



**INDEPENDENT LIQUOR AND GAMING AUTHORITY OF NSW**

**INDEPENDENT REVIEW OF THE STAR PTY LTD BY ADAM BELL SC  
UNDER THE CASINO CONTROL ACT 1992**

**PUBLIC HEARING  
SYDNEY**

**MONDAY, 20 JUNE 2022  
AT 10:00 AM**

**DAY 45**

**MS N. SHARP SC appears with MR C. CONDE, MS P. ABDIEL  
and MR N. CONDYLLIS as counsel assisting the Review  
MR M. HENRY SC appears as counsel for the Non-Executive Directors  
of Star Entertainment Group Ltd  
MS K. RICHARDSON SC appears as counsel for The Star Pty Ltd**

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to a direction against publication commits an offence against section 143B of the Casino  
Control Act 1992 (NSW)*

<THE HEARING RESUMED AT 10:01 AM

MR BELL SC: Yes, Mr Henry.

5 MR HENRY SC: Thank you, Mr Bell. This morning, I'll be making submissions  
on behalf of the non-executive directors of The Star Entertainment Group: Mr  
Sheppard, Mr Heap, Mr Bradley, Dr Pitkin and Ms Lahey. Each of them was  
examined. Collectively, their examinations proceeded over six days. Counsel  
10 assisting has submitted that all of them were truthful witnesses and that there's no  
reason not to accept their evidence, and we embrace that.

We also adopt many of the submissions made by my learned friend,  
Ms Richardson, including submissions regarding the non-executive directors  
and - in connection with the KPMG reports; China UnionPay; overseas payment  
15 channels, including EEIS; responses to media allegations concerning Crown;  
Suncity; and international rebate business. In view of the facts that Ms Richardson  
has addressed you, Mr Bell, at length on those topics with reference to the  
non-executive directors, we'll adopt her submissions and I don't propose to make  
submissions about those subject matters. We will, however, provide you, in our  
20 written submission, with the transcript references of the submissions that  
Ms Richardson made which we adopt.

What I do propose to address you on are four matters: firstly, I'll make some brief  
general submissions about the roles and responsibilities of the board and  
25 management; the second topic will be to address counsel assisting's submission  
that the board was too passive and failed to demonstrate active stewardship; the  
fourth topic will be the ASX announcements of 11 and 12 October 2021; and the  
fourth and final topic I propose to address is a proposition that was put by you, Mr  
Bell, to Ms Richardson at the end of her submissions last week on Thursday to the  
30 effect that the board must accept responsibility for the deliberate concealment  
from you of matters relating to Suncity. So I'll deal with that but I'll deal with it at  
the end, if I may.

Moving, then, to the first topic, that is, the brief general submissions about the  
35 board and management. We submit that the following principles apply to the roles  
of the non-executive directors, and in our document we will provide you with  
authority references for each of these propositions. The first is directors have a  
core, irreducible requirement to take reasonable steps to place themselves in a  
position to guide and monitor the management of the company. The second is the  
40 board should meet as often as it deems necessary to carry out its functions  
properly.

The third is directors should have a questioning mind, and if they know or by the  
exercise of ordinary care should know, facts that would awaken suspicion and put  
45 a prudent person on guard, they should act with care commensurate to the relevant  
risk. And fourthly, that non-executive directors are not required to be involved in

the affairs of a company at an operational level. They are required to engage in a general monitoring of corporate affairs and policies but are not required to engage in a detailed inspection of day-to-day activities or have a detailed awareness of those activities. These matters may be delegated to management, and it is  
5 permissible for directors to rely on others. So they're the four principles that we say are applicable to the roles and responsibility of the non-executive directors.

It's apparent that the principles proceed on the basis that the board of directors is an organ of a company that sits at the apex and has ultimate responsibility to guide  
10 and govern the management and, through management, the affairs of the company and the direction of the company. Now, that obviously should be known to the board, but it should also be known to management as well. They must work together. May I refer you, Mr Bell, to two pieces of evidence which shed some further light on this. And I can read them to you and provide the references. I don't  
15 need to have them brought up. The first is some evidence that Dr Pitkin gave at transcript 3570 at lines 6 to 13, and what she said was:

"The board must put in place robust - a robust governance framework. There needs, though, to be a relationship of trust between management and the  
20 board, and the board relies upon management to be open and complete in the information that it provides to the board. Otherwise, the board cannot assess what's happening in the business, cannot monitor appropriately, cannot make the right decisions. For the most senior leadership to hide issues from a board, it undermines the very foundation of the governance framework."  
25

And to similar effect, Mr Sheppard said at transcript 3743, lines 16 to 20:

"In most of the organisations - well, in fact, all of the organisations that I've  
30 been involved with, except this one, the whole system worked on a - it was reinforced by a trust between the board and management. And in this case, that trust was misplaced."

Now, Mr Sheppard is a very experienced company director, and Dr Pitkin falls into the same category. And their observations, we submit, are pertinent for  
35 present purposes. In substance, the non-executive directors are entitled to rely on and trust management. They are not required to assume or, absent good reason, suspect that management is misleading them or withholding information from them. A requirement to challenge management and hold them to account exists. That may be accepted. But it doesn't involve an assumption or starting premise  
40 that management is either incompetent or untruthful.

Now, I've been speaking in general terms. An example of management's failure to inform the board of information in breach of the trust that both Mr Sheppard and  
45 Dr Pitkin referred to attends the ASX release of 12 October 2021. The information that wasn't disclosed to the board was the fact that between September 2018 and January 2020, and notwithstanding multiple requests by AUSTRAC, management

refused to provide the KPMG reports in their entirety to AUSTRAC. And the basis upon which that stance was taken was in reliance upon a claim for legal professional privilege.

