduciary duty, and we say no breach of clause 11 of the agreement, and - - -

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30 COMMISSIONER: Should he not have actually turned his mind to the perception of conflict at the time?

MR HUTLEY: The difficulty with perception of conflict, that can be, with respect, an ambiguous phrase. Sometimes one - - -

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40 COMMISSIONER: Should he not have turned his mind to it? Should he not have said, “Well, I’m sitting on the board of a publicly listed company. I’m about to sell the shares in it as a sole director of another company. I’m advising the publicly listed company, as a director of the other company.” Should he not have actually said to himself, “I better have a look at this perception before I go forward?” Is that not a reasonable thing to expect of a director of a public company?

MR HUTLEY: Well, Madam Commissioner - - -

45 COMMISSIONER: Yes.

MR HUTLEY: - - - in the circumstances of this case, where he is not doing anything to – about the price or deploying the information, he might have done what you did suggest, but in my respectful submission, he was under no obligation to do what you suggest. And it was, in a sense, the acute sensitivity of him implicit in
5 knowing he was not – basically, as one knows in one’s soul that – knowing that he was not departing from his obligation that - - -

COMMISSIONER: But it’s the obligation I’m asking you about. Does not a company director in these circumstances of a public company have an obligation to
10 say, “I not only should look at conflict. I do need, in the circumstances of these arrangements, to look at the perception.”

MR HUTLEY: No.

15 COMMISSIONER: From the point of view of the reputation of the public company?

MR HUTLEY: No.

20 COMMISSIONER: Is that is not a reasonable – I see.

MR HUTLEY: Can I say from the point of view of the reputation of a public company, a reputation of a public company is determined by the assessment of the truth. Now - - -

25 COMMISSIONER: Yes.

MR HUTLEY: And if directors act conformably with their duty, as properly understood and that is exposed and discussed and a conclusion is made, as we submit
30 it must be made, that he did act conformably with his duty, not in breach of fiduciary duty, then the reputation of the public company will be protected. It’s only - - -

COMMISSIONER: But the question is should he not have turned his mind to considering whether there would be a perception of conflict in what he was doing?

35 MR HUTLEY: What he should have made sure is that he - - -

COMMISSIONER: No, I’m asking you this question. Mr Hutley, please, it’s a small question. Should he not have turned his mind to whether it was his obligation
40 to look to see whether there was a perception of conflict in what he was up to at that time, what he was doing at that time?

MR HUTLEY: In my respectful submission no. If perceptions - - -

45 COMMISSIONER: All right then.

MR HUTLEY: - - - of a public company is different to acting in breach of your – a duty, because if he looked to the perception - - -

COMMISSIONER: Yes.

5

MR HUTLEY: - - - and he had come to the conclusion that he was not, then the perception would equate to the reality. It's only if one comes to the conclusion that the perception is different to the reality that – and asks the question should one consider that this might be perceived as a conflict even though - - -

10

COMMISSIONER: Yes.

MR HUTLEY: - - - it manifestly is not, if that's in question, and one then says should I not act because I'm entitled to act because I'm not acting in breach of fiduciary duty, but should not act because someone might come to a – form a perception which would be ill-informed, that I am in breach of fiduciary duty, we would submit that a director acting properly would not do that. A director must - - -

15

COMMISSIONER: Yes. You've redrafted the situation, but I understand that you do not accept that have Mr Johnston had an obligation to consider for himself, at the time of this transaction, whether there was – there may be perceived to be a conflict of interest in him selling his shares at the same time he's advising Crown on the budgetary constraints. I understand that.

20

MR HUTLEY: Our submission is he had a duty not to breach his obligations to the company, and - - -

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COMMISSIONER: That's a different question to the one I've just posed. I understand that your answer to my question is no.

30

MR HUTLEY: Quite, because - - -

COMMISSIONER: All right.

MR HUTLEY: - - - his sole duty is what I have submitted.

35

COMMISSIONER: Yes, I understand. Thank you, Mr Hutley, for those submissions.

