



NEW SOUTH WALES INDEPENDENT CASINO COMMISSION

**THE INQUIRY INTO THE STAR PTY LTD & THE STAR
ENTERTAINMENT GROUP LIMITED**

**PUBLIC HEARING
DAY 18**

MONDAY, 20 MAY 2024

INQUIRY BEFORE MR ADAM BELL SC

MR C. CONDE WITH MR D. HABASHY

**MR I. AHMED SC WITH MR P. HOLMES, MR D. WONG, MR H. ATKIN
AND MS E. FORSYTH FOR THE STAR PTY LTD AND THE STAR
ENTERTAINMENT GROUP LIMITED**

MR D. MCLURE SC FOR WITNESS RAV TOWNSEND

MR L. LIVINGSTON SC FOR WITNESS DAVID FOSTER

DR J. RENWICK SC WITH MS J. ROY FOR WITNESS ROBERT COOKE

MR L. GYLES SC FOR WITNESS NICHOLAS WEEKS

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<THE HEARING IN PUBLIC SESSION RESUMED AT 10.02 AM

MR BELL SC: Yes, Mr McLure.

5 **MR MCLURE SC:** Mr Bell, I wanted to just draw attention to some aspects of
our submissions which have not already been dealt with in The Star's submissions.
In saying this, you may have noticed from our written submissions that we have
sought to draw attention to some documents which I understand have not already
been received into evidence.

10

MR BELL SC: Yes, Mr McLure. I have read the written submissions and they do
include reference to a number of documents which, for various reasons, are not in
the Hearing Book. Ms Townsend is welcome to make whatever submissions she
chooses but I did want to make it clear that if reference is made to documents
15 which are not ultimately tendered and placed in the Hearing Book, in accordance
with the procedural directions, then they won't be taken into account. If they are
ultimately tendered, then I will need to consider what, if any, weight should be
given to those documents in circumstances where the legal representatives for
Ms Townsend chose not to ask her any questions when she gave evidence and
20 didn't otherwise deploy those documents whilst the evidence was being heard with
the result that those documents weren't put to other witnesses, including, of course,
Ms Townsend herself.

MR MCLURE SC: Yes. Well, could I deal, firstly, with the question of whether
25 the documents should be received. I read your procedural direction and my
interpretation of it is that it is a matter for Counsel Assisting and the Inquiry
whether or not they are to be received. But to the extent that we have a role in
asking the Inquiry to receive them, we do. Could I specifically identify the
documents which we ask the Inquiry to receive into evidence?

30

MR BELL SC: That will be a matter, at least in the first instance, for Counsel
Assisting to determine.

MR MCLURE SC: Yes. All right. Well, could I just - to the extent that this is
35 useful to Mr Conde, could I just identify from our written submissions the
paragraphs which refer to documents which, as we understand it, are not yet
presently in the Hearing Book. They are the documents referred to in paragraphs
11, 13, 17 and 19.

40 Could I start then at paragraph 11. By reference to that email exchange between
Mr Neilson, Ms Townsend and subsequently Mr Saunders, we submit that you
would find that, by no later than 15 August 2023, remembering that Ms Townsend
didn't commence her role at The Star until July of 2023, that she had turned her
mind to the problem which had already been identified by others, especially
45 Mr Saunders, that there was a growing problem with the size of the remediation
cohort against the deadline that had been set for completion of that remediation
task.

Where Mr Saunders said, in response to Ms Townsend's suggestion that these problems should be discussed with Mr Weeks - Mr Saunders asserts that Mr Weeks and the board were already aware of it and we submit you would find that at least part of the basis for that assertion was what occurred in the 2 August 2023 monthly update, the relevant extract of which we have set out at the top of page 3 of our written submissions.

At paragraphs 12 and 13 of our submissions we refer to the FCOC meeting. The aspect of this which we wanted to draw to attention was the document Financial Crime Remediation Backlog Update. As I said before, as we understand it, this is one of the documents which has not yet been received into the Hearing Book.

The reason we contend that document is very important to the Inquiry's assessment of what information had been communicated by The Star, but more pertinently involving Ms Townsend, is the statement made on the second page of that document that when the automated responses were going to be adopted by The Star, the consequence of that was that The Star intended to, as we have quoted, record the ECDD case to be complete.

At paragraph 14 we refer to the next monthly update to Liquor & Gaming New South Wales. One thing which you will have noticed about the three monthly updates that we have referred to in these submissions is they all follow a similar format in the sense that they each include a table at the end of the document setting out the numbers against each of the ICM3 steps that needed to be completed. But, relevantly, so far as the 1 September 2023 report is concerned, it noted that there had been a completion of the measure 5 of 31,376.

As we have said in the submissions, it was reasonable to expect that the reader of the 1 September 2023 monthly update would digest it with the knowledge of what had been communicated the day before at the FCOC meeting and in the remediation backlog update document, in particular.

At paragraph 16 we refer to Mr Weeks' letter to Mr Saunders and Ms Townsend. One of the findings we urge the Inquiry to make is that, by 8 September, the interactions up to that point had been sufficient to communicate to Mr Weeks and Liquor & Gaming New South Wales that The Star had adopted and modified ECDD approach for the remediation cohort. That contention is not tendentious because that is exactly what Mr Weeks says he had discerned from the monthly updates as he says in the opening sentences of the extract we have set out in paragraph 16 of our submissions.

At paragraph 17 we reproduce the email exchange between Mr Cooke, Mr Saunders, Ms Townsend and Ms Bhandari on 9 and 10 September when they were involved in preparing and settling the response to Mr Weeks' letter. A few things to say about that. Firstly, at subparagraph (a) of our submissions, paragraph

17, you can see Mr Weeks is telling Mr Cooke, Ms Townsend and Ms Bhandari that he had communicated this issue to Mr Weeks in conversations with him.

5 At paragraph 17(c) we record Mr Saunders' belief that this did not require, that is, the modified approach, did not require Mr Weeks' approval. That might have been contestable but, nevertheless, it was something that had been brought out in the open.

10 And then paragraph 17(d) shows, contrary to the criticism that's been levelled at Ms Townsend, she did inform herself of the change in method and how that was producing the asserted completion results. Furthermore, we submit you would find that it shows a conscientious and ethical sensitivity to Mr Weeks' need for information and the importance of ensuring that The Star was being collaborative with him.

15 At paragraph 18 we refer to the 15 September 2023 letter. I wonder if I could just ask that document to be shown. It is INQ.5001.0001.0191. If that could be taken down to page 0198, please. Our written submissions make reference to, looking at the fourth column, the remediation ECDD process, make reference to what
20 appears in the bottom half of the page, the mandatory note. But I just wanted to remind you of what appears in the top part of that column where it explicitly says that steps 5A to 4D were not being conducted and that The Star was moving directly to 5E.

25 So we submit that, on any view, what that document is communicating was that The Star was not doing the steps that it provided for in 5A and 5D and that all it was doing in relation to 5E was placing a note on customers SYNKROS record in relation to what would need to occur the next time they interacted with the casino. When I say "all they were doing", all they were doing in relation to measure 5.

30 Moving on, at paragraph 19 of our submissions we draw attention to the meeting of the FCOC in September of 2023. We have set out the passage from the minutes of that meeting which seem germane to this issue. I recognise there is some degree of ambiguity about who is said to have found that the business was complying
35 with the ICM requirements and exactly which aspect of the automation of the ECDD triggers was being discussed but, nevertheless, it is plain that these things were discussed in the presence of a representative of the manager.

40 At paragraph 20 we draw attention to Mr Crawford's letter to reiterate the point we made in writing. Plainly, what that document demonstrates is that The Star's position about all of this, as communicated, including in the letter of 15 September 2023, had been understood by Mr Crawford and Mr Weeks because they were expressing their lack of satisfaction with what The Star was proposing to do.

45 Then paragraph 21 is the monthly update which was the subject of the criticism of Ms Townsend. I will come to what we say about that just in a moment but can I say this much now: on its face, that document does not purport to be the first final

primary communication to Liquor & Gaming of the modified ECDD approach. You will note that it adopted the same format as at least the last two monthly updates. It was reasonable to think that any person who was curious about the numbers in each of the steps that are set out in the table at the end would understand that the rapid turnaround of tens of thousands of remediation customers was not because every one of them had been individually assessed but, rather, that The Star had done exactly as it said that it was going to and applied a bulk automated response to them.

10 What we have set out between paragraphs 22 and 26 of our submissions -

MR BELL SC: Just before you get to that, Mr McLure, I wanted to raise with you an issue that I had with the 30 September 2023 communications so that you have got an opportunity to address it. The 28 September 2023 letter from the regulator to Ms Townsend identified concerns held by the regulator that the manager was not promptly and properly consulted in relation to the changes to the ECDD process in respect of the remediation cohort. It reiterated that:

20 "Compliance with all regulatory requirements, including internal controls was critical."

And it granted an extension of time for the completion of the ECDD for the remediation cohort to 31 October. It is clearly a very serious communication from the regulator. In response, Ms Townsend acknowledges receipt of the NICC letter of 28 September, refers to initiatives that have been undertaken, including weekend work, overtime and surge resources to increase total product output, allowing the company to bring the remediation plan back within the scheduled contingency.

30 It then says that the remediation cohort has been completed but there is no indication in this letter that acknowledges or cavils with the NICC's very serious concerns about the process. Why wouldn't a proper inference from this communication be that the reader should assume that the ECDD had been completed in such a way as to address the NICC's concerns?

35 **MR MCLURE SC:** Well, two reasons: firstly, could I ask that Mr Crawford's letter, which is INQ.5001.0001.0188, be displayed. Looking at the fourth paragraph, what Mr Crawford is communicating, especially in the last two lines, is that the NICC was reserving its position in relation to The Star's actions. So the only - or at least the most reasonable interpretation of what Mr Crawford was saying was he and/or Mr Weeks had digested what The Star was saying they were going to do in the 15 September letter and had not at that point decided to reject that as proper satisfaction of the ECDD process but, rather, they were maintaining that issue under consideration. And then two days later, then Ms Townsend sends the next monthly update report and there is nothing in the monthly update report to suggest that what The Star was warranting to Liquor & Gaming or to Mr Weeks or to Mr Crawford was that, in view of the 28 September letter, they had decided to

depart from the modified process that was set out in the 15 September letter and adopt the business as usual process for all customers.