5 I'll come back, as I said earlier, to the release. But for present purposes, I simply note that management's failure to inform the board on that occasion is an example, we submit, of the broader principles to which I've just referred, and Ms Richardson has addressed other examples. Having said all of that, none of it serves to understate the ultimate responsibility and accountability of the board for  
10 various matters, and each of the non-executive directors accepted the same in her or his evidence. And I'll just remind you, Mr Bell, of some of the evidence. I won't provide the transcription references now, but we'll do that in the document.

15 Mr Heap gave evidence that the board does have ultimate responsibility for culture within an organisation, and it has to be in parallel with particularly senior management because the board is only able to run the company with senior management and then with the entire organisation. It is ultimately for the board, he said, to set expectations with respect to all matters in relation to culture, including ethical behaviour. He agreed that the board must accept significant responsibility  
20 for the cultural failings at The Star and some responsibility for not being provided the information it needed.

25 Mr Sheppard's evidence was to similar effect. He gave evidence that there were shortcomings in the culture of the organisation, that he and the board have always made it very clear to management in numerous ways that matters should be escalated if there's any doubt whatsoever. He identified the code of conduct, the risk appetite statement, the requirement on the risk officer to undertake the risk committee that the company was operating within its risk appetite, the introduction of do the right thing, informal conversations with management to encourage  
30 disclosure, all as examples of the clear systems and processes set by the board. But despite this, he agreed that the board must accept some responsibility for the problems and that, in retrospect, the board should have asked more questions and put in place better structures for reporting.

35 Dr Pitkin's evidence was that the board, because it sits at the apex of the organisational hierarchy, takes ultimate accountability for what happens in the organisation and is responsible for putting in place a governance framework that supports the values of the organisation. She accepted that the review uncovered many serious issues and that the board is accountable for these matters. She did,  
40 however, also make the point that the board cannot be responsible or have oversight for every aspect of an organisation's culture.

45 And she said at transcript 3549, line 9 and following that The Star has over 8000 employees spread across three locations and that there would be tens of subcultures and ways of doing things in that organisation. She said that the board has the responsibility to set, including through the code of conduct, expectations

around key things and then to monitor and strengthen the cultural dimensions that support those expectations, but the board is not accountable for absolutely everything.

5 Ms Lahey accepted that there have been significant cultural failings and that the board must accept significant responsibility for the failings. She agreed that the evidence to the review discloses respects in which material information was withheld from the board and gave evidence that on some issues the board did not have the full picture presented to it. And finally, Mr Bradley accepted that there  
10 have been significant cultural failings for which the board must accept significant responsibility and for which he must accept some personal responsibility. He agreed that with the benefit of hindsight, he should have asked more questions of management, even though it's hard to ask questions when one is not aware of certain matters.

15 Now, the repeated references to the board or members of the board that I've referred to accepting significant responsibility for matters should be noted for two reasons, we submit: first, it reflects acknowledgement and insight on the part of the relevant non-executive director; and, secondly, it reflects the fact that  
20 questions of degree are relevant when considering responsibility for failings. The non-executive directors' frank acceptance of their ultimate responsibility or accountability for certain issues identified by the review is not merely the subject of evidence to which I've referred; it's evidenced, and perhaps more powerfully so, by the very considerable body of work that they have approved, engaged in and  
25 overseen to address the problems that have emerged and been exposed.

Ms Richardson addressed you on that work at length last Thursday at transcript 4358, line 42, to 4367, line 15. It was the last topic that Ms Richardson addressed, and it went through the catalogue of steps that have been taken to address  
30 problems that have emerged. I shan't burden you with the same. Ms Richardson went into great detail. However, on any view, the list of remedial measures is considerable, and the board's adoption of the measures carried with it an acknowledgement of the problems and an acceptance of a significant degree of responsibility for them. And that, of course, includes the process of the board  
35 renewal itself which is underway.

So they're the submissions we make under the first topic heading. The second topic heading to which I will now move is the - I withdraw that. The submission that was made by counsel assisting at times that the non-executive directors were  
40 passive or lacked in active stewardship - I think, in fairness, it was actually put as the board, not the non-executive directors, but there we are. So counsel assisting described the board as passive and as having failed to demonstrate active stewardship of the business. We make the point that those submissions were put at a high level of generality, and we submit that the evidence does not support any  
45 general finding that the board was passive or lacking in active stewardship or did not hold management to account.

What we submit is that it's actually uninformative to look at that issue at a general level. And in order perhaps to illustrate the point, I'll ask you, Mr Bell, to go to a passage of a document that was the subject of some focus by counsel assisting with each of the non-executive directors in their examinations. All of them were questioned about this passage. It's in the CEO report of May 2018. But before I come to that, to give some context, I'll ask you to go to the minutes of the July board meeting at which the paper was presented, and that's exhibit B1011. If that could please be brought up on the screen. Thank you.

So this is the minutes of the directors' meeting of 26 July. You will see that it commenced at 1.55 in the afternoon. I draw attention to that because it finished at 4.45, and that comes from the last page. We needn't go to it. So that the meeting is almost three hours long. The minutes themselves are nine pages long. If one goes to page 1049 - if that could please be brought up. Thank you. You'll see about halfway down the page there's on the left-hand side in the bold typescript:

"Managing director and CEO report, May 2018 and June 2018."

And you will see there, Mr Bell, that both of those papers were taken as read and that Mr Bekier spoke to the key points of the papers. There was then board discussion, and I don't need to trouble you with the rest, other than to note that there's nothing in that section of the minutes that refers to Salon 95 or Suncity. Now, you will also see - and we needn't go through the detail of it, but where, for example, it says "FY19 budget", there's a paper titled FY19 Budget taken as read.

I've been through the minutes, and there's 23 papers that are referred to as taken as read in these minutes, including the one to which I'll now go, which is the CEO report of May of 2018. And if that could please be brought up. It's exhibit B753. So this is the report. As I say, it's one of 23 papers that were taken as read in the minutes. It's 27 pages long itself. If we could go, please, to page 1695. Thank you. You will see a heading 11, Legal and Regulatory, and there's then a number of subheadings. Down the base of the page, heading 11.2, Projects and Commercial Matters. And then over the page again - if we could please scroll to the next page - you'll see the third dot point from the top of the page has in bold typescript:

"Salon 95 service desk."