MR HUTLEY: And, of course, one of the difficulties about questions of "perception" is one is acting not in the glare of publicity at a moment that one makes one's – one acts. One, in effect, is concentrating on performing one's duties, not on performing – on considering what might be perceived should a whole series of circumstances take place, and things be inquired into without a full consideration of my position. The difficulty is, in our respectful submission, the overlay – the logic of what your question to me entails is a constant secondary question by people under fiduciary duties to not be concerned not only about the performance of their duties,

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but also how one might perceive, inaccurately, the performance of their duties, in our respectful submission, as a constant in the position of a director would create an intolerable interference with the performance of their duties because if they always have to consider perception they may be deterred from performing their duty because
5 of a fear that it perceived that they might not be performing their duty - - -

COMMISSIONER: With public company directors, they should know – they should know what their duties are.

10 MR HUTLEY: Quite.

COMMISSIONER: And taking up your point about publicity, perhaps that's an appropriate thing for them to think about. If I were someone looking at this it would be as obvious as anything that this is a problem, and if that's a test, and it could be
15 applied to this, I'm having difficulty not coming to the conclusion that it is so obvious. And in any event, I do understand your submissions and I will give them detailed consideration, Mr Hutley.

MR HUTLEY: Right. If I could now turn to part C.
20

COMMISSIONER: Yes.

MR HUTLEY: That is – that's part C of the influence of Mr Packer statement of issues.
25

COMMISSIONER: Yes.

MR HUTLEY: Question C1 is whether the influence of CPH and Mr Packer renders the licensee of the Barangaroo facility unsuitable, and Crown Resorts
30 unsuitable to be a close associate of the licensee.

COMMISSIONER: Yes.

MR HUTLEY: Now, for the reasons we've explained, the contention that Mr
35 Packer and CPH had some overbearing influence over the affairs of Crown Resorts is simply not supported by the evidence. Having not established that matter, it cannot be said that any influence of Mr Packer renders the licensee or Crown Resorts unsuitable. In addition there is no evidence that Mr – that the influence of Mr Packer and CPH had any adverse impact on Crown Resorts or the public interest, and in the
40 fact – the evidence to which we have referred you to supports the contention that Crown Resorts and its shareholders have benefited from the involvement of Mr Packer and CPH over many years.

We contend that the suggestion that there should be any concern arising from Mr
45 Packer or CPHs influence on Crown Resorts going forward is unsustainable. It's noteworthy that despite having a 46 per cent control of the shareholding, CPH has never had more than three nominee directors upon the board and has never sought to

control this company in general meeting, and has in fact shown eminent restraint to ensure that a publicly listed company has a majority and by a significant proportion, majority independent board. That bespeaks a company which is in an appropriate association with a casino, Crown Resorts.

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It bespeaks that the executives of that company, the directors, Mr Johnston and Mr Jalland and Mr Packer, have been responsible at all times in ensuring that the board of Crown Resorts is one which by majority is independent and thus not in any way – not in any particular way focused upon the interests of CPH. Thus, every aspect of its conduct bespeaks an organisation which is an appropriate associate. You may
- - -

COMMISSIONER: A suitable associate.

15 MR HUTLEY: You have expressed concerns about, firstly, the services agreement, and the - - -

COMMISSIONER: The controlling shareholder protocol.

20 MR HUTLEY: The protocol. Those are at an end. Their existence – the possibility of them coming in – returning might be described – you will have to hear from Crown, but I would – you would be fairly confident in considering that they are remote. They will not occur. My client will therefore be a shareholder, as it has always been, but it will not have a relationship of those varieties. That will mean
25 that Crown Resorts will conduct its business dealing with my client, CPH, as a shareholder, and to the extent that it has any directors on the board, nominees, they will have only the position of any director on the board.

And their position with respect to information which they receive as a director on the
30 board will be constrained in the same way as every other director on any board is constrained, and also any other nominee director is constrained. That is, it can only be used for the purposes of the – their performance of their role as directors. Not freely available to CPH, it will have exactly the same constraint as every other director – shareholder.

35

COMMISSIONER: Yes.

MR HUTLEY: Director. And CPH will be in no privileged, if I can use that term, position. Once one has come to that position, one asks rhetorically what possible
40 grounds are there for concluding that CPH is not an appropriate close associate, not a suitable organisation, and any one of the three individuals for whom I act are not. They are. If you find that errors have been made by one or more of them, that is still in circumstances where, to take Mr Johnston, every other director has expressed his – commended his abilities in glowing terms.