5 That the reader of the 30 September letter could not have interpreted that to mean, as I said, that The Star had decided to reverse course and adopt the business as usual process contrary to what they said they were going to do in the 15 September letter.

10 **MR BELL SC:** Except that Ms Townsend referred to all of the these initiatives, including weekend work, overtime and surge resources when, as I understand it, all that happened in relation to the 22,000 customers within the cohort was that if an email address was held it was sent to the customer saying that the next time they gained entry to the casino they would be required to provide a source of wealth check how is that consistent with all of this weekend work, overtime and surge resources?
15

MR MCLURE SC: Yes, that's correct, as you said, in relation to the source of wealth step. But that's not a complete statement of all of the work that was being done in relation to all of the ECDD cohort. Indeed, as you can see from, if one looks at the earlier monthly update report, a large number, like in the hundreds of the ECDD cohort, had been elevated for management consideration. So the assertions about weekend work and so on are cable of being understood as being referable to tasks other than just the measure 5 source of wealth step.
20

25 **MR BELL SC:** Yes. You go on, Mr McLure.

MR MCLURE SC: We have drawn attention in paragraphs 22 through to 26 of steps that were taken after the 30 September 2023 monthly update. We draw attention to those matters only to make it clear that, by reason of the communications preceding up to and including 30 September 2023 report, this issue had been brought out into the open. In no sense could it be said that Ms Townsend had been a party to a concealment of what it is that The Star was saying it was doing and was going to do in relation to the modified ECDD process for the remediation cohort.
30

35 So the points we wanted to make about those matters are that, firstly, consideration of what the 30 September update was communicating and whether or not it was adequate depends on viewing its purpose and the surrounding communications. It was not the communication of the modified approach. The communication of the modified approach were the things that started in June, included what had occurred at the FCOC meeting in August and then, most relevantly, was set out explicitly in the 15 September report - letter, rather.
40

45 So far as Ms Townsend's individual conduct is concerned, we submit you would find there is ample evidence of diligence on her part, in particular, the remediation backlog report prepared for the 31 August FCOC meeting and her advice to Mr Cooke and Mr Saunders on 10 September that the response to Mr Weeks' 8

September letter needed to properly explain the modifications to the process so that he, Mr Weeks, and Liquor & Gaming, could understand how it was that The Star was getting through the backlog so quickly. But if, against all of that, the Inquiry was minded to find that the monthly updates should have included the same level of detail as the remediation backlog update and the 15 September response to Mr Weeks, we submit that would not justify you making the professionally damaging finding that she is someone who lacked diligence and candour because in reality what that demonstrates is at best an error of judgment about whether or not the 30 September report was something which could be read in the context of the other communications which had occurred in the weeks preceding it.

Our submission is you could make comprehensive findings about the real issue here, which is whether or not there has been a breach of ICM3 without making any finding about Ms Townsend's competence, diligence or candour.

The last thing I wanted to say is just to pick up the point you made at the beginning, Mr Bell, about what weight you should attach to these matters in circumstance where they weren't addressed when Ms Townsend gave evidence. That's something which we will need to address by a short supplementary statement from Ms Townsend to explain the circumstances in which she gave her evidence. We will submit that to the Inquiry recognising where you are in the process and I understand you will decide whether or not that's something you are prepared to accept but, nevertheless, that will need to be addressed in a statement.

MR BELL SC: Well, on that issue, the evidence has concluded, and you would be aware that we are operating under extreme time pressures here, so if you wanted to make an application to lead further evidence, that's what it would have to be, an application. But it would - I will say no more about it. You will need to make an application in due course.

MR MCLURE SC: Yes. We will do that.

MR BELL SC: The other point I wanted to ask you about is in paragraph 31 of your submissions you say that Ms Townsend's concession that the 30 September 2023 monthly update was capable of being misleading should also be rejected. Just to be clear, are you asking me not to accept your client's own evidence?

MR MCLURE SC: Yes. I'm asking you to not accept the concessions that she made to questions that were put to her that the 30 September monthly update was misleading because it did not disclose that the sources of wealth and transaction analysis checks had not been undertaken in accordance with the business as usual process. You would not accept that evidence, we submit, because it was plainly incorrect on the basis that those matters had been communicated most recently in the 15 September letter.

MR BELL SC: Yes. Thank you, Mr McLure.

MR MCLURE SC: Thank you, nothing further.

5 **MR BELL SC:** Mr Livingston, you are making submissions on behalf of Mr Foster, are you?

MR LIVINGSTON SC: I am. May it please the Inquiry.

10 **MR BELL SC:** I would like to take a short adjournment. I have been sent the submissions but I haven't had any chance to read them. I would just like to have a chance to skim them. Perhaps we might adjourn for 10 minutes.

MR LIVINGSTON SC: Of course.

15 **<THE HEARING ADJOURNED AT 10.28 AM**

<THE HEARING RESUMED AT 10.36 AM

20 **MR BELL SC:** Yes, Mr Livingston.

MR LIVINGSTON SC: Mr Bell, I propose to begin with three important matters of context before turning to take you through our written submissions. As you may have already seen, our central point is that the Inquiry need not, and should not, make any finding to the effect that Mr Foster personally was a "barrier to suitability." That is the submission Counsel Assisting urges upon you in their written closing at paragraphs 356 and 358. We say that submission should be rejected.

30 The first of our three points is simply that the Inquiry need not make any such finding. No part of the Inquiry's Terms of Reference require it to assess the suitability of Mr Foster per se. Obviously any findings or observations about Mr Foster could only be pertinent if necessary to assess suitability of The Star entities.

35 The Inquiry's task is to assess, at the time of the Inquiry's report, the then-present and prospective future suitability of The Star entities and we say the evidence is quite plain that, by that time, Mr Foster will have exited.

40 Ms Ward gave some evidence on this topic which was quite clear. I don't need to take your Honour to the transcript but it is day 9 at transcript page 683 and 684 and, in a nutshell, Ms Ward said that Mr Foster's present position as an Executive Director of Star Entertainment is an interim arrangement only and is to be in place only until a permanent CEO is appointed. She said that she expected this to be around six to eight weeks. That was evidence given three weeks ago. Counsel Assisting refer to that evidence in their written submissions at paragraph 280. The Star entity's written closing submissions also refer to the same evidence and confirm in paragraph 9, footnote 6 that Star Entertainment:

"Expects to appoint a replacement CEO in a matter of weeks, after which Mr Foster will depart from both his role as director and interim executive."

5 So it's in that context that we say that there is little, if any, relevance to The Star entity's present and future prospective suitability assessed as at the time of the Inquiry's report to dwell upon what was or was not Mr Foster's state of mind or private motivation in, for example, December 2023 or January 2024.

10 Our second point by way of introduction is that the Inquiry should not make any finding in terms that Mr Foster is or was a "barrier to suitability." We say the Inquiry should be slow to make serious adverse findings against individuals unless strictly necessary to do so for the purpose of addressing the Terms of Reference at the time of the Inquiry's assessment is delivered.

15 **MR BELL SC:** Mr Livingston, have you read what I said about that issue in the 2022 report?

MR LIVINGSTON SC: I must confess I have not, Mr Bell. No.

20 **MR BELL SC:** I did consider that issue of collateral damage to reputation and the need to avoid it unless it was essential. You can take it that I will be taking the same approach this time as well.

25 **MR LIVINGSTON SC:** Yes, of course. Thank you, Mr Bell. It has a particular force, we say, in this context, where the submissions that Counsel Assisting are advancing a certain individual who will be gone from the organisation at the time the report is provided.

30 **MR BELL SC:** That said. And whilst - that said, I do have to, don't I, consider the question of suitability of The Star entities by reference to all that's occurred since the first report, bearing in mind my Terms of Reference to look at that whole period. Would you accept that?

35 **MR LIVINGSTON SC:** Yes, we do accept that. We don't take issue with that as a general approach. Certainly that's what the Terms of Reference require. Our point is really that there is little to be gained from naming individuals as barriers to suitability and that's a label, really, that carries with it a particular form of risk of harm to reputation and to career which is different from submissions that are made
40 about matters of fact. So a submission that somebody - a named individual is a "barrier to suitability" is a conclusion, it's a label, it is not a finding of primary fact or intermediate fact, and it carries with it a particular risk that it may be
45 at all or in any sector and that, of course, would include financial services where statutory and regulatory standards of fitness, propriety and suitability are commonplace.

5 So for this Inquiry to name a specific individual as being a "barrier to suitability"
would be redolent of a judgment as to whether that person is a fit and proper
person or any number of roles, roles or positions, well beyond the purview of this
Inquiry. As I say, the concept of a barrier to suitability, when applied to an
individual, is a measure for that is of little assistance. It raises more questions than
it answers. It lacks precision and it lacks any clear factual content and certainly
that's why we say it carries with it a grave risk of being readily misunderstood,
including misunderstood in a way that may occasion serious harm to the personal
and professional standing of the individual concerned. But it also necessarily
involves a great degree of oversimplification.

15 We say it is a beguiling but misleading simplicity to suggest that a single person,
even a Chair of the Board of Directors, is himself or herself personally a barrier to
suitability. That's a mode of analysis that, with great respect, reduces a complex
parts-moving and messy reality into a simple but unfair shorthand slogan and
that's especially so with the findings relating to Mr Foster. (Inaudible) sought that
he personally is a barrier to suitability. In large part, it does seem to rest upon
contestable and contested interpretations of a few words in private text messages
sent in the heat of the moment. And when one looks carefully at the way the
Counsel Assisting submissions seek to characterise Mr Foster personally as a
barrier to suitability, one sees that at the heart of it is an invitation to speculate on
Mr Foster's private thoughts. Not to look at the whole of his record as a director of
Star Entertainment from December 2022 onwards or the whole of his record as
Chair from March 2023 to April 2024. It's a grave finding of thought largely
founded on a subjective state of mind or attitude or mindset, as Counsel Assisting
put it, rather than on objective events and objective conduct and it is there that we
say that the risk of injustice arises.