And the passage - I won't read it to you, but the passage that attends that dot point was the subject of questioning by counsel assisting of each of the non-executive directors. It was put to them that as curious board members, they should have asked questions about this entry in the board paper, with a view, in substance, to flushing out the fact that, in May of 2018, cash was being exchanged for chips in Salon 95. Now, there's nothing in the text of the dot point that clauses any red flag of that issue and, as we've seen, there's nothing in the minutes that would cause anyone to ask any questions about Salon 95 or Suncity.

The reason I take you to this is we submit that, in context, the proposition that this paragraph buried on page 22 of this document, without any attention being brought to it at the board meeting - the proposition that that should have prompted interrogation by the directors, we say, is unreal. The exchange of cash for chips in Salon 95 was a serious matter and that was accepted by the non-executive directors in their evidence. That was not drawn to their attention, either in what was said at the board meeting or in this paragraph, and Ms Lahey's evidence was that she thought the paragraph was directed towards a hospitality desk. And Dr Pitkin's evidence was to similar effect. I can give you the references. Ms Lahey was transcript 3651, lines 21 to 28, and Dr Pitkin was transcript 3570, lines 21 to 26. And we say that's a perfectly reasonable reading of what's put there.

There's a further unreality, we submit, about looking at a paragraph like this in the abstract and saying it should have prompted interrogation. In circumstances where there's nothing about the paragraph that causes any concern, if that sort of paragraph, buried, as it was, in board papers, was to prompt an obligation on directors to make inquiries about the subject matter of it, a board meeting would become wholly impracticable. This board meeting would have gone for weeks. There was hundreds of pages of documents. This board meeting dealt with the end of financial year, being the July board meeting, there not having been one in June. And as I said, there was 23 board papers that were put to the board.

It's wholly inadequate for management not to draw to the attention of the board critical matters that may be buried somewhere in the board paper in that sort of circumstance. And it's perhaps - just stepping back a moment, it's perhaps a trap or a vice in relation to the electronic age. It's one thing for a director to be examined in a witness box, presented with a board pack that's three or four hundred pages long and asked to turn to page 267 and look at a particular paragraph and then be asked questions about it. It's readily apparent that unless there's something that stands out about the paragraph, the director wouldn't pay any specific attention to that paragraph, absent direction or obvious reason to make inquiry.

When a document, as is now, is just put up on a screen and a witness is directed to a particular paragraph only, that context is, or can be, lost. There's no criticism made of it; this is just part of the modern age. But it's something that we respectfully submit should be kept steadfastly in mind when considering these sorts of issues, because what one loses, or may lose, is the context in which this particular paragraph really should be assessed. So this, of course, is just an example, but it was an example of the board members being questioned about a subject matter by reference to a board paper for the purposes of trying to demonstrate the passivity or lack of active stewardship which was the subject of the submission - the general submission. And we say two things about it. Firstly, it doesn't demonstrate that. But, secondly, we say it rather also illustrates the need to go to the specifics for the purposes of assessing whether or not there has been some failing of the nature I've described.

What we also submit is in order assess whether there has been passivity or a lack of active stewardship, it's necessary to go through a process. First of all, a flag has to be identified, whether it's during the course of the board meeting, in the board paper itself, which is sufficiently prioritised and flagged. That's the first step. Secondly, if the flag's there, one then has to descend into, well, what questions - or what's the substance of the questions that really should have been asked. And then thirdly, one has to consider what are the likely answers to those questions. Because without that, it's impossible to determine whether the making of the inquiries or the asking of the questions would have made an ounce of difference.

**MR BELL SC:** I suppose the questions would be: what were the concerns, and what were the activities?

**MR HENRY SC:** Yes. And that's the sort of analysis we say would need to be undertaken in respect of each instance where it's suggested that there was some sort of lack of interrogation when it should have arisen. But those questions - I respectfully accept what you say, Mr Bell, that they're the questions here. But there's nothing that was - that made this paragraph stand out to warrant those questions being asked. That's the point.

Finally, we say that the proposition that the non-executive directors were passive or lacking in active stewardship - we say, as I've said - we submit there shouldn't be such a finding. But we also say such a finding is not necessary or appropriate in circumstances where there has been no submission that the non-executive directors aren't suitable persons to hold their offices. So we say that's a significant point as well.

May I turn, then, to topic 3, which is the ASX releases. Now - pardon me for one moment. Counsel assisting has made a submission - this is at transcript 4044, lines 19 to 20 - that the two ASX announcements, that is, of 11 and 12 October last year, were wrong in serious respects, and then a further submission at transcript 3987, lines 5 to 6, that the two ASX announcements were misleading and that ought to have been apparent to the directors at the time. Now, Ms Richardson has addressed you as to why you should make no findings as to counsel assisting's submissions that the ASX releases were misleading or wrong in serious respects. And there were two places in the transcript where submissions to that effect were made, at transcript 4254 line 38 to 4256 line 34, and then separately at 4351 to line 45.

Mr Wood effectively supplemented those submissions, at least for our purposes, in the live transcript at transcript 4456, lines 4 to 7, with respect to civil penalty provisions. And the substance of the submissions that have been put to you on this issue is that it's not an area that you should enter upon for the reasons that have been advanced in those submissions. And I won't go over that, but we do adopt those submissions and join in the contention that you should not make findings



that bear upon the correctness or otherwise of counsel assisting's submission.  
That's our primary position.