45

He certainly has not acted dishonestly, in our respectful submission, in any respect, and he has acted, in our respectful submission, not in breach of any duty to Crown

Resorts at any time. Now, we've had a robust debate here about this question of whether - - -

COMMISSIONER: That wasn't robust, Mr Hutley.

5

MR HUTLEY: Sorry?

COMMISSIONER: That wasn't robust.

10 MR HUTLEY: Well, can I say - - -

COMMISSIONER: Mr Hutley, just on that topic, even if I were to find that Mr Johnston should have given consideration to that matter, as I apprehend it you say that that could not convert him into a person who is unsuitable.

15

MR HUTLEY: Certainly. Certainly. I mean, he – there's no – there could be no suggestion that he was, in effect, acting malevolently - - -

COMMISSIONER: Yes.

20

MR HUTLEY: - - - in not following that course.

COMMISSIONER: Yes, thank you.

25 MR HUTLEY: And should you come to the view he should, we take it as given we respect that view, it is a view which might be thought to be a view of some novelty, at least from a legal point of view.

COMMISSIONER: Yes. Yes, thank you.

30

MR HUTLEY: And I'm not sure whether your view would be it was a legal duty rather than, in effect, a counsel of prudence, and as a counsel of prudence going forward it will be a counsel of prudence which would be harkened to by all. But in our respectful submission that would be all that follows from it. Returning to the question with which I'm dealing, Mr Packer has indicated in his evidence he has no intention of ever becoming a director of Crown Resorts again. You will recall that at transcript 3747, lines 41 to 46. Now, for those reasons you need not be concerned about the influence of the protocol. You need not, therefore, be concerned about the position of Mr Packer.

40

The issue in the Inquiry is one of present suitability only, and even if the Inquiry concluded about the protocol that it had problems or for that matter the services agreement, their past history. Now, other than the matter which I've dealt with about MFIA, nothing else goes to the question of suitability and I don't propose to return to that. Now - - -

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COMMISSIONER: So what about the fact that – I haven't been given any reasons, although we will request some information, I haven't been given any reasons why, in Mr Johnston's letter, for CPH asking for the agreements to be terminated why they should be terminated. Assume that there's a recognition that this creates too many
5 problems. The fact that it's taken all this time to reach this point is a consideration in dealing with suitability and recommendations and the like. The fact that it didn't happen until now is just a topic that perhaps might need addressing.

10 MR HUTLEY: I'm sorry, when one is speaking of that, are you speaking there of the protocol and the services agreement?

COMMISSIONER: And the services agreement. Yes.

15 MR HUTLEY: As to – from the position of Crown, while it didn't terminate until now, because as you appreciate it – the protocol they could terminate at any time, as they could the services agreement. That should be left, in effect, to Mr Young as to why it hasn't occurred. From the point of view of my client, there is the position that if Crown continued to think it was a valuable agreement to Crown, it hardly goes to
20 – and this Inquiry has brought out, as it were, through a rigorous analysis, and with all due respect to you, Madam Commissioner, your observations of concerns about its operation, which others may not have fully divined except through the assistance of this exercise, but I can't speak for Crown in that regard, but there had been a perception that real value – and you will have seen that all the directors have taken
25 the view that they have obtained real value under the agreement and, in a sense, there has been or would appear to have been a reassessment in the light of the issues raised, frankly, in the course of this Inquiry, and appropriately in the course of this Inquiry.

30 And we – my client, as it were, raised the issue of terminating these matters and I think it's fair to say we've raised it because as you saw in the – your, in effect – some of the questions you asked of Mr Packer, Mr Packer took very seriously your issues raised with him, and any suggestion that this licence suitability would be impacted by this agreement immediately renders this agreement of no use to the
35 organisation.

COMMISSIONER: Yes, thank you, Mr Hutley.

40 MR HUTLEY: And so can I then turn to question C2, which is whether the Commissioner should recommend to ILGA that it reconsider its approval of Mr Packer as a close associate. Now, counsel assisting essentially based this – and you can see that in paragraph A5 of their submissions – sorry, of their contentions on the basis of MFIA. Now, that's really notable. Mr Packer was the executive chair for
45 many years. He undoubtedly had a very significant influence on the company over the period and we've referred to numerous and significant contributions he's made to Crown.