30 The way Counsel Assisting put it at paragraph 177 of their written submissions is
to attribute to Mr Foster certain states of minds. They label it as suspicion, as fear
and defiance. That is, his mindset, his alleged attitude to the regulator and to the
manager. We simply say that a soundly-based factual analysis that is measured
and balanced would focus instead on objective conduct assessed in its proper
context.

40 Our third point by way of introduction, Mr Bell, is that the asserted factual
foundation for Counsel Assisting's invitation that Mr Foster be found to be a
barrier to suitability is unsafe. There is a real risk that the Inquiry's fact-finding
would miscarry if it were to rely on selective quoting, out of context, of isolated
words and phrases in private text messages between Mr Foster and Mr Cooke. A
really quite distorting picture emerges if fragmented those messages are read in
isolation and without regard to their fuller context. And in our written
submissions, it's that fuller context that we sought to address. We suggest that
45 wider context indicates that the isolated text messages should not be given the
outsized importance that Counsel Assisting's submissions attach to them.

If I may take Mr Bell briefly through the written submissions as a basis to develop some of the points that are there made. We commence in the early part, particularly paragraphs 7 to 13, with a fuller picture of Mr Foster's professional background and his motivations for joining Star and for putting himself forward in the positions that he has held there. In paragraph 14 we have set out a very brief summary of the work done by Mr Foster towards regaining suitability since becoming Executive Chairman on 22 March 2024. I won't read that out to you, Mr Bell. You will see the description there appears.

10 Next we turn to the remediation plan. In particular, paragraph 16 is an overview of the chronology, the objective chronology relating to the drafting of that remediation plan in August 2022 prior to Mr Foster taking up his position on the board in December 2022. And as we have recorded there, the drafting of that plan was put on hold in October 2022 following communications by the manager
15 requiring Star Entertainment to prioritise five initial workstreams, which we have then summarised.

As we say, towards the end of paragraph 16, as at 4 September 2023, the manager had identified that it would not be an easy task to engage the various external
20 small to medium enterprises to quickly lift the organisational readiness culture streams, et cetera. So it indicates objectively that there were delays to finalising the remediation plan which were unrelated to the actions or the attitude of any individual.

25 There is then a description in paragraphs 17 and 18, paragraph 18 in particular, of the various workshops led by Deloitte and by the Ethnic Centre from May 2023, which had benefits, no doubt, but they did delay the preparation of the remediation plan which was not able to be finalised until October 2023. As we say in paragraph 19, the manager's report, as at 3 October 2023, noted that if the
30 remediation plan was implemented it was likely to achieve remediation of the management and operations of Star Entertainment.

In paragraph 20 we have given a brief overview of the critical business challenges that the board was facing in 2023 which required significant management
35 attention. They included the proposed NSW Government casino tax changes and the need for two capital raisings. But notwithstanding those urgent pressures, material remedial steps were being taken, including the ones that we have briefly summarised in paragraph 20.

40 Our short point really is that even if the court - I'm sorry, if the Inquiry were to accede to Counsel Assisting's submission that the text messages or emails manifest hostility toward the regulator, which we deny, nonetheless, that did not, in any event, impact the course of The Star entity's road to suitability.

45 Mr Bell, we then turn to paragraphs 21 to 25, The Star's response to the manager's reports, and I will return to that topic shortly when we come to the detail later in the submissions.

Can I turn to the text messages and emails which are at the centre of the criticism advanced by Counsel Assisting to Mr Foster? In paragraph 26 of the submissions we set out what we say is the context for understanding those messages and from paragraph 27 we make the point that these were shorthand and poorly expressed comments that reflected the rapid-fire nature in which they were typed and sent occurring at a time of immense pressure on Mr Foster.

We say that they did not impact on his professionalism and his continued desire to assist Star in its advancement and compliance with the NICC. If one steps back and looks at the evidence as a whole, one sees isolated, occasional private expressions of frustration exchanged between Mr Foster and Mr Cooke but one must balance that against an objective record of a respectful and constructive relationship between manager, the NICC, and Mr Foster.

From paragraph 29 we deal with the contention by reference to one of the text messages that Mr Foster advocated to abolish the NICC. It is important, we say, to understand what Mr Foster said about that message in particular, because it does seem to cover all that follows in Counsel Assisting's submission. Can I take you, please, to the transcript of day 7. This is page 483. If one has page 483 of the transcript, one sees from line 30 in particular it was put to Mr Foster that:

"Privately you wanted to abolish the NICC, didn't you."

Mr Foster's response was to say that having read a number of texts out of context:

"...and in the heat of the moment I did make some comments but I'm happy to explain."

And Counsel Assisting then, at the bottom of that page, put to him again that:

"It's correct, isn't it, that you wanted to abolish the NICC?"

The response at the top of the next page is important. It is at the top of page 484. Mr Foster said:

"Well, in that particular context - and I have had this conversation with Mr Crawford directly - it was in the context of an uneven playing field that existed and still does exist in New South Wales relative to the casinos to the clubs."

He went on then to refer to subsequent conversations with Mr Crawford in which he, Mr Foster, had suggested a good outcome would be for the commission:

"Under a different name possibly would oversee the club operations as well as the casino's to ensure an even playing field."

And that's the central concern that he was seeking to convey in this part of the oral evidence. Not that there was a desire on Mr Foster's part to abolish the NICC, but rather, for there to be a new and different regulator with a broader scope, be it the NICC, be it a different regulator under a different name but, nonetheless, the
5 concern and his central interest was, as a matter of policy, whether it might not be better for the industry for there to be a regulator with a broader regulatory scope.

When Counsel Assisting sought to take Mr Foster back to the words used in the text message, at line 15 on the same page, Mr Foster very candidly admitted that
10 those were the words used in that particular text but he went on to say at line 20:

"In the heat of the moment that was a comment made but, as I explained, the outcome was around achieving a level playing field."

15 And Mr Foster explained that in a little more detail on the next page in the transcript, page 485, commencing at line 14 where he referred to:

"To facilitate regulation of the broader audience, the scope or structure of it would need to change."

20 He was asked:

"Were you suggesting you did not think the NICC was independent."

25 His answer:

"No, quite the opposite, that it was an independent organisation targeting casinos only as opposed to the broader sector that I raised earlier."

30 Now, what then occurred in the examination particularly from line 40 on this page is that Counsel Assisting put to Mr Foster that there is a:

"Pretty big difference between public statements about working collaboratively with the regulator and private statements about abolishing that
35 regulator?"

And the answer was:

40 "Yes."

This is a topic that we take up in a little detail in our written submissions in paragraphs 33 and 34. But our short point is that Mr Foster had already plainly rejected the premise of this question. That is, he was rejecting the premise that he had sent private statements about abolishing the regulator because he had
45 explained that when he used that poorly chosen word he was referring to a new and broader regulator, a broader scope, in place of the NICC under that name or a

different name. Poorly expressed certainly, but he was not privately making statements about abolishing the regulator.

5 So his acceptance that there is a big difference between public statements about working collaboratively with the regulator on the one hand and on the other hand private statements about abolishing that regulator was a hypothetical answer to a hypothetical scenario because he had rejected that that was an apt description of his messages. He was answering what he must have understood and did understand to be a hypothetical question.

10 And that does become clear, with respect, when one follows through the questions and answers on the next page, that's page 486, where he said at the top of that page:

15 "Again, the understanding is that we needed one regulator covering the clubs and the casinos."

That was the objective. He says at lines 8 to 10:

20 "My words were poorly chosen, provided in the heat of the moment. They did not properly reflect the point I was trying to make."

25 At line 19, it was put to him, more directly and more precisely, that it would be a challenge for a Chair of a company to work cooperatively with the regulator if, in private, the Chair is considering a need to abolish that regulator. And Mr Foster directly rejected that proposition. He said:

30 "No, because, as I mentioned, these were comments made in the heat of the moment which didn't clearly articulate the purpose of the discussion and at all times my interaction and approach has been constructive, transparent and engaged."

35 And a little further down, line 32, he refers to discussions he had had with the Chairman of the NICC:

"That we would ideally like to see this scope broadened beyond just the casinos to cater for the whole of the casinos and the major club."

40 And he says at line 40 and 41:

"It was around a desire to broaden the scope of the regulation of the industry."

45 It was put to him:

"But you wanted to abolish it."

He said, no:

"Poorly words used and the option which was a better one was to extend the scope of the NICC, which I discussed with Mr Crawford."

5

We say that, in fact, is evidence of a direct constructive relationship on a personal level between Mr Foster and the Chair of the NICC. Why? Because he was having direct discussions with Mr Crawford about the policy options for future regulation of this industry. And we say that is how the evidence ought to be understood.

10

If we can then turn to a topic we address in paragraph 38 of the written submissions. This concerns the manager's reports and Star Entertainment's response. As we say in paragraph 38, the response of 23 January 2024, which has been the subject of much attention in this Inquiry, does need to be understood in the context of the earlier correspondence from Mr Foster to the NICC. The response of 23 January 2024 itself makes express reference to the letter dated 22 December 2023 and we say that the context of reading both letters together is important when assessing the tone and substance of the response provided.

15

20 Can I ask the operator, please, to call up a copy of the 22 December 2023 letter. It is document STA.8100.0065.9422. And you will see that it is a letter from Mr Foster as Chairman to Mr Crawford, Chief Commissioner of the NICC. That commences in its first paragraph referring to the various meetings that had been held between the NICC and members of the board on the dates that are there identified. It goes on to say:

25

"The board has reflected deeply on the correspondence reports and the frank discussions we have had."

30 In the next paragraph in refers to the board's disappointment which had been expressed to the NICC in the 7 December and 18 December meetings, that the NICC chose to share a number of concerns with the media:

35

"Prior to giving us adequate opportunity to respond to your letter and concerns."

And the next paragraph there is an expression of:

40

"Disappointment that the NICC has chosen not to approve or endorse the Remediation Plan."

There is reference then to working with Mr Weeks through five iterations of the plan:

45

"On the understanding we were working toward approval by the NICC."