5 If you're against us on that, though, we do make submissions, and wish to make  
submissions, on the facts. And that's not something that has been done to this  
point. So what I'm proposing to do now is embark on a chronological  
walk-through of the facts that we say are relevant to the two of the ASX  
announcements being released. And the starting point - I'm sorry, I don't have the  
10 exhibit number for this one, but I do have the number identification. It's  
STA.3029.002.0026. It's the minutes of the board meeting of 1 October 2021.  
Thank you. So this is the starting point. On 1 October 2021, there's a directors'  
meeting. For present purposes, if we could please turn to page 0027, you will see  
at the base of the page there, Mr Bell, a heading in the left column, bold typescript,  
60 Minutes Story Pending:

15 "The chairman and Peter Jenkins -"

Thank you:

20 "Group executive external affairs, spoke to inquiries received from journalist  
Nick McKenzie in relation to media he is working on, including 60 Minutes  
story and related Sydney Morning Herald articles."

25 If we could please go to the next page. Thank you:

"Mr Jenkins confirmed interview requests were declined, however  
management understands that Mr Philip Crawford, chair of the Independent  
Liquor and Gaming Authority, has participated in a detailed interview.  
Mr Jenkins advised that he anticipates questions may be put to the company  
30 by Mr McKenzie close to the time the story or articles are to be published."

So - thank you - pausing at this stage, the board's informed, firstly, that inquiries  
have been made by Mr McKenzie, and, secondly, that questions may be put to the  
company closer to the time of the publications. So that's on 1 October, the starting  
35 point. The next document to go to is of 6 October. It's exhibit B3136. You will be  
familiar with this, I rather apprehend, Mr Bell. This is the email of 6 October from  
Mr McKenzie to Star Media which sets out his catalogue of requests. I don't need  
to take you through the detail of it. But do observe that, first of all, he requests  
answers by close of business Thursday. You will see that at about point 6 on the  
40 page, asks:

"Could Mr Bekier answer the questions by COB Thursday."

45 And then - which - I draw attention to it because it's, well, we submit, rather  
ambitious given what follows. Nominally, if one looks at each of those dot points,  
for example:

"Did any external audit firm write reports -"

5 Etcetera. If that's said to be one question - there's 38 questions put here. Many of them have multiple components to them, and they include questions about the activities of 19 patrons or junket representatives. In other words, there's a substantial catalogue of issues that are raised that will take time to attend to.

10 So that's on the 6 October, which was the Wednesday. One then moves forward in time to the Friday to a board meeting on 8 October 2021, and that document is STA.3029.0002.0063. So this is the minutes of that board meeting. Just pardon me for one moment and I'll find my copy of it. You will see that the board meeting is convened at 6.25 pm on the Friday evening. It's an online board meeting. The full board is present, and the management or executive officers who are there are Mr  
15 Theodore, Ms Martin, Mr Hawkins and Mr Jenkins. If one goes to the purpose of the meeting, it's:

20 "The chairman noted that this meeting has been convened as an additional meeting of the board for the primary purpose of considering responses (including ASX release) to be provided to allegations anticipated to be made in 60 Minutes and associated Sydney Morning Herald and Age media by journalist Nick McKenzie after receiving queries and a request for comment from the journalist. The 60 Minutes report is expected to air on the evening of  
25 10 October -"

So that's the Sunday night:

"With related media articles expected to be published in parallel."

30 Now, just pausing there, the first thing to observe, we submit, is this meeting, and it being convened at the time it was convened at short notice, on its face, appears to demonstrate the board acting swiftly, diligently and carefully in relation to an apparently concerning issue. They don't, at this stage, know what the allegations are, but they have been given - the board wasn't sent the questions by Nick  
35 McKenzie in that email, and that email, as far as I'm aware, was not passed on to him, but they were given the heads up that there were allegations that were the subject of questions and that it was all on the way. So if one reads further down on the page, at about point 5, there was a paper provided, Channel 9 Media Matters, and a draft ASX release to the board. And then further down the page, Mr Bell,  
40 you will see it says:

45 "Management spoke to the engagement with the journalist, including providing a detailed summary of the extensive list of questions raised by Mr McKenzie. Management confirmed that the list of questions received have now also been added to the Diligent Boardbooks portal, along with an initial response to the journalist."

And then it reads on:

5            "In Mr Jenkins' discussions with the journalist, Mr McKenzie, he noted that  
in his view -"

And then there's the three dot points set out. You may recall this was the subject of  
some questioning of various non-executive directors, the questioning directed  
towards whether "he" before the word "noted" was a reference to Mr Jenkins or  
10 Mr McKenzie. The evidence on that was Mr Sheppard said - Mr Sheppard and Mr  
Bradley said that they recalled it was Mr Jenkins - I withdraw  
that - Mr McKenzie's views that were noted. And the transcription references are,  
for Mr Sheppard, page 3248, line 36 to 44, and Mr Bradley, transcript 3533, lines  
9 to 19.

15 Mr Heap took a different view. He said that "he" was a reference to Mr Jenkins,  
and that you will find at transcript 3418, line 16, to 3419, line 9. Mr Heap did say  
that he was - he couldn't recall the meeting and that he was effectively trying to  
construe the document. We say the more obvious reading of it is that it's  
20 Mr McKenzie who is referred to. The other directors weren't asked about it. But  
because of the fact that at the time the allegations were so many and unexplored,  
or largely unexplored, it doesn't make a lot of sense, we respectfully submit, for it  
to mean Mr Jenkins.

25 As the minute refers - the list of questions being extensive, we say that was a  
precursor to an equally extensive set of allegations that would take time to  
examine. But that was still to come. If one goes over the page, please, to page  
0064. At the top of the page, the second paragraph refers to management speaking  
to the details gathered so far in response to the queries that were posed and  
30 speaking to an initial draft ASX release that was included with the paper that had  
been provided, noting that it would need to be finalised once the articles are  
published. So it was a draft ASX release drafted in the absence of any of the  
allegations being framed. And then:

35            "Management noted that on the review conducted to this point, and having  
considered the 60 Minutes promotional trailer that was broadcast, a number  
of the questions appear to be positioning allegations that could be misleading  
depending upon the context in which they are presented and the level of detail  
included."

40 And then there's a list, and just flag the first in particular of the dot points on the  
list:

45            "That an external review was conducted of the company's AML program in  
2018 and the reports were not disclosed to relevant regulators."