Secondly, even after the event of MFIA he returned to the board and no criticism is made of him in his role during that period. Now, we then get back to MFIA and the submissions we've made. I'm not going to repeat them. It would be, in our respectful submission, wholly unjustified to conclude that by virtue of that event in
5 all the circumstances with which you are now seized renders Mr Packer unsuitable. It simply would be, with respect, wrong to do that. It is – there's no other way to put it, for all the reasons we've put.

10 COMMISSIONER: Perhaps it's better to put it as unjustified.

MR HUTLEY: I was using wrong not in the sense of legally wrong, in the sense
- - -

15 COMMISSIONER: I see.

MR HUTLEY: - - - of - - -

COMMISSIONER: Yes.

20 MR HUTLEY: - - - unjustified.

COMMISSIONER: Yes, I see.

25 MR HUTLEY: Now – yes, I should, although you're well seized of this. We're dealing with questions of honesty, integrity and character.

COMMISSIONER: Yes, yes. Yes.

30 MR HUTLEY: Now, can I finally deal, I think – is that it? Yes. I think I have covered all your questions, all the matters.

COMMISSIONER: Yes, I'm grateful, Mr Hutley. Thank you.

35 MR HUTLEY: I have people behind you.

COMMISSIONER: Yes, I see that.

40 MR HUTLEY: I am indebted to you, Madam Commissioner, for the time you have allowed us, and those are our submissions.

COMMISSIONER: Yes. Thank you, Mr Hutley. Yes.

45 MR HUTLEY: I think there's just one question I didn't ask, and it's from some days ago and I've been meaning to.

COMMISSIONER: Yes.

MR HUTLEY: You asked a question as to whether there was evidence that the Wynn transaction - - -

COMMISSIONER: Yes.

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MR HUTLEY: - - - didn't take place because of the publication. You recall - - -

COMMISSIONER: Yes, yes.

10 MR HUTLEY: And the question was whether one consideration in keeping the Melco transaction confidential was the belief of that effect on the Wynn transaction. You asked me that question, I think, and the evidence is in relation to that Mr Johnston's evidence in his second statement, WIT.CPH.002.0001 at paragraph 22(c).

15 COMMISSIONER: Yes, thank you.

MR HUTLEY: And Mr Jalland at WIT.CPH.003.0001 at paragraphs 21 to 23.

20 COMMISSIONER: Yes, Mr Hutley. What I will indicate, of course, you have leave to provide the submissions in support of your oral submissions. I have to indicate to you that I have presumed that you've taken me to all the significant matters that you wish to put to me in respect of these aspects of the Inquiry

25 MR HUTLEY: I indicated in my submissions where we would further embellish in writing rather than go through it.

COMMISSIONER: Yes, if you could do that.

30 MR HUTLEY: And I did also intimate that should proposals come from Crown of the variety we indicated we would appreciate – so far as they impact upon my client directly, we would appreciate an opportunity to make any further short oral submissions before - - -

35 COMMISSIONER: Yes, there will be no difficulty with that.

MR HUTLEY: - - - the Inquiry closes. We're indebted to you, Madam Commissioner.

40 COMMISSIONER: Yes, thank you for all your detailed and helpful submissions, Mr Hutley, and those with you. I will just take a short adjournment. I understand that we're going to hear from Mr Owens of senior counsel shortly to make some submissions on behalf of Mr Brazil, and I will take a short adjournment to accommodate that. Thank you.

45

ADJOURNED

[12.11 pm]

COMMISSIONER: Yes.

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MR OWENS: Commissioner - - -

COMMISSIONER: Yes, Mr.

10 MR OWENS: I appear for Mr Brazil to make submissions, Commissioner.

COMMISSIONER: Yes. Thank you, Mr Owens. Please proceed.

15 MR OWENS: Thank you. Commissioner, for understandable reasons in light of the
ultimate questions that the Inquiry is tasked with answering in connection with the
suitability review, the submissions of counsel assisting have generally sought
findings in relation to the board of Crown Resorts as an, in effect, collective entity
without qualification by reference to its changing composition over time, nor the
20 individual conduct of its constituent members. Now, as I say, while that focus is
understandable, we submit that it should not be permitted to obscure the fact that the
board was of course comprised of different people at different times making different
contributions to the discharge of its functions.