What the letter then turns to do is to set out an outline of the streams that the company was focussing on. They are set out, commencing at the bottom of that page. Number 1 is People. Over the following page, number 2 is Remediation Plan. And in part 2, in subparagraph (b), Mr Foster observed that:

5

"The manager has raised a desire to ensure as many remediation milestones are delivered and assured to demonstrate strong traction with the remediation plan."

10 Goes on to say:

"We support this objective and have requested that KPMG work through their stand down period to assist."

15 And so on. There is reference then in Part 3 to Organisational Strategy, Part 4, to Culture Program. That includes, at the top of the third and final page of the letter, bullet point A, that:

20

"The NICC and Mr Weeks have both indicated they believe cultural change is proceeding too slowly and the legacy mindsets and shadow values remain in the company."

25 Mr Foster goes on to note that morale in the business remains challenged. He refers to recent media articles that had exacerbated this pressure, particularly in Sydney. He says he has:

30

"...raised his concerns regarding psychosocial safety with Mr Weeks earlier this week and will be writing to him today providing details of this, the support the organisation is providing to staff and asking for his assistance in the way his team engages with the organisation."

35

Then, Part 5 deals with Risk Management, Part 6, Contingency Planning and Part 7 Governance. And the letter ends with a note of perhaps optimism. It says, in the third to last paragraph:

40

"We are currently a board whose average tenure is well under 12 months. We are deeply engaged in the oversight of the remediation and viability of the entity and during 2023 have held over 120 board and committee meetings and workshops."

And there is reference then to a desire to succeed and to provide a further update in the New Year.

45

Now, this is, we say, an example, an objective example, of an open, transparent and constructive relationship. These are not the words of a man who is a barrier to suitability. Of course, there were points of difference and disagreements and

concerns. Nonetheless, it was a constructive relationship at a personal level between Mr Foster and the Chairman, the Chief Commissioner of the NICC.

5 May I turn then to a slightly different angle on the same topic. That's the matter we deal with in paragraph 39 in the written submissions. This really concerns the formulation of The Star's response to the manager's reports. Our short point really is that this was a board-owned response. This was a whole-of-board response. Mr Foster and Mr Cooke were not acting on a frolic of their own. What we sought to do in paragraph 39 is to draw together the threads from Ms Ward's oral
10 evidence where she was very carefully taken through aspects of the draft response letter on which she had commented and Ms Ward admitted that her responses indicated disagreement with the manager's report.

15 She stated that it was important from her perspective to respond fulsomely and to call out disagreements and areas of agreement. She agreed that she thought it was important to ask the manager for examples and evidence of some of the areas in respect of which she had indicated the board should disagree with the manager's report and she was taken to numerous topics of that kind where she had indicated that examples and evidence should be asked from the manager.

20 When one looks at Ms Ward's evidence in those pages of the transcript that we have referenced in paragraph 39, we do say that it cannot fairly be found that Mr Foster and Mr Cooke were the only authors of the response, nor that they dictated the language or tone in that response. And, indeed, Ms Ward
25 acknowledged that the response included language provided by her which the submissions for Counsel Assisting describe as containing terms of art in public law.

30 Of course, it is not surprising that a board, in a highly regulated industry, would have areas of disagreement with the regulator and its appointee. Certainly, senior executives and board members have competing business priorities and imperatives. An honest and cooperative relationship with the regulator does not entail or require complete agreement with everything said or done to or by the regulator or its appointee.

35 There will be occasions where a company's obligations to its shareholders, to its staff or to other stakeholders may illegitimately temper the way the company, within the confines of the law and the regulatory regime, may engage with the regulator. And an example, consistent with Ms Ward's evidence, is correcting the
40 record when a report is provided to a regulator that the board considers is inaccurate or is incomplete. In that context, we say that advocating for the interest of the company by setting the record straight is perfectly appropriate.

45 Now, of course, the choice of language and the tone may fall within a range or spectrum within which reasonable minds can differ. That's especially for a company facing multiple difficult challenges within a tightly regulated industry. Mr Foster accepted in his evidence that, with the benefit of hindsight, the language

and the tone of the response to the manager should have been different but that does not justify a finding that Mr Foster individually had a suspicious, fearful or defiant frame of mind toward the regulator or that he personally was a barrier to an open and constructive relationship with the regulator.

5

Mr Bell, we then turn, in paragraph 40 of the submissions, to the email in which Mr Foster said:

"If done right, could be a catalyst to get rid of Weeks."

10

And the point we make there is that Counsel Assisting addressed Mr Foster that he had suggested to Mr Cooke in private of a catalyst to get rid of Mr Weeks. But, again, it is important to see the context that was provided by Mr Foster's oral evidence.

15

We have set out the pertinent parts of the transcript in paragraphs 40, 41 and 42 and the nub of it is really in paragraph 42, in the passage from the transcript extracted there, where Mr Foster said that the context was the:

20

"Complexity in the different roles that Mr Weeks undertook between his manager role and close focus in New South Wales, which certainly is an important role but a very different model within Queensland, which caused some complexity at times."

25

He went on to explain:

"The discussion was more around that it would be a simpler model to have Mr Weeks focused on New South Wales and one of his team as the lead in Brisbane."

30

That is what Mr Foster was seeking to convey. Now, he candidly accepted that the phrase "get rid of" was a poorly-worded thing to say but the substance of what he was trying to convey was that a different structure to simplify the regulatory remediation efforts, that was what he was communicating, and when it's seen in that context the evidence does not support a finding of a suspicious, fearful or defiant mindset to the regulator.

35

Next is the text message referring to "war". We deal with that in paragraph 44. The terms of the message itself are significant. We have quoted in paragraph 44:

40

"They are prepping for war we better do the same."

So the message was responsive in nature. It was not an unprovoked or self-initiated antagonism or aggression or defiance. It was Mr Foster responding in the moment to what Mr Foster perceived to be a threat to the company. He was saying that "they", that is, the NICC or the manager, are preparing for war. We, the company, better be ready to respond.

45

Now, just pausing there, that itself is not an unnatural reaction as a Chair of a public company with duties to the company as a whole when your company is the subject of a perceived significant threat.

5

Now, how did he form that perception? We have tried to summarise the evidence in paragraphs 45, 46 and 47 as to how Mr Foster formed the perception that the NICC or the manager were preparing for war and it had to do, as we say in paragraph 45, with the calendar invite that he received for the meeting. He happened to receive it because it was scheduled to take place in the boardroom directly next-door to his office in circumstances where no meeting had been scheduled there and where the manager was using a separate physical office location.

10

15

The starting point is it was most unusual for meetings to be called in that boardroom for which Mr Foster was not aware and, indeed, which he was not a participant. So, as we summarised in paragraph 46, his curiosity having been peaked, he Googled the names of the attendees. He discovered that two litigators from law firms, that did not represent Star Entertainment, were meeting with the manager. And he then sought some clarification from Mr Cooke, who, in turn, sought information from The Star's external lawyers. They advised that it was likely just a meeting to discuss a response to The Star's letter and following which no further action was taken.

20

25

Now, in hindsight, Mr Foster's perception formed in the moment that this was an act of war or the NICC and the manager were prepping for war, may very well had been an entirely mistaken perception and almost certainly was formed too quickly. But what matters is that it went nowhere. It was a fleeting reaction to a perception of reality that was quickly corrected. Mr Foster did not cause The Star entities to engage litigators or to take any other "war-like" step in response.

30

Next are the messages referring to a "class action." We have dealt with those in paragraphs 49 and 50 in particular. The short point is that when Mr Foster sent a text message referring to a class action, what he was doing was seeking to understand what a potential shareholder class action might look like. Not that he was seeking to procure one or to illicit one or to form one.

35

MR BELL SC: Mr Livingston, in paragraph 48, you quote Mr Foster's text:

40

"Another angle is establishing grounds, if possible, for a class action from shareholders against Nick Weeks and/or NICC."

Can you just remind me, what was the first angle that Mr Foster had suggested?

45

MR LIVINGSTON SC: Yes. Yes. I'm not sure I have the answer to that at my fingertips. The particular page with that reference to another angle appears is

STA.8890.0001.0102_0002. It is perhaps not of much assistance because it is displayed in a way that is not put in the context of the earlier message.

MR BELL SC: Yes. Thank you, Mr Livingston.

5

MR LIVINGSTON SC: The way we put it is that this was a kind of thought bubble by Mr Foster where he was shooting off fast messages to Mr Cooke talking about matters that were concerning him and the concern that this reflected was a concern that shareholders of Star Entertainment might somehow be able to launch a class action against Mr Weeks or the NICC.

10

MR BELL SC: Was the first angle prospect of suing Mr Weeks for acting in bad faith?

15

MR LIVINGSTON SC: That was never a proposal that Mr Foster put. There is material. I will be coming to the good faith material next. That was messages that occurred around this time.

MR BELL SC: Yes.

20

MR LIVINGSTON SC: Our short point is that that was not a proposal by Mr Weeks to sue - sorry, by Mr Foster to sue Mr Weeks. But I will come to that in a moment. Certainly those messages were roughly contemporaneous with this one.

25

MR BELL SC: Yes.

MR LIVINGSTON SC: The significance - and we develop this point in paragraph 50 of the written submissions - your Honour - I'm sorry, Mr Bell, you will have seen reference in the letter in December 2023 to which I took you earlier from Mr Foster to Mr Crawford, concerns about media attention, including statements in the media relating to regulatory oversight and Mr Foster explained that numerous shareholders had expressed to him that they were concerned that their investments were suffering as a result of those public statements.

30

35

So what Mr Foster explained in his evidence, as we have summarised in paragraph 50, what he was seeking to do was to identify the risks that could be faced by Star Entertainment, Mr Weeks, or the NICC, arising out of the shareholder concerns that had been raised with Mr Foster. It was in that context that Mr Foster, who obviously is not a lawyer, had a thought about whether shareholders could file a class action of some sort. But that was all it was. It was a thought bubble. And he had moved on and Mr Foster quickly accepted in examination that it was a bizarre idea.