So at that point, the board is informed by management that an allegation that reports, in this context must mean the KPMG reports, were not disclosed to regulators, that that could be misleading. There's no mention there of any delay in the provision of the reports to anyone, and that's in circumstances where, as  
5 previously noted, the executives who were in attendance, or at least one of them, ought to have been able to inform the board of that fact. Instead, what was positively put to the board is it may be misleading depending upon the context and the detail if what is put is that the reports were not disclosed to the regulators. Then, if one goes down the page, there's a number of - there's four other items that  
10 are flagged - I won't read them to you - as potentially misleading allegations if they're published. And then it says:

15 "The board requested management to provide responses and content on each question from the journalist in a paper as soon as practicable, expanding upon the briefing provided in this meeting and taking account of media content published."

So the board is seeking more information post the media publications and wants to know answers, so far as that's possible, to the questions that have already been  
20 asked. And then:

"The board discussed and provided feedback on the media response and the draft ASX release, noting -"

25 If I could just ask you Mr Bell, to take a mental note of the third dot point, that:

30 "The release should make clear that the Bell Review is the next in a series of regular reviews, and the company will continue to participate in a transparent and cooperative way, as in prior reviews."

So there's the board not just informing the executives who are there but saying, "We want you to make a public statement to that effect. We are to be transparent and cooperative." Then:

35 "The board noted that management will take account of the feedback provided and update the draft ASX release following the 60 Minutes broadcast and publication of press articles. Management will target circulating the final draft review by 8 am Monday morning."

40 Now, that's on the Friday night - or Friday evening. Then one comes to the Sunday evening when the 60 Minutes program is aired. There's a transcript of it. We needn't bring it up, but I will just give you the reference, exhibit B3166. It says that the program - according to this transcript, it was broadcast at 10.28am on  
45 Monday, 11 October 2021. That may be correct, but it can't be the first occasion on which the program was broadcast. It was certainly broadcast on the Sunday night.

But taking it as having been broadcast on the Sunday night, there was then also media articles published in the Fairfax press on the Sunday. It's unclear from the material, at least as far as we can discern, what time on the Sunday the  
5 publications were broadcast in the Fairfax press. According to Mr Conde's questioning at transcript 3411, line 44, the first of the articles in the Sydney Morning Herald was the article at exhibit B3156. And we needn't go to it - you will be familiar with it, Mr Bell - but I just draw attention to it because it made claims about 10 of the patrons that had been identified in Mr McKenzie's list of  
10 questions, as well as allegations about the KPMG reports and the use of China UnionPay cards. So there was a plethora of allegations made in the media articles.

That was on the Sunday evening, then. We have 60 Minutes. The next thing that happens is at 8.15 on Monday morning, 11 October, Ms Martin emails a revised  
15 draft ASX release for lodgement with the ASX, but she emails it to the directors for their consideration and approval. We needn't go to it. The important point to take from it is just the timing, it's 8.15 am. The reference is STA.3412.0079.9274. So that's at 8.15. The ASX release is approved and then made by the ASX at 9.07 am that day, so 52 minutes later. Now, I'm not sure if that 9.07 am is the subject of  
20 evidence. I got it off the ASX website yesterday. That's where I got it from.

The reason I've gone through this sort of detail is in assessing the conduct of those who approved the ASX release, we submit that the context is important, and that was the subject of some evidence from Dr Pitkin. If I can perhaps remind you of it.  
25 It's at transcript 3632, commencing at line 10. This is Mr Conde's questioning of Dr Pitkin:

"And then do you recall, with your board colleagues, authorising the ASX  
30 release?"

"Yes."

And then it's brought up. And then reading down the page:

"Would you agree that, at this time, there were allegations which the  
35 board - which you and, to your observation, your board colleagues considered to be misleading, but there were also allegations which you and, to your observation, the board considered not to be misleading?"

40 Then Dr Pitkin says:

"The China UnionPay was an assertion that was not misleading. The board had found out about that two weeks previously."

45 And then there's this exchange:

"Would you be concerned that the second paragraph of this release, the first sentence, focuses only on allegations or assertions which it considers to be misleading but doesn't mention the others?"

5 "No. Mr Conde, this ASX announcement was put out early Monday morning  
after the 60 Minutes program aired on the Sunday night. There was a matter  
of hours to approve this and release it. As a board member, I knew that a  
number of assertions were not correct - misleading, to use a more general  
10 term - and I was very concerned, as a director, that the company not start to,  
if you like, prosecute its case in the media or through ASX announcements -"

If we could perhaps just go over the page:

15 "Given that the review was underway. There would be no opportunity, in  
trying to meet the ASX requirements of getting the announcement up before  
the market opened -"

Which, just pausing there, is 10 o'clock:

20 "To consult with the review team about what we could or couldn't say in the  
announcement. At the time, I was comfortable with the statement. In my  
mind, there were a number of assertions that were misleading. By saying 'a  
number of assertions', we're not saying all of the assertions. I just don't think  
25 there was time to be doing a very detailed assessment of all the assertions,  
given we only had a matter of hours to consider them, really, from the 60  
Minutes aired to the intervening hours before we had to get the ASX release  
up."

30 Now, we say that evidence accurately reflects the chronological sequence and the  
reality of the situation. It's one thing for lawyers to pour over, analyse and critique  
each sentence of a document for hours after the event, and I don't say that  
critically. That's part of the task, and we do that. But it's quite another to be in the  
position of the directors when presented with a need to approve an ASX release in  
35 this circumstance. When a smorgasbord of allegations - serious allegations have  
been made against the company, there's a need to respond, but there's not time to  
interrogate and evaluate - examine each of the allegations.

40 So we say, in context, the directors acted with due care and expedition in difficult  
circumstances. We submit that no adverse finding should be made against them  
with respect to their approval of the ASX release, and that's the release of 11  
October. I haven't asked you to go to the release itself. You can conveniently see  
the relevant sentence, as we apprehend it anyway, back on page 3632. If we just  
go back a page, please, operator, in the transcript. You will recall, Mr Bell - it's at  
line 17:

45

"The Star is concerned by a number of assertions within the media reports that it considers misleading."