25 Now, the reason we say that's important is, of course, because findings that were to
be expressed, in terms of the performance of the board without regard to those
differences will necessarily be capable of operating as findings in relation to all of
the members of the board over the relevant duration. And as, of course the
Commission understands, decisions such as Ainsworth emphasise the importance of
30 the potential impact or collateral impact on the representations of individuals not to
be, as it were, affected by a side wind as a result of the Inquiry's quite proper focus
on the particular questions to which the Inquiry is tasked with determining.

35 Against that background, we do wish to emphasise several features of particular
relevance to Mr Brazil's individual position, namely, first, the fact that he served as a
director of Crown only until April 2017, with his last board meeting being the
February 2017 meeting; and second – and I'll develop this shortly – his actions, we
say, in relation to some of the critical issues relevant to the Inquiry differed
materially from those of other directors. Now, given those matters, which I will
40 expand upon in a moment, it's our submission that many of the findings, expressed
as they are in counsel assisting's closing submissions – as I've said understandable –
are premised on a range of matters with which Mr Brazil had no involvement or in
which, in fact, his actions were opposed to those relied upon by counsel assisting.

45 Can I turn, first, to the question of the China arrests. And counsel assisting has
submitted, of course, that the Inquiry should make a number of findings connected to
a failure to perform a – can I just call it a post-mortem – a thorough post-mortem
regarding the China arrests. In particular, and then based on that, counsel assisting

has submitted that the Inquiry should find that there was a culture of denial and an unwillingness to examine and address past failings, there was a failure by Crown to conduct any comprehensive review or root cause analysis to ascertain causes and similar unrelated findings.

5

Now, whether or not those findings should be made in relation to the board as a whole, it's Mr Brazil's submission that it's plain that responsibility for those failings should not be, as it were, attributed to him. Indeed, more than that, Mr Brazil submits that the Commission would find that such failings occurred despite his best efforts to the contrary. In particular, Mr Brazil submits that the Inquiry would find that he advocated vigorously for precisely the kind of rigorous and comprehensive

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COMMISSIONER: I do apologise, Mr Owens. If we can just pause for a moment.

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MR OWENS: Yes, Commissioner.

COMMISSIONER: We will just wait, Mr Owens. It won't be long, I hope.

MR OWENS: I understand, Commissioner.

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COMMISSIONER: Yes. My apologies again, Mr Owens. Please proceed.

MR OWENS: Of course. Thank you, Commissioner. I was submitting, Commissioner, that Mr Brazil would - - -

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COMMISSIONER: Had advocated.

MR OWENS: Yes, vigorously, exactly, for exactly the sort of inquiry that counsel assisting said should have been carried out. So we would say that, in fact, Mr Brazil personified the spirit of, as it were, critical self-reflection that counsel assisting submits was lacking in Crown as a whole, and that divergence between the personal conduct and attributes of Mr Brazil and the board of Crown Resorts as a whole demonstrates, we respectfully submit, the need for precision in relation to the expression of the substance of findings urged by counsel assisting.

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The critical facts are that, in October 2016, in the very first board meeting after the arrests of Crown staff in China, Mr Brazil demanded that an inquiry be undertaken as to whether, and his words were "we are culpable here", and he says he obtained a commitment of the board to do so. Can I just pause there, Commissioner, to say I propose, if it is convenient, not to read out transcript references, and the like, here, but if we have leave to hand up a written document which contains those references we will do so.

40

COMMISSIONER: Yes, you do, Mr Owens. Thank you for that assistance.

45

MR OWENS: Mr Brazil also gave evidence, you will no doubt recall, Commissioner, that he, metaphorically, at least, thumped the table at the final board meeting that he attended in February 2017 for the purposes of ensuring that the post-mortem that he had insisted upon was on track and would be completed. That
5 evidence was corroborated by other directors, Ms Coonan corroborated that evidence, although she said that other directors were keen to do it as well. And Mr Dixon further corroborated that evidence, saying that it sounded like Mr Brazil, and he said that Mr Brazil thumped the table, and he, Mr Brazil, is certainly never
10 backward.