40

45

Then perhaps segueing back to the matter you raised with me a moment ago, Mr Bell, the questions about the good faith limitation on the manager's indemnity, that's the topic that we take up at paragraphs 52 through to 54, and it is important to be quite clear, we say, about what was going on here. There was a message sent

by Mr Foster to Mr Cooke extracting the indemnity clause in the manager's Instrument of Appointment and, as explained in paragraph 53, that indemnity was retrieved by Mr Foster from the ASX announcement. And I should take you to the evidence that Mr Foster gave about this. It is transcript page 494. If one has page 5 494 and moves through to line 5, Mr Conde said at line 5 that he is happy to:

"Explain the context of the issue with the indemnity."

10 And the explanation that he gave then commences on that page at line 19. Mr Foster said at line 19 that:

"That related to an issue around workplace health and safety issues which emerged, I think, it was around mid-December."

15 And that's consistent with the letter that I took you to a moment ago. And Mr Foster continued:

20 "And a topic that I had raised with Mr Weeks in one of our regular catch-ups, which was then followed by details that I provided in writing, regarding an emerging issue that we had with complaints relating to psychosocial safety from a number of our employees with interactions with one of Mr Weeks' team. That was discussed at a number of times with the board and there was concern expressed at the board given the personal liability around psychosocial safety for directors."

25 Just pausing there, that was the concern about liability at board level. There might be some potential liability on the part of the directors or conduct or alleged conduct by members of Mr Weeks' team that was adversely affecting staff of the company.

30 Mr Foster went on, at line 27. The question was asked around whether or not, given the employee concern was in the manager's office, whether that was covered under Mr Weeks indemnity:

35 "That was a topic that I didn't pursue other than I had not seen Mr Weeks' indemnity, which I had looked at in this case."

40 So it is in that context we say that one is to understand the message in which Mr Foster retrieved the terms of the indemnity and forwarded it to Mr Cooke. There was concern, as we say, in paragraph 53, that action might be brought by employees who alleged they had been allegedly impacted by a person on Mr Weeks' team. That those employees might bring a claim against The Star.

45 Then, in paragraph 54, we refer to the subsequent email which Mr Foster sent to Mr Cooke with the text "Good Faith?". And again we say with reference to the transcript that we have referenced in paragraph 54 that Mr Foster denied that he had given consideration to a claim against the manager for an alleged lack of good

faith. He explains the circumstances of that particular message in the transcript that we have cited in paragraph 54.

5 It was not some sustained attempt to investigate a claim against Mr Weeks personally for lack of good faith. It was, rather, concern that emerged in the way that we have described. Mr Bell, may I turn then to the question of Mr Cooke's exit statement and the role of the board in relation to that exit statement?

10 **MR BELL SC:** Yes.

10 **MR LIVINGSTON SC:** We deal with that topic in paragraph 55 and, as we say in paragraph 56, that exit statement had been originally prepared as an ASX release and it was eventually negotiated down to be an internal release, that is, a personal message from Mr Cooke to Star, and we have referred, in paragraph 57 to 15 the 21 March 2024 board minutes. The draft of those board minutes which we have quoted contained a little more detail than the final version of the minutes. The draft minutes recorded that the directors had provided some feedback on the draft statement and that the board discussed status of that statement which the Chairman noted had been reviewed by King & Wood Mallesons.

20 Mr Foster had also run the exit statement past Star Entertainment's media advisor and, as we say in paragraph 57, the final form of the minutes of that meeting reflected the discussion to the effect that there was a preference not to publish the document but there was ultimately acceptance, perhaps reluctant acceptance, that 25 it was not a decision for the board to make.

The quote really is it cannot fairly be found in this context that Mr Foster was the only person who played a role in the negotiation and agreement of Mr Cooke's exit statement. No adverse finding should be made regarding him, with respect.

30 Finally, we deal in the written submissions more generally with what the evidence reveals concerning Mr Foster's relationship with the NICC and the manager. We take that up in paragraph 60 and we make the point that it was Mr Foster's practice proactively to seek meetings with Mr Weeks. Paragraph 62, we refer to Mr Weeks' 35 own statement in his status update to the NICC on 15 June 2023 where Mr Weeks wrote:

40 "Based on our observations, the level of board engagement and inquiry has improved under the leadership of the new Chair."

In paragraph 63, we summarise the collaborative work performed by Mr Foster and Mr Weeks on a number of matters, including the scope and composition of the Compliance Committees for individual properties, which took place over several months from mid to late 2023. Those discussions resulted in modifications made to 45 cater for Mr Weeks' advice which were then taken by Mr Weeks to engage with regulators.

5 In paragraph 65, we refer to Mr Weeks' own evidence before this Inquiry that he and Mr Foster had constructive conversations regarding what Star Entertainment needed to prioritise on its pathway to suitability. We also call on the evidence of Mr Arzadon, paragraph 66, to the effect that, at the time Mr Foster transitioned into the role of Executive Chairman, he reached out to engage with Mr Weeks' team to understand their feedback and his transition into the role resulted in some shifts in the organisation's approach to certain issues, including increased openness to stakeholder feedback.

10 Those, we say, ultimately, are better guides for the Inquiry as to the nature of Mr Foster's constructive open relationship with the manager and the NICC than seeking to discern meaning from a few words or phrases in off-hand messages sent in the heat of the moment.

15 As we say in paragraph 67, those were messages that were made in private to Mr Cooke with whom Mr Foster could share frustrations, much like in any working environment, but without any such frustrations impacting Mr Foster's professional duties, actions and interactions with the regulator and it's really consistent with ordinary human experience to suggest that such off-hand private
20 comments with a trusted colleague in a high-pressure working environment are easily misunderstood or wrongly given outsized importance.

25 Two barristers who are working closely on a difficult trial might exchange with one another private frustrations about the presiding judge. That does not mean that they treat the court with anything less than all appropriate professional respect and candour and comply with their professional obligations to give all necessary assistance to the court. Similarly, two senior executives or directors might exchange with one another private frustrations about a regulator or the regulator's
30 appointee. That does not mean that they treat the regulator with anything less than all appropriate professional respect and candour and provide all appropriate cooperation to the regulator.

35 Finally then, Mr Bell, in paragraph 69 through to 72 of the submissions, we deal with the apparent suggestion that there was an alleged concentration of power at Star Entertainment between Mr Foster and Mr Cooke. Our short point is that, in fact, this was not a chieftdom of two individuals. This was a highly engaged and proactive board of directors. In paragraph 69 we deal with an observation from Dr Lagan. The current basis for that is, with respect, far from clear.

40 **MR BELL SC:** Just pausing there, Mr Livingston. I may well be wrong but I thought that each of the other directors, by "other directors", I mean other than Mr Foster, but perhaps Ms Ward is in a different position, but certainly the other directors have told me that they had no idea that the separation deed had the exit
45 statement as a schedule to it and that the separation deed authorised the issue of the exit statement. As I say, I may be wrong about that but that's what I thought I recall.

MR LIVINGSTON SC: They did give some evidence broadly to that effect but we say you should treat that evidence with some caution. A safer guide to the evidence is the contemporaneous documents and, in particular, the two versions of the minutes of the 21 March 2024 board meeting. The first of those is the draft
5 version which perhaps I will ask the operator to call up. That's
STA.8000.0164.0001. So you will see that it has the draft watermark on it. This is
a draft version of the minutes of the meeting of the Board of Directors of 21
March 2024 and you will note the directors who were present. And to the third
substantive paragraph in the section headed Executive Changes and Retention
10 Framework, that's the paragraph that begins:

"The board discussed..."

It says:
15

"The board discussed the status of a CEO exit statement, which the Chairman noted had had been reviewed by KWM."

It said:
20

"Directors provided some feedback on draft statement."

So that, we say, is important evidence and likely to be a safer foundation for finding a fact as to what occurred on 21 March 2024 rather than statements made
25 by individual directors based on recollection.

MR BELL SC: Except it doesn't really tell one what the feedback was. I thought each of the directors had told me in some detail what they had been urging Mr Foster to do.
30

MR LIVINGSTON SC: Yes, that is true so far as it goes. There is some further detail about the nature of the feedback in the next version of the minutes which I should take you to. That's document STA.8000.0173.0001, which appears to be an updated version of the same document in the sense that this is the version without
35 the draft watermark. And you will see, if one looks at the corresponding paragraph, in this version it is the second substantive paragraph in that section of the minutes, it said:

"The board discussed the status of a CEO exit statement, noted it was not for
40 the board to approve, expressed concern about the statement being released and asked the Chairman to encourage the CEO not to release the statement. The Chairman advised that the CEO currently intended to release it as an internal email and agreed to speak to the CEO."

45 That perhaps does provide some further information as to the nature of the feedback being given by the directors.

Our point really is the way it is expressed in that version of the minutes, apart from nothing else, makes it quite plain that the directors had read and understood the draft exit statement and had digested it and had views about it. It was a subject of specific discussion between the directors at the board level and it would be
5 wrong to suggest that the board was kept out of the picture in relation to the exit statement or that the exit statement was some frolic on which Mr Foster and Mr Cooke had gone off on. This was something that was the subject of express discussion at board level in the terms that you see in those two documents and, as I say, recollections given sometime later by individual directors may not be as
10 reliable as what's recorded in those two contemporaneous documents.

It is significant in this sense - and this, perhaps, is the topic that we do take up in the written submissions from paragraph 69 - is that the episode relating to the exit statement does seem to be the basis for the evidence from Dr Lagan and the
15 submission by Counsel Assisting that this was some centre of power or concentration of power between Mr Foster and Mr Cooke and we say that really it is just not a - there is no sufficient basis to make such a finding.

You may recall, Mr Bell, the letter that Mr Foster wrote to the Chair of the NICC in December 2023, to which I took you earlier, recorded that the board and its committees had met over 120 times in 2023. This was a highly engaged board as one would expect. It's not the case that Mr Foster and Mr Cooke comprised some
20 centre of power to the exclusion of the board.

Of course, as the two most senior members of Star Entertainment, they assumed a great deal of responsibility, but we say that the evidence falls far short of establishing that they operated in some way so as to exclude the board.
25

There is a telling piece of evidence from Ms Ward that we have referenced in paragraph 72 of the submissions. Ms Ward said that Mr Foster would normally speak last on issues at board meetings and this, we say, was consistent with
30 Mr Foster's approach as Chairman which was collaborative and respectful of the views of other board members.