5 That's the sentence, as we understand it, that's in issue. Now, as far as the text of  
that sentence is concerned, we submit you should not make any finding as to  
whether you consider it to be misleading for the reasons that have been advanced  
by others. If you disagree with that, we submit you shouldn't find it's misleading.  
The sentence does not assert that all assertions in the media reports were  
10 misleading. And a fair reading of the ASX announcement is that it informs the  
market that The Star considers some media assertions misleading, and it doesn't go  
beyond that.

15 Now, the argument that was put to the directors, well, shouldn't you have, to be  
more accurate or complete, supplemented what's there with another sentence, and  
we just submit in all of the circumstances in which this had to be approved and  
came into being, with the knowledge that the directors had at the time, the fact that  
there wasn't any further sentence or qualification doesn't result in what is there  
being misleading. It's, in fact, accurate.

20 So that's what we submit about the first of the two ASX releases. The second one,  
of course, comes the following day. And the circumstances that gave rise to that  
were that there were investors expressing concern about media assertions  
regarding the KPMG reports. And for this - if, operator, we could go back to page  
25 3633, please. When I say "back", I mean to the next page, I'm sorry. So at page  
3633, line 36, Dr Pitkin gives this evidence:

"Now - then, the next two days -"

30 So this was early Monday morning - just pausing there. She's referring to the  
release on the 11th there:

35 "Over that Monday and Tuesday, there was significant feedback that came in  
from investors. Investors were not concerned about allegations relating to  
junkets, including payment methods or anything else, because they knew  
junket operations had been stopped the year before. But they were very  
concerned about the allegations around the KPMG reports. Because the way  
the program - the 60 Minutes program had presented it, it talked about secret  
reports. It talked about the board not getting them. It talked about them being  
40 hidden from regulators, and it spoke as if it was ongoing and that the  
company had not addressed the matters. So the extent of the feedback from  
the shareholders was such that the board met urgently on the Tuesday  
evening -"

45 So that would have been 12 October:

5 "And decided that in order to have an informed market, we needed to put out a further release to address the particular issue. We discussed it at length because we were aware that then, you know, you're pulling on the ball of string and how far do you go. We had only also received, that evening, a document which contained more information about a number of the patrons and there were reviews ongoing. But we did then decide to put out that further release on the Tuesday evening."

10 Now, that evidence accords with the board minutes for the meeting. Those are at STA.3029.0002.0031. So if we could go to those, please. And before descending into the detail of them, you may recall at the start of my address, Mr Bell, going through the principles applicable to the roles of the non-executive directors, one of them was that the board should meet as often as it deems necessary to carry out functions properly, and we see that in action here. So returning to the minutes, on 15 12 October, the Tuesday, 4 o'clock. Again, it's an online. The attendees are the same. The purpose of the meeting is as recorded there, that is:

20 "An additional meeting of the board for the primary purpose of considering a draft ASX release."

And it's further to the ASX release of the previous day:

25 "The chairman noted the update call held with the board and management yesterday afternoon and the updates already received by the board during the (non-meeting) call."

30 Now, I don't think there's evidence of what that involved. But nonetheless, there was obviously activity attending to the issues that had arisen, or were arising, as they unfolded. Under the heading Media Coverage - this is the second paragraph:

35 "Management noted that in the context of the media since the evening of 10 October, including across today, and taking account of the share price movements since yesterday and investor feedback received, it is management's recommendation that a further ASX announcement be released following on from the ASX release issued yesterday. Management noted that the key matter at the core of the ongoing media, including in particular in press articles today and a radio interview this morning with Mr McKenzie, is the KPMG reports from 2018 and the company's response to those reports. Management further noted that Mr McKenzie has not yet covered all matters 40 the subject of the initial questions put to the company on 6 October and therefore may publish further articles, including with ongoing reference to the KPMG reports. In that context, the board accepted and agreed with management's recommendation to issue an ASX release."

45 Just pausing there, this is management's recommendation to come to the board to deal with allegations concerning the KPMG reports. Now, if ever there was - well,



one might say, opportunity, another might say obligation for management coming to the board in this context to raise the issue the subject of concern with the failure to provide a response to requests the KPMG reports, this must have been it. And it didn't happen. If one goes back to the minutes:

5

"Management spoke to the draft ASX release placed on the Diligent Boardbooks portal this afternoon and responded to queries from the board on the content of the same. The board provided feedback. Following discussion, the board resolved to approve it with management to take account of the board's feedback and finalise the final form of lodgement with the ASX and the chairman."

10

So there's clearly discussion about the terms of the release and careful attention given to its terms. Again, these minutes, we submit, portray diligence and timely attention to an important matter requiring attention by the board. But as I've said, critically, although we don't have evidence as to who said what at the meeting about the terms of the draft that was produced to the board, what we do know is that this was brought forward by management with a recommendation, and management didn't tell the board important information relevant to the release.

15

20

Having said that, if one goes to the release - and the release is at exhibit B3176. Just while it's coming up - there it is. Thank you, operator. The timing of the release on the ASX, Mr Bell, was 7.17 pm on 12 October, so about three hours after the meeting. Now, the issue with the release, as we apprehend it, is under the heading Summary. It says:

25

"Recent media reports have asserted that reports prepared by KPMG in 2018 were kept secret and not adequately acted upon. Those assertions are incorrect."

30

As we understand it, there's no issue with the statement that the reports were acted upon or adequately acted upon; the issue is with whether or not it's accurate to have said, or misleading to have said, that the reports were kept secret. Now, again, we say you shouldn't make a finding one way or the other about this. But if you're against us on that, we submit you shouldn't find it to be misleading. And we say that particularly in circumstances where, by 12 October 2021, the KPMG reports had been provided to AUSTRAC back in January of 2020 - so some considerable time before - and had been acted on by the time of this announcement.