Now, we say that that final board meeting of February 2017 is an important one, because, during that meeting it became apparent to Mr Brazil that the comprehensive post-mortem that he had understood was being performed had not
15 been completed. To ensure that it remained, as he put it, "on track" and committed to be concluded, it was necessary for him to engage in what he called more thumping of the table. So, in doing so, Mr Brazil demonstrated that his initial demand for a comprehensive review was no mere matter of form or appearance; he was following up and he was critically assessing the work that had been done. And having
20 determined that the work that had been done didn't meet the requirements of a comprehensive post-mortem, he once more forcefully demanded that that work be done. By the time that meeting had concluded, the Commission will recall, Mr Brazil said he understood that the post-mortem work was back on track, and that is the important, as it were, break in the chronology where Mr Brazil exits. And it's after that time, contrary to the understanding that Mr Brazil had at the end of his last
25 board meeting, that at some point after that a decision was taken not to do that comprehensive investigation. Mr Dixon said in evidence that that powerful request that Mr Brazil made, it didn't happen.

So we say that, in light of those facts, counsel assisting's submission – as I say,
30 appropriately framed by reference to the task with which they are focused on ultimately – that their submission that the board consciously decided not to investigate facts, matters and circumstances which led to the China arrests and that the board of Crown Resorts deprived itself of the opportunity to understand and learn from the lessons of the past, those submissions can only be accepted with the
35 qualification that Mr Brazil fought vigorously to achieve the opposite outcome and, therefore, in no way shares responsibility for the subsequent decision of the board when he was no longer a member of it.

The failure to do a post-mortem is, of course, in turn, relied upon in support of a
40 broader range of findings in relation to the board and Crown generally. Our submission, of course, is that it follows from what I've just put that any such dependent findings premised on the intermediate conclusion concerning the board's failure to perform a review, must also exclude Mr Brazil from their reach. Examples of that kind of finding include the general and overarching submission that there
45 existed a culture of denial and unwillingness to examine and address past failings; arrogant indifference to regulatory and compliance risks, which were said to permeate the organisation. Those findings which are urged upon the Commission by

counsel assisting are framed without limitation in time to the period after Mr Brazil's directorship, and we say that they cannot be made in relation to him.

5 There's another general and overarching submission made, which is that the board failed to engage in active stewardship and challenge management, including by reference to the requirement that the board hold management to account. And we say again those submissions, to the extent that they depend upon the failure to critically engage with the cause of the China arrests and the failure to demand a comprehensive retrospective inquiry which would provide the board with the information it needed to understand what had gone wrong, who was responsible and, therefore, how it ought never to be repeated again, none of those matters can be attributed to Mr Brazil.

15 So the obvious finding of that nature, we say, is the existence of a culture of denial and unwillingness to examine past failings. And for all the reasons I've given, coupled with the fact that a mere four days after the China arrests, Mr Brazil was asking the board whether we had worked out whether we are culpable here. And when he was challenged and said, "Surely you don't mean the board," he, without, of course, knowing either way, explicitly ruled the board in as a group of people who might be culpable. And we say, therefore, that in explicitly contemplating the board's and, indeed, therefore, even his own culpability, Mr Brazil demonstrated the opposite of denial.

25 We make similar points in relation to submissions about arrogant indifference to regulatory and compliance risk, and the like. Calling for a full inquiry, expressly contemplating your own culpability and those of your fellow directors, we say, is the opposite of arrogant indifference. So overall, in relation to that matter, we say that, to the extent that the board is found to have failed to properly discharge its responsibilities, it should be found that it did so contrary to the urging and the example of Mr Brazil.

30 Could I turn next, then, to the question of the failure to inquire in relation to junkets. And counsel assisting there has submitted that the Inquiry should make various findings concerning failures to inquire and challenge management in relation to junkets. And those contentions include matters such as failing to inquire as to risks, failing to make sufficient inquiries of management, to challenge management about operator relationships and submitting that there's no evidence of directors pushing back on management about Crown Resorts junket partners.

40 Again, we would submit, with respect, that Mr Brazil's personal actions are inconsistent with the attribution of responsibility for any collective failure of the board in the respects alleged. In particular, may I refer the Commission with respect to the minutes of the 15 November 2016 board meeting. I won't, as I say, take you to it now; the reference will be in our written document. But the minutes there record specifically that Mr Brazil asked that the legal review that was then being conducted by MinterEllison be expanded to look at the impact of junket behaviour on Crown's reputation.