So, in conclusion, we say that the evidence relied upon by Counsel Assisting does fall well short of establishing the extremely broad and categorical conclusion that they seek, namely, that Mr Foster personally was a barrier to suitability and we say that such a grave finding seeking to apportion blame on a named individual should not be reached on such exiguous material.
35
40

For those reasons, and the reasons we have set out in the written submissions, we say the Inquiry need not, and indeed should not, make any finding to the effect that Mr Foster personally is or was a barrier to suitability.

45 May it please the Inquiry.

MR BELL SC: Yes. Thank you, Mr Livingston. I will now adjourn until 12 o'clock.

<**THE HEARING ADJOURNED AT 11.39 AM**

5

<**THE HEARING RESUMED AT 12.01 PM**

MR BELL SC: Yes, Dr Renwick.

10 **DR RENWICK SC:** I trust, Commissioner, that you have received our written outline provided this morning.

MR BELL SC: I have. I have had a chance to read the introduction and identify the topic headings.

15

DR RENWICK SC: Yes, thank you. So I will be addressing you on all topics except for Ms Ivanoff, where my learned junior, Ms Roy, will address you. If I can start then with the initial propositions on page 2 and it's uncontroversial that Mr Cooke's reputation attracts procedural fairness and, Mr Bell, we respectfully adopt what you said a little while ago this morning, which you will only deal with matters which may go to reputation where essential and, on a number of occasions in our submissions, we say, with respect, it is not essential that you come to any finding which might affect reputation in relation to Mr Cooke.

25 The next proposition in paragraph 2(b), which I will expand on when I come to the exit statement, is the overall performance of Mr Cooke, which was, we say, fairly described in the statement made to the market, to the ASX, upon his resignation and if I can adapt what learned friend Mr Imtiaz of Senior Counsel said last week when he suggested that perhaps Mr Cooke had been a war-time leader, but if that were so, there was certainly a war-time cabinet in the sense that there was a board which was exceptionally hands-on. You have heard a minute ago from my learned friend, Mr Livingston, remind you that the board met over 120 times in 2023 and I will be seeking to persuade, you, Mr Bell, that there was no diarchy here between Mr Foster and Mr Cooke which excluded members of the board, or members of the SLG for that matter. Rather, there was very close involvement by the board and appropriate involvement by the SLG.

40 The next matter is it is undoubtedly the case, as a matter of historic fact, that Mr Cooke had lost the confidence of the regulator, the NICC, no later than 7 December. Mr Weeks in his evidence, on the first day of this Inquiry, confirmed that the Chief Commissioner had said as much to the board and that's an historic fact. That happened. However, in our respectful submission, you do not need to and, therefore, should not decide whether that loss of confidence was or was not justified. However, what we do say is that when he was told by members of the board of that expressed lack of confidence by the regulator, Mr Cooke immediately put the interests of the company ahead of himself. He immediately offered to depart and, with the exception of Ms Ward, whose evidence on this

topic I will come to in due course, that offer was twice rejected by the board in December and that amounted to a repeated vote of confidence in him and the prospect of his departure was not revived until much later until the announcement of the Inquiry.

5

The next topic, Commissioner, I am just trying to summarise our points here, was the preparing of the responses by the board to be two reports by Mr Weeks for which have featured so much in this Inquiry. These were reports, you will recall, to the board which the board responded to.

10

In our respectful submission, the board was bound to, and did give, the closest attention to the responses itself and we set out there in paragraph 2(f) a series of factors as to why the board was required to and, in fact, did pay the closest of attention.

15

I will need to say something about 2(f)(v). There was a recognition - and I will take you to some of the relevant emails - that the responses the board gave in writing were more direct and confrontational in tone but that was a deliberate course taken by the board about which Mr Cooke is not to be criticised, in our submission. And why? This is point 2(g). He was both CEO and a board member.

20

May I just say something, again, by way of overview about the non-sharing of the manager's reports, except as required, with members of the SLG. The reports were to the board. He was expressly told - and I will come to references in a minute - by the board, he was not at liberty to distribute them broadly except insofar as he needed to get information to put into the responses. And that's an important point.

25

In our submission, you will find - and I will remind you of the evidence in a minute - that the board was very closely involved in the drafting process and by that I mean every aspect of it, its content, it's tone, and yes, even matters of emphasis in the printing such as bolding and underlining. The two people who were most closely involved, entirely appropriately, were Mr Foster and Ms Ward. I say "entirely appropriately" because Mr Foster was then the Chair and Ms Ward was the only lawyer on the board, apart, of course, from Mr Cooke himself, and she had extensive experience, as you have heard, as a former General Counsel, as a partner in a large law firm and the like. It was entirely proper and appropriate for her to be very closely involved. In our submission, you will conclude that Mr Cooke acted in accordance with his fair understanding, at the time, of what the board wished to have put in the responses.

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We understand that the board members now regret the unintended effect the responses had on The Star's relationship with the regulator and that's not just the NICC but also the manager. That, in our submission, the board cannot escape the fact that they entirely owned the responses including the covering letter. And I will take a little bit of time, if I may, just to remind you of the relevant exchanges of emails.

45

Eventually though, this year, Mr Cooke departed. There has been some questioning by those assisting, of witnesses, about whether there was a resignation or not. The proper characterisation is, as in paragraph 2(h), it was a termination without cause but it was by consent. It was not as if Mr Cooke was resisting what happened. And when I come to both the ASX release and the CEO exit statement, both of which, of course, are annexed to the separation deed, I will seek to make clear that statement.

The next point, though, is that although - well, the next point really is that the separation deed, having been signed by Mr Foster and Ms Ward, whether or not they read the attachments to the deed at the time each of them signed them, is not to the point, as far as criticism of Mr Cooke is concerned, because, by operation of the Corporations Act, it is not open to The Star to deny that the deed was duly executed and thus that Mr Cooke had permission to issue the annexed exit statement.

MR BELL SC: Why do I need to decide that point about the effect of the corporations law? Why is that a necessary matter for this Inquiry to resolve?

DR RENWICK SC: It is only necessary, in our respectful submission, Mr Bell, if you were to take up the suggestion made, I think, by Counsel Assisting that somehow parts of the exit statement were not authorised by the board. As far as we're aware, from Mr Cooke's point of view, in the face of a signed deed, it was authorised.

It is a little bit like, by analogy, Mr Bell, the evidence that Ms Ward gave about the emails she - and I think Ms Page is in a similar position - that they sent emails about the responses to the manager's statements which say in terms to Mr Cooke:

"We approve of the contents."

Both of those witnesses gave evidence, which I will take you to, suggesting that perhaps that was not entirely accurate, that is to say, they hadn't then reviewed it. But what matters from Mr Cooke's point of view, a bit like the exit statement, is he was entitled to proceed on the basis that the deed had been properly executed, and he was authorised to release the exit statement, as he did, and similarly, he was entitled to rely, as he did, on the emails from board members saying "Yes, that's in order."

In relation to the exit statement - this is point 2(j) - Counsel Assisting indicate in their submissions that there were three false narratives. I will seek to persuade you that none of them are false narratives and, indeed, there are no factual inaccuracies, in our respectful submission, when you read that document as a whole and in context.

2(k) concerns the text messages and my learned friend, Mr Livingston, has, with respect, fairly comprehensively just taken you through them and I will not need to

take up much time on them. Simply to make the point here which I will briefly expand on later that Mr Cooke is generally, indeed almost always, a recipient of text messages from his Chairman. Mr Cooke responded in a limited professional way to each of them. For example, when the Chair said seek legal advice, he so acted, and they were predominantly sent during a brief and stressful period and, as we read the evidence, didn't contradict any public statements of the company at that time. But we do adopt what Mr Livingston said that these are informal private messages and what the company and Mr Cooke should be judged on is by what they actually did in interactions with the regulator.

Point 2(l) concerns the anonymous uninvestigated whistleblower complaint about which there is a fair deal of evidence and about which Mr Cooke was questioned. The short point we make is that it was unfair for the three directors there identified to have regard to an anonymous uninvestigated whistleblower complaint never put to Mr Cooke, in forming the view by those directors that Mr Cooke should be terminated.

Finally, Commissioner - Mr Bell, in our respectful submission, you need not and you are not in a position to make findings about whether Mr Cooke's management of the company, under the overall direction of the board, was optable or not. But what you can conclude - and I will be taking you in a little detail to the evidence of the relevant members of the GLT or the SLG, as it was previously called - is that they almost all said they could raise any matters they wished, add any matters they wished to the agenda, and to say what they wished, and you will find that the evidence of Ms Ivanoff and Ms Katsibouba, to the extent they are to the contrary, to be in a minority.

So that's the overall position. Can I first then go as quickly as I can to paragraph 6 and following under heading B, the board involvement on the 23 January 2024 responses. We have provided a bundle of documents to those operating the overheads.

Can I just say - and perhaps I should have mentioned this when I get to it - in paragraph 4, we do say that it has been necessary in a few places to supplement the evidentiary material. Can I immediately explain the very limited extent to which that is so?

With the exception of, I think, a document, these are all documents which we sent to Counsel Assisting under the practice note on 28 April. This is to say things which are not presently in the Hearing Book. And we then invited them to tender it and if - they may, after today, decide to tender it, if they don't, our respectful submission is they should be received. We are going to take them to them now.

The one exception to that: if you go right to the end of the last page of the submissions, this is truly in reply evidence, you will see at page 54, under the heading Declarations from Continuing Executives, The Star criticises Mr Cooke at

paragraph 185 for failing to follow up Mr Humphries' declaration. You will recall that evidence.

5 The documents are (inaudible) is that Mr Cooke, when he was only a week away from finishing up as Chief Executive when he was following this up and we refer to documents at footnotes 223 and 224. If you go up to paragraph 186, they simply make good the propositions in the last two sentences of 186, namely, that there is a response by a staff member to Mr Humphries' email offering to discuss the disclosures and, 20 minutes later, Mr Humphries submitted his declaration.

10 As to that last sentence, you have already got the declaration, footnote 224 is simply the covering email. So really, the only new evidence is the email at 223 and I will come to that, I think, in all likelihood, after lunch. So we have otherwise fully complied with the practice note and to the extent we wish to rely on that
15 single extra document, it may be over the lunch hour, Counsel Assisting will consider whether he is prepared to tender it or not. But it is truly a matter in reply.