35

40

So the failure to include the delayed provision of the reports on account of an erroneous privilege claim doesn't, we say, render this misleading. It's, rather, that at the time at which this is issued or released, the information in it, which is really just intended to inform the market that so far as it's suggesting there are outstanding problems that KPMG have raised that are a risk to the company, that

45

that's incorrect. So that's what we say about the content of the misleading assertion, as we apprehend it's put.

5 **MR BELL SC:** I think all of the directors told me that they wouldn't have issued the release in these terms had they been told the truth about the dealings with AUSTRAC.

10 **MR HENRY SC:** I'm about to deal with that. With respect, you're almost totally correct about that. I'll go to the transcript. The position of Mr Sheppard - sorry, I withdraw that. The starting point on that issue that you've raised, Mr Bell, is that at the time of approving the release, none of the directors were aware of the delay in provision of the KPMG reports to AUSTRAC. So even if, contrary to what I've put, (a) you make a finding, (b) you say it's misleading, we say no responsibility for that lies at the feet of the directors because they were not told, and there was  
15 ample opportunity to tell them of this issue.

And the transcription references for that I'll go through and, as I do, I will address what you've just raised with me. Mr Sheppard's transcription reference is 3264, line 35, to 3267, line 15. I couldn't find - and it may be that I've overlooked  
20 it - where he landed on the point you've just raised, but we can check that. Mr Heap, 3440, line 30, to 3448, line 9. He accepted, ultimately, that the sentence was misleading.

25 Mr Bradley, transcript 3539, line 15, to 3541, line 45. He agreed that it was better to have provided the date the reports were given to AUSTRAC. So that would be the January date. That's, of course, on an assumption he knew them, or he knew it, which he didn't at the time. Dr Pitkin was at transcript 3634, line 40, to 3636, line 24. She agrees that if she had have known the position, she wouldn't have put the release in the same terms, which I think is your point. And Ms Lahey, her  
30 reference is transcript 3692, lines 5 to 12. She said that if she had known the relevant information, "we may" have worded it differently.

35 So there's certainly some evidentiary support for the proposition that you put to me. I accept that. What we do say about that proposition, though, is the mere fact that something could have been worded differently or supplemented doesn't necessarily mean that what is there is misleading. We say it's a question of degree and impression. But that's perhaps all the more reason not to go into this territory.

40 In relation to the members of the boards proceeding in the way they did, that is, proceeding on the basis that there was no non-disclosure, if I can put it that way, of the KPMG reports, can I take you, please, to evidence of Dr Pitkin at transcript 3636. And I do this because there was some questioning of various directors about, "Well, when you were given this draft release to approve, didn't you ask questions about, well, when was the KPMG report provided," and so on and so  
45 forth. And generally the answers were, "Well, why would I do that? We understood that all reports that should be provided to the regulator would be, and

that was the standing assumption." Well, Dr Pitkin here gives some helpful evidence to give content to that way in which to approach things. So this is at 3636, commencing at line 8. She says:

5 "I knew at the time of this release that AUSTRAC had been told about the reviews by KPMG; that the regulations and action plan had been shared with AUSTRAC; that AUSTRAC had been consulted on the development of the risk assessment process, which was one of the enhancements to the program; and that AUSTRAC had received the new AML/CTF program after it had  
10 been approved by the board. And by this board meeting on the evening of 12 October, I knew, because of the paper that was given to the board, that AUSTRAC had been provided with the reports in January 2020. So putting all that together, I concluded that the reports had not been kept secret and that the statement in the third paragraph starting, 'Details of the review,' was  
15 accurate."

And then she accedes to the proposition that you put and that you put to me a moment ago. But we say having regard to that evidence, it was entirely proper and understandable for the board to proceed in the way in which they did, and that  
20 even if, contrary to what we submit, the announcement is misleading, that's through no fault of the board.

That deals with the ASX announcements. I don't propose to say anything at all about the continuous disclosure obligations issue. That wasn't taken up with any of  
25 the non-executive directors. And for reasons that have been advanced by others, that's something we say you should steer well clear of. Would you just pardon me for one moment, please? Thank you. That brings me to my final topic, and that's topic 4. And topic 4 arises because of two questions, Mr Bell, that you put to my learned friend Ms Richardson on the last occasion she addressed you. And the  
30 transcript reference is at 4373, line 33, where you put to Ms Richardson:

"The board must accept responsibility, must it not, for the failure to disclose this important matter to me?"

35 And the next question explains what the first question is referring to at 4374, line 1:

40 "My question is whether The Star accepts that the board must accept responsibility for this deliberate concealment from me of the matters relating to Suncity."

Now, we wish to deal with that head on because it's obviously a very serious matter, and what's pregnant in the questions is that the board is responsible for serious wrongdoing. And I appreciate that, in the second question, you were  
45 asking, understandably, Ms Richardson for Star's position, and I'm representing the non-executive directors. But nonetheless, we wish to put the non-executive

directors' position on the record. And before I do that, I should indicate that I understand Ms Richardson will address you further on the earlier aspect of this point, that is, what occurred before Commissioner Bergin. The questions to which I have taken you refer only to what you say was non-disclosure to you, not to  
5 Commissioner Bergin, and that's something that Ms Richardson is going to take up further, I understand.

10 So in relation to the position of the non-executive directors, we say a number of things. Firstly, none of them have concealed anything from you, much less deliberately concealed anything from you. And we submit there's not a skerrick of evidence to suggest otherwise. We say that submission is consistent with counsel assisting submitting that they were - my clients were all witnesses of truth and their evidence should be accepted. So that's the starting position.