Now, we say that that is evidence that Mr Brazil did seek to inquire into the risks concerning junkets. He called for an external legal review and it went beyond even merely putting a question to management, consistent with his conduct in vigorously calling for a full post-mortem in relation to the China arrests, and both of those
5 actions we say reflect a pattern of behaviour on Mr Brazil's part that the board should not merely accept what it was being told by management with respect to these important matters, but it should inquire, question and verify the information, particularly in this context by commissioning independent legal reviews. All of that is consistent with Mr Dixon's evidence that Mr Brazil was "never backward".

10 We say that all of those findings taken together, all those facts taken together, don't permit a finding that Mr Brazil was responsible for that active – failure in active stewardship and failure to hold management to account. There's a second aspect to the junkets issue, though, which is the longstanding failure to meaningfully act, as
15 it's put. And consideration of that submission, we respectfully submit, requires careful attention to be paid to the circumstances prevailing during Mr Brazil's tenure on the board and those applicable after his departure, along with his individual actions. The fundamental premise, correct so far as it goes, of counsel assisting's submissions is that there was a long history of allegations in relation to junkets that
20 ought to have been – ought to have prompted action by the board.

In relation to Mr Brazil, though, it's important to recognise, we submit, that the only so-called red flag relating to junkets that had been raised by the time of his last board meeting in February 2017 was the 2014 Four Corners report relating to allegations
25 concerning Suncity and Neptune junkets. After Mr Brazil left the board there was, of course, a lengthy series of issues that arose in relation to junkets. In March 2017, a Four Corners report again. In June 2017 there was AUSTRAC's letter to Crown about Mr Chau and his criminal record. We say, of course, coming from a regulator that letter represented a serious escalation in the information that had been provided
30 to the company.

September 2017, there were more media reports concerning Mr Chau. December 2017, a fine was issued by the VCGLR for breaches of internal controls relating to junkets. In April 2018, there was the discovery of a significant amount of cash in the
35 Suncity Room. There are extensive media allegations which occurred in July 2019, and then there was some August 2019 allegations concerning the Song junket. Each of those allegations, we accept, represented a risk to Crown posed by junkets that was escalating both in terms of the number of allegations and the nature of the issues being raised, and that they had a cumulative effect. And by the time of the media
40 allegations in 2019, it appears to us that it could be accepted that they reflected a grave and urgent problem calling for immediate response.

Counsel assisting submits, of course, that that response did not occur and therefore that the board has failed to meaningfully act on risk arising from junkets. Our point
45 is simply that any such findings ought not to be made in a way as to allocate blame to Mr Brazil. The extent of the allegations, their number, their length of standing and their coming one upon the other, is distinctly different as between Mr Brazil in the

period before February 2017 and that applying after, and we say that the Inquiry would only look at the position as at February 2017 without the benefit of hindsight insofar as findings were to be made implicating Mr Brazil.

5 We say, indeed, it was more than just the absence of red flags during Mr Brazil's
tenure. We say there were also some green flags which pointed in the other direction
against which Mr Brazil's conduct ought to be tested, and those green flags included
the Fifth Review of the VCGLR which noted that although there were risks posed to
10 Crown by junkets it concluded that Crown had managed the issues arising from
criminal activity at the Melbourne casino well, and the Fifth Review also found that
Crown was generally meeting its obligations under the AML Act. And AUSTRAC
in 2014 found no serious deficiencies. So we say that once both the single red flag
- - -

15 COMMISSIONER: Did you say 2014 there? Did you mean 2017?

MR OWENS: For the AUSTRAC review, I think I meant 2014.

COMMISSIONER: 2014. Thank you.

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MR OWENS: So we say when all of those matters are considered together, along
with Mr Brazil's action in the November 2016 board meeting, that a conclusion of a
failure to meaningfully act upon longstanding allegations in relation to junket
operators could not be made in relation to Mr Brazil. So once again, Mr Brazil's
25 submission is simply to emphasise that the relevant facts relied upon by counsel
assisting to support the finding that they have urged are starkly different in the period
following February 2017 when Mr Brazil attended his last meeting. So we make the
point explicit: we submit that if there are to be any findings made against Mr Brazil,
it's respectfully submitted they should only be made on the basis of those matters
30 applicable to the period within which he was a director.