MR BELL SC: Yes. Well, Dr Renwick, you would have heard what I said to Ms Townsend's counsel about the general principles in relation to documents not
20 in the hearing book and they obviously will apply to you as well.

DR RENWICK SC: Indeed. Indeed.

25 So can I take you back to paragraph 6. This is to do with the board involvement. And in paragraph 7 we repeat the point, that we understand there is now regret about the tone of the response and, of course, the response by the regulator to what the board then said and the indication the same course would not be taken. But the purpose of these submissions are to show that at the relevant time, namely, in December and January, the responses were done with the full involvement and
30 concurrence of the board.

So if I can take you - and I can do this all quite quickly - so I think people have got the documents up. If we could start with document tab 3 which is the letter which Mr Livingston took you to a minute ago. This is a letter from Mr Foster to
35 Mr Crawford. If we just blow that up a little, you will see there that this is a letter from Mr Foster and on the evidence, Mr Cooke did not draft this letter. But, nevertheless, in the second paragraph, you will see there is Mr Foster saying to the Chief Commissioner:

40 "We will point out areas where we disagree or where there are material omissions."

45 And then the expression of disappointment in relation to the publicity in the third paragraph. So this was a document which Mr Cooke did not draft but is all the piece, that is to say, consistent with the eventual responses drafted including as to tone.

If we can then go over to document 5, so this is an email which is in the Hearing Book. This is from Mr Foster to Mr Cooke. And the point of taking you to this, Mr Bell, is you see from an early stage there is very direct input by Mr Foster on the proposed drafting and there are both general comments and specific comments by Mr Foster.

And then, if you go over to document 7, these are all set out in full in our submissions, I'm just highlighting the key points. It is sufficient from document 7 to note that, as Mr Foster describes it, this is a few thought starters for the additional report. So this is Mr Foster being closely involved in the early drafting. This is covering (inaudible) of the relevant response. I need not take you to it but it is attached to that document.

So when the board become involved is about three days later at document 8 and you have seen this document, I think. This is an email from Mr Cooke to all members of the board and this is the draft response. Significantly, in the second paragraph, you will see Mr Cooke says:

"I have attempted to keep the responses relatively clinical."

And so this is a queue for the board to think about whether he has achieved that aim and then, in the next sentence, refers to a:

"A number of areas where he needs additional input and verification."

In the next paragraph he says:

"Very happy to take onboard any feedback or suggestions you may have, content or approach wise."

So that is Mr Cooke very closely involving the board. You will start to see the responses coming in two days later. You have, at document 9, you have Ms Page responding two days later saying:

"Thanks, Robbie. I think this is looking pretty good. I have marked up a couple of comments."

I need not take you to it but if you looked you will see that that is exactly what she did. Then the next document is document 11. This is an email from Mr Hodgson at the top of the page, three days later:

"I think the cover letter reads well. Do we want to identify any areas of agreement in this letter as, no doubt, the NICC will not read the annotated attachment. 'Wrong', may have been stated as 'in our view incorrect' but that is a matter of style."

5 You can see there again close involvement by another board member and also the concern and the need for emphasis because of a concern and whether it is justified or not is not to the point. But the concern expressed by a board member that the NICC might not read all of the annotated attachment, with all respect, that might explain the bolding and the underling. Matters of emphasis, which as counsel we are all familiar with, to draw particular attention to particular matters. Not to insult anybody or to raise something over the threshold of being a legal threat but simply to appropriately emphasise.

10 The next document, which is document 12, is a document you will well recall, Mr Bell, as I took Ms Ward to it in great detail when I cross-examined her. You will recall that on many, many occasions in this email, which can fairly be described as a very close and appropriately close analysis by the only other legally qualified member of the board to the draft but you will recall the evidence was, on 15 many occasions, she uses the word "disagree." At the start of it she does say that:

"I have reviewed the draft in detail and my comments are set out below."

20 But this is one where she certainly - Ms Ward certainly does accept that she read it all in her detail and her comments are set out. I will leave it to you to incorporate as appropriate. And then she makes reference to having the KWM lawyers cast his eye over it before we sent it to the NICC:

"And please circulate to the board for a final read-through."

25 There are a number of direct comments made there and you will see in paragraph 3 she specifically wished recognition of achievements taken to be set out and, 4, recognition of operating environment.

30 In relation to paragraph 3, you will recall - and in any event we set out in our submissions - that she agreed with my questions that one of the reasons you would set out achievements in detail in this document is because, unlike the manager, the regulator proper, the NICC, would not be aware of day-to-day achievements in the same detail. So that's that very important email to which, the next document, 35 document 13, Ms Page says:

"Many thanks, Anne."

40 To Ms Ward:

"You have clearly put an enormous amount of time into this."

Exactly, she had:

45 "And it is very much appreciated."

And then if you go to document 14, again, Mr Hodgson at the top of the page says:

"I completely agree. I didn't know where to start but Anne has shown me."

5 Exactly. She was all over the detail. And then Ms Thornton, at document 15, says the same:

"Thank you, Anne, for all your work."

10 And then she has a particular comment which shows that she also is closely involved. And then Ms Ward, in the next document, document 16, says this:

"Thanks all for the comments. I agree with Michael's points. Regarding Toni's point, I sought to address this in my para. 10."

15 So she is all over the detail. Then she says, if you go over a sentence:

"Let the NICC rebut this in writing. This goes to the heart of the due process point and not taking into account irrelevant matters."

20 So Ms Ward there is clearly saying "We don't want there to be any doubt that the NICC understands our concerns." With all respect, although much has been said about the tone of this, all people with power have limits to those powers and there are limits to their discretions. It is perfectly appropriate in a straightforward and unvarnished way to indicate where there is agreement or disagreement and that no
25 doubt is why the regulator's response came as a surprise. So be it. But at the time that was clearly (inaudible).

We then go over to document 18. You can see here this is an email from Mr Cooke to Mr Foster saying:

30

"I'm still working on sections ... not proofed yet."

So the document itself is attached to this email:

35 "I also have to factor in Anne's suggestions to the other document which may change."

40 But Mr Cooke says there are many flaws in our manager's approach. A few more emails. The next one is document 19. The next day Mr Foster is, again, closely involved and appropriately so as the Chair:

"Hi Robbie, all looking good."

45 It begins:

"It is a stronger tone but so is this report relative to the first one."

That, in all respect, is absolutely right. The second manager's report did have a stronger tone than the first one. And he also, if you look to the end of the email:

5 "Content, I think, is good, subject to a couple of suggestions above. The tone will be important for everyone to be OK with."

So there is the Chairman saying everyone on the board has to be okay with this. Then we go to document 20, later that day, which is the email from Mr Cooke to all board members saying:

10 "Here is the final piece of our response. You will notice this response is more detailed and correct."

Go down a paragraph:

15 "I still need to run through the comments from Anne and conform my response with that feedback."

20 So he is entirely appropriately seeking to incorporate everything he has got from Ms Ward, and rightly so. Then in 21, the next document, later that night you have an email from Mr Hodgson and he sets out there his fairly detailed comments but he also is very closely involved.

25 Then, if we go then to document 23, this is the email from Mr Cooke of 22 January, again, to all board members attaching all relevant documents subject to some very minor comments which are set out in dot points. And he says:

"These documents are more advanced iteration."

30 Next paragraph:

"They still require a final proofread."

Next paragraph:

35 "They are being sent to the two lawyers at KWM for legal reviews and we are targeting providing the package to the NICC and the OLGR tomorrow."

40 We are coming close to the end of it now. I'm next going to refer, in paragraph 24 - I understand I can refer to this, providing I don't quote from it - Mr Ahmed will tell me if I am not able to do this, but the next document is the email from Mallesons to Mr Cooke.

45 **MR BELL SC:** Just before you go to that Dr Renwick. This email on the screen now of 22 January, with the cover letter to the NICC and the response to the manager's reports in clean copy, did that version contain the underling that there was some evidence about?

DR RENWICK SC: To give you an example, the answer is - I will just find a good example. Yes. So if you go to point 519, that's point 513.

5 **MR BELL SC:** Yes looks like - there it is.

DR RENWICK SC: There we are. So, for example, Mr Bell, you will see the first lot of red, completely red. You will see the underling there:

10 "Provided to ensure that any decisions may be taken by the NICC."

And so on. That's the relevant considerations one. If we go over the page, for example, the second paragraph you will see underling there and, with all respect, one looks at the underling there, it is a matter of emphasis:

15 "Unprecedented number of existential threats and significant challenges going to the core of Star's business."

20 It's not intended to be an insult. It is not intended to raise the temperature. It's intended to draw to attention matters, where, as you have seen from Mr Hodgson's concerns, it may be - it doesn't matter whether he was right or not - but his concern was the NICC might not read in detail the whole of the document and that explains why certain matters were emphasised.

25 But if you go through this document - and I won't do it now because it is a long document - you will find, I think, the underling is almost in its final form.

MR BELL SC: Yes.

30 **DR RENWICK SC:** So if you now go to document 24, I'm not going to read it out but you will see this is from Malleons to Mr Cooke. I simply invite you to, at this stage, read from about point 6, the sentence beginning "Most" and the next sentence "We have sought."

35 **MR BELL SC:** Yes. Yes, thank you.

DR RENWICK SC: If you go then to document 25 - so this is an important email, Mr Bell. I cross-examined Ms Ward about this. This is an email from Ms Ward where she agreed that she did, indeed, use these words and she begins by
40 saying:

45 "I have reviewed the cover letter and revised responses and I am happy with all of them. Collectively, I think these documents make a clear case to refute much of the managers reports, particularly the sweeping assertions and conclusions he makes. The October report is frankly amateurish and subjective and lacking supporting evidence. I'm interested to hear any suggestions from Patrick and Rhys."

Those are the two gentlemen from Mallesons:

"But..."

5

This is an important "but":

"Keen to get the documents out to the NICC ASAP."

10 Just concentrating on that last sentence, it is true Ms Ward was interested to hear
of suggestions but, actually, her priority was getting the documents out. Going
back, though, to the beginning of that paragraph, Ms Ward gave evidence that,
contrary to what she said here, she had not, in fact, reviewed the cover letter and
revised responses. However, it matters not from Mr Cooke's point of view whether
15 she had done so or not. What matters is that someone in Mr Cooke's position who
receives an email from the other lawyer on the board, copied to all the members of
the director, he is entitled to take it at face value and he did and he is not to be
criticised for doing so.

20 If we go then to document 26, so this is Ms Page:

"I agree with Anne's comments."

25 So the next one I have is the email from Ms Page to Ms Ward, document 26 of 23
January 2024. That's not this document. It is STA.8100.0066.2543. So here, this is
Ms Page responding to Ms Ward and copying again everyone on the board,
including Mr Cooke:

"Agree with Anne's comments."

30

So, again, she took it literally what Ms Ward had said and she agreed with them:

"I do worry that it will inevitably disturb the hornets nest regarding
relationships. So we need to be ready for that."

35

And then the next document, which is 27, is the document I think which we have
just been shown, which is some penultimate comments from Mr Foster to
Mr Cooke. He describes:

40

"Just a few thoughts (small)."

Then if we go over, finally, to document 29, you will see at the top there, so this is
a response to the Mallesons advice earlier that day and at the top of the page you
see there is a comment by Mr Cooke about it and then you have a comment from
45 Mr Foster:

"I did not have an issue with KWM edits. The key messages not lost just a little bit gentler."

And then that led to the document at 31. So Mr Foster, at about point 2, says:

5

"Where did you land?"

And then at the top of the page Mr Cooke says:

10

"The letter is the softening. I have edited the submissions a little."

And they are attached to that email. So the suggested softening is actually to be found in the covering letter, which, of course, would be read with the submissions as a whole rather than in the body. We can take that down. Then if I can take you back to the submissions, Mr Bell.

15

So, in our respectful submission, with all of that, you get to what we submit in paragraph 16 of our submissions, you could only with respect rationally find that Mr Cooke acted in accordance with his fair understanding of the directions and intentions of The Star board and it was a board document. They all adopted it. That's one of our principal points that we would make in these submissions.

20

The next topic, Mr Bell, is management style and GLT input. So this is where we do rely on what was said in the ASX exit statement and that's at document 44. Document 44, INQ.5002.0001.0113. There we are. This is the ASX statement. You will recall, Mr Bell, that this is an attachment to the termination deed which I will come back to.

25

So this isn't a formal ASX announcement which was made on behalf of the group as a whole. In our submission, we note that Mr Foster expressly stood by the contents of this. No director demurred from any aspect of this statement in contrast to Mr Cooke's exist statement and it is a powerful statement of the type as to what Mr Cooke had achieved. In particular, we rely on the attributed quote from Mr Foster but clearly in context on behalf of the board which begins:

30

35

"Robbie has worked tirelessly since he joined in October 2022, focussing on stabilising the operations, resolving a number of existential threats to the business.

40

And many of those, pausing there Commissioner, are pointed out in responses to the manager:

"Addressing separate remediation demands from regulators."

45

No doubt about that:

"And rebuilding the management team and systems including the addition of more senior risk compliance and financial crime executives and the commencement of our culture transformation. Robbie shared in a resolve to put safe, responsible and ethical gaming at the core of what we do."

5

That is, if I may say so, respectfully consistent with Mr Ahmed, Senior Counsel's, submission, that our client was a war-time leader. He certainly was in the very difficult circumstances. At paragraphs 22 and 23, we set out, if you like, the evidence given by a number of witnesses about which is entirely consistent. Paragraphs 20 to 22, you can see some evidence about Mr Cooke saving the country - company. Sorry, not country:

10

"Working tirelessly, number of major, major issues, and the like."

15

In paragraph 23, you will note that Ms Lagan gave some evidence that Mr Cooke had appeared resistant to her suggestion they bring in as an employee, an organisational development person, but we then set out some of the things which The Star had done and who it was assisted by. That's why, in paragraph 24, we say:

20

"Reasonable minds may disagree thanks to the capacity of an external consultant as opposed to the recruitment of a permanent internal organisational development officer. Something which has now occurred."

25

There can be no doubt that The Star and Ms Cooke were valiantly trying to get as quickly as they could, as many good executives as they could, but where they could not, in our respectful submission, you will find they used consultants because that's who they needed to use.

30

Also in paragraph 25, we would make the submission that Mr Cooke, considering the previous roles he had in the law, gaming and financial services, he was used to being in a highly regulated environment.

35

Over the page on page 19, in paragraph 26, there are some references to Mr Cooke's management style and may I just draw your attention to a number of these. So you have Mr Humphries' view at paragraph 26 that Mr Cooke was very approachable:

40

"Open to suggestions and comments and that he had a good relationship and that if he needed help he got it."

45

At paragraph 28 you will see the evidence there set out from Ms Townsend that she and Mr Cooke met every fortnight and she described his management style as generally supportive. Over at paragraph 29 there is a reference to Mr Saunders, the Chief Risk Officer, and he described Mr Cooke's style as very collaborative, even-tempered, balanced and easy to work with no matter the pressures. At

paragraph 30, Ms Burke, the Chief Transformation Officer, she said, and we set out the quote:

5 "I felt empowered to do my job, to get on with it. If I had any particular issues or matters I needed to discuss with him outside of my fortnightly one-to-ones, he would make himself available to me."

10 And, importantly, and I asked a number of senior leadership group people this question. She did feel, see paragraph 31, free to add agenda items and Mr Cooke had never tried to influence her on what she put into a board paper or raised at the GLT. Now, it's fair to say that wasn't a universal view and the outlier, if I can put it that way, to the contrary view, was Ms Katsibouba.

15 We set out in paragraphs 33 to 39 the evidence that she gave in that regard and the short point we seek to make there is that Ms Katsibouba was unable or unwilling to provide particular examples of any concerns she had about Mr Cooke but we say it was really an unparticularised matter of impression. But to give one example, she, of course, Ms Katsibouba, had a critical role in relation to finance. We say, though, at the end of paragraph 36 of our submissions, that you have
20 financial matters routinely added to the meeting agenda of the senior managers and I have already mentioned the evidence from people who were permitted to speak freely, ask for help and so on.

25 It is highly significant, Commissioner, that, in paragraph 37, you will see that that body was meeting daily in May 2023 to talk about pressing (inaudible) concerns. If I can just read the extract which is set out in footnote 92, T596, 26 to 34, so Mr Conde's question at line 23, page 596, was:

30 "So, in the middle of 2023, do you agree that Ms Katsibouba told you that she wanted to raise with that team concerns that she had about financial matters, including challenges presented under its earnings."

Mr Cooke gave this important evidence:

35 "I don't believe so purely because that's the matter that, in April 2023, the business was experiencing quite a significant decline in performance and the GLT or ExCo was meeting daily in May to talk about financial matters because we were trying to get costs out of the business, and any member of
40 GLT or ExCo were able to put any matters on the agenda they saw fit. So if Christina."

That was Ms Katsibouba:

45 "Had wanted to put something on the agenda."

Thank you very much. I'm now up to line about 32:

"She would have been able to and I, from memory, believe there were quite a number of financial updates provided to the team from when I started so I would accept that."

5 We would say that is powerful evidence from Mr Cooke. The next topic is the sharing of the manager's report with the GLT and I have already averted to this and it is an important point. So there was some criticism by members of the GLT that they didn't receive all of the manager's reports. But we say Mr Cooke had no authority to do so because, firstly, in paragraph 40, we see there is a quote there
10 from what the Chairman, Mr Foster, had written to the manager, Mr Weeks, and you will see there he said:

"I got some feedback. You have mentioned/discussed the NICC letter to the board with Betty..."

15 That's Ms Ivanoff:

"This morning. Philip."

20 That's the Chief Commissioner, Mr Crawford. I presume that means:

"In my discussions with him yesterday indicated they would not be sharing it beyond the Commission and yourself and I agree I will do the same, ie, board only. Appreciate if you could refrain from discussing it with anyone other
25 than the board. Happy to discuss, David."

In paragraph 41, Ms Page was to the same effect. She says there that the header on the document from the manager, Sensitive New South Wales Government on top of the communication. And there was a direction in the letter to share with the
30 board, which Mr Foster did:

"It wasn't ever clear to me that people had been given permission to share it more broadly in the organisation."

35 Nevertheless, as set out in paragraph 42, where it was essential to seek instructions, in effect, for information from senior managers, Mr Cooke, appropriately did so and we set out the references there.

40 That brings us to Mr Cooke's departure and I will say something about it before the luncheon adjournment, if I may. The key document that you will need is the exit statement, While that is being brought up, we make this submission in paragraph 43: so when you read the document as a whole, we seek to persuade you there is nothing factually inaccurate in it and, contrary to what our learned friends for Counsel Assisting say, there are no false narratives. But Mr Cooke was
45 certainly contractually entitled - and you asked me in relation to the Corporations Act why we will need to make a finding - we simply say you would say, from Mr Cooke's point of view, he understood, he was entitled to make this exit

statement and so - yes, we might just take that document down. We will come to the actual exit statement itself in a minute.

5 Can I just remind you, Commissioner, Mr Bell, at paragraph 45, that at least by 7 December, in a meeting between the board and the regulator and the manager - the NICC as well as the manager at which Mr Cooke was not present, in effect, the Commissioner had indicated to the board that it had lost faith and Mr Weeks gave that evidence in terms of the first day of the hearing.

10 The evidence is, though, that Mr Cooke immediately, when he was told that, invited the board to remove him in the best interests of the company and the board didn't accept that invitation. You will recall the evidence that Mr Cooke received permission to talk to various directors one on one. The conclusion you will come to, Commissioner, is that, with the exception of Ms Ward, all of the board wished
15 him to stay. Their reasons may differ. They may not be identical one to the other but they all agreed he should stay and, in the circumstances, where that is a serious indication from the regulator, and you have our point, Commissioner, that's a historical fact which is undoubted but you need not adjudicate on whether that loss of confidence was justifiable or not. That it happened. Nevertheless, the board
20 sought to keep him on.

It is true, as we set out in paragraph 46, that the board sought to confirm whether it considered, consequent on that loss of confidence, that the change of CEO