15 The second position - and relatedly - we say, as you pointed out to Ms Richardson in the course of the questioning on this issue, the non-disclosure, a subject of your question, is an important matter, that is, you're asking whether the board is responsible for serious wrongdoing. Now, that brings the principles of Briginshaw into play. You've been addressed already on those principles by Mr McLeod and  
20 Mr Wood last Friday, and you would obviously be familiar with them. I don't propose to dwell on them. But those submissions included - Mr Wood gave an authority for the proposition that those principles should be applicable in this forum notwithstanding that the rules of evidence obviously don't apply. The point we make is that a finding that the board is responsible for the deliberate  
25 concealment of matters relating to Suncity should only be based on cogent evidence, and we say there is none.

I won't take you to it - there is evidence - but I will give you the references, if I may. There is evidence of three of the non-executive directors being questioned  
30 about the 8 November 2021 written response to questions from you. The references are Mr Heap at page 3427; Dr Pitkin at pages 3616 to 3617; and Ms Lahey at page 3681. And neither Mr Sheppard nor Mr Bradley were questioned about the November 2021 response. But the thing to note about those responses is that they don't touch at all - I withdraw that. The questions and the responses don't  
35 touch at all on either any non-disclosure or Suncity or Salon 95; they're about entirely unrelated subject matters. So, I suppose, having referred to Briginshaw, in a sense it rather falls away. This is really a no evidence point rather than a no cogent evidence point.

40 The third point we make about this is we submit that it's not open to find that any of the non-executive directors are responsible for the deliberate concealment of matters relating to Suncity because that would involve a denial of procedural fairness. Now, that follows from the submission I've just put a moment ago. Now, I wish also - sorry, I withdraw that. In the circumstances, any non-executive  
45 director, or the non-executive directors collectively, cannot be found, in fairness,

to have responsibility for what you've put because, in fairness to them, that ought to have been put to them if it was to be pursued.

5 Can I also take that one step further. It's not so much a procedural - well, it's a procedural fairness point of a different kind. If you could go, please, to transcript 3638, line 9. There is actually some positive evidence which we say is relevant to this from Dr Pitkin. At line 9, she says:

10 "I'm not sure I completely understand the question, Mr Conde. The board has done and is doing a number of things, including ensuring full cooperation with this review."

15 Now, you may recall I took you to the 8 October directors' minutes and what was put in there about transparency and comprehensive cooperation. What one has here is something to a similar effect, sworn evidence from Dr Pitkin that the board is doing a number of things - sorry, has done and is doing a number of things, including ensuring full cooperation with this review. Now, she was not challenged on that evidence. The proposition that the board is responsible for the deliberate concealment of information to this review is squarely at odds with that evidence. 20 So it's, we say, one step removed from not putting the questions to the witnesses. There's actually positive evidence that goes the other way that wasn't challenged.

25 And so for all those reasons, we respectfully submit that the board - there's just no basis whatsoever for a finding that the board is responsible for any concealment, much less a deliberate concealment, of you. Unless I can help you with anything further, that's all I wish to put.

30 **MR BELL SC:** Yes. Thank you, Mr Henry. Ms Richardson, do you intend to make some submissions in response to those from the other parties with leave to appear?

35 **MS RICHARDSON SC:** No, I don't. There is an issue in relation to the matter that arose last week in relation to Mr Hawkins' evidence and the question asked by you, Mr Bell, as to whether there was a failure of The Star to correct matters before Commissioner Bergin. I don't want to go into it at length, but I did want to check that the oral evidence of Ms Skye Arnott before the Bergin Inquiry is an exhibit in this review. It's at exhibit L1, which is ILGA.001.001.0001. And there's a second tranche of her evidence, because she gave evidence on one day and then there was a break - and actually, Mr Hawkins gave his evidence in between the 40 two days of Ms Arnott's evidence - and then she came back and gave evidence on 6 August, and that is the separate exhibit, exhibit K2, which is ILGA.001.001.0246.

45 And the effect of that evidence - and in our written submissions, we will provide the exact T references to where that is - is that in her evidence, Ms Arnott disclosed - or gave evidence to Commissioner Bergin that after the service desk

Salon 95 at The Star commenced operating, that cash for chip transactions had been observed by staff at the Suncity service desk. Ms Arnott revealed that that matter had been brought to her attention. She accepted that that - this was in response to questioning from my learned friend Ms Sharp, that that was a matter of concern to her.

She gave evidence that steps were taken to investigate the matter, including by reviewing surveillance footage, and she gave evidence that she had reviewed surveillance footage. She gave evidence that The Star was not comfortable with those transactions taking place and that The Star developed protocols for Suncity to follow. And they, of course, are the specific Salon 95 standard operating procedures that are the exhibit - they are exhibit A526, and so on. So we will seek to expand upon that in our written submissions, that we say that you would resist an inference that there was a failure to correct matters before Commissioner Bergin because Ms Arnott had revealed all of those matters in her evidence before Commissioner Bergin. May it please the review.

Sorry, I do have some tenders. Well, sorry, I don't have tenders. I have an issue to raise. It's just - a letter went to solicitors assisting last night which was in relation to whether my learned friend would tender the part R exhibit bundle. So obviously it's not a matter for me, but I just bring that to attention as a final potential housekeeping matter.

**MR BELL SC:** Yes. What's the position in relation to that, Ms Sharp?

**MS SHARP SC:** Yes. There is a list of 19 numbered documents, which I will tender as exhibit R1 to R19. I do reserve the position, and will have something more to say about it in our submissions in reply, as to the weight to be provided to some of these documents, because there are certain documents that we would have examined the directors about had they been made available at an earlier point in time.

**MR BELL SC:** Yes. Thank you. All right. Mr Henry, Ms Richardson, Ms Sharp, is there anything else you wanted to say at the moment?

**MR HENRY SC:** Not for my part. Thank you.

**MS SHARP SC:** Not from me. Thank you, Mr Bell.

**MS RICHARDSON SC:** Not from me. Thank you.

**MR BELL SC:** All right. In those circumstances, I will now adjourn until Monday, the 28<sup>th</sup> of June for submissions in reply from counsel assisting.

**<THE HEARING ADJOURNED AT 11:16 AM UNTIL MONDAY, 27 JUNE 2022 AT 10 AM**