The next topic that I will address just very briefly concerns the board's flawed
response to media allegations which was a matter that arose several years after Mr
Brazil's tenure had ended, and that flawed response is an important matter which
35 underpins a very great number of findings for which counsel assisting contend in
nearly every case study. Again, it might appear to be labouring an obvious point, but
they are plainly not matters for which Mr Brazil can be held responsible or which are
relevant to him given the date upon which his tenure ended.

40 So we say, overall, Mr Brazil's position is distinct and unique amongst members of
the board from 2016 to today because he alone, of all those directors, did not
participate in either of the 2019 flawed response to the media allegations or the
decision in 2017 not to undertake an inquiry into the China arrests. So we say that it
follows from the fact that Mr Brazil is the only board member who can have no
45 conceivable responsibility for either of those matters, that it follows that he ought not
to be, as it were, inadvertently tarred with conclusions that may be based in whole or
in part upon them. May I just record formally that we, on our reading of counsel

assisting's closing submissions in relation to money laundering, we don't understand there to be any allegation made which implicates Mr Brazil in any way there, so if we're wrong about that I would appreciate the opportunity to address that topic, but we don't understand there is any such allegation.

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In conclusion, our point is that counsel assisting's submissions rely heavily, for good reason, on failure of the board to conduct an inquiry or look back after the China arrests, notwithstanding Mr Brazil's repeated thumping of the table. They rely on the failure by the board to make inquiry as to junkets. They rely on the escalation of red flags post February 2017 in relation to junkets, and they rely on the flawed response to the 2019 media allegations. All of those matters are an essential part of the factual underpinning of many of the findings proposed in the closing submissions. For the reasons I have given, none of those failings can be attributed to Mr Brazil and nor could they be considered as relevant matters in arriving at findings in relation to him.

15

In their closing submissions, counsel assisting describes a vicious cycle of interdependent levers which operated to cause the various failings underpinning numerous of the findings that have been urged, and that makes clear the extent to which all of these matters are relied, really, as a basis upon which almost the totality of the findings in relation to the board are sought to be made. There's an interdependent manner in which all of these things are ultimately found to form the basis of the submissions contained in counsel assisting's submissions.

20

Our submission is that the generalised form in which those findings are sought would, if made in that way, attribute responsibility to Mr Brazil, and that is to say if, as a matter of construction, Mr Brazil is a member of the group by reference to which a finding is made, then it follows that the finding will be interpreted as having been made in relation to him. It's clear that the body of generalised findings that have been sought in the closing submissions have been expressly founded upon and are inextricably dependent upon facts extraneous to Mr Brazil and therefore to that extent fatally flawed in relation to him.

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All of this is simply to observe that, understandably given the questions with which the Inquiry is tasked by the terms of reference, no separate consideration of Mr Brazil's distinct position has occurred or even been attempted in the analysis contained within counsel assisting's submissions, and in the absence of such a differentiated analysis the facts, taken as a whole, do not support either in substance or as a matter of due process the making of the proposed findings in relation to the board generally unless they exclude Mr Brazil from culpability.

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It's therefore submitted that the Inquiry, to accord with the rules of natural justice, must either conduct a reasoned analysis of Mr Brazil's distinct facts and make findings derived therefrom, or exclude Mr Brazil from the generalised findings currently proposed. Those are the submissions that I wish to make, Commissioner.

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COMMISSIONER: Thank you, Mr Owens. I can indicate that in respect of the money laundering aspects, in particular of the Southbank and Riverbank accounts

which are pivotal, that's one thing. The cooler bag vision that we've seen so many times suggests that that occurred in 2017 and 2018, after your client departed as a board member so, as I apprehend it, your anticipation is correct. Should I be wrong, certainly notification will be given to you, Mr Owens.

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MR OWENS: I'm very grateful for that indication, Commissioner.

COMMISSIONER: You're granted leave, and thank you for your written document referring to those matters to which you've referred in your oral submissions.

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MR OWENS: Thank you, Commissioner.

COMMISSIONER: Thank you, Mr Owens. Anything further from anyone else before I adjourn the public hearings to Monday at 10 am? All right then. I will adjourn until then. Thank you.

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**MATTER ADJOURNED at 12.44 pm UNTIL
MONDAY, 16 NOVEMBER 2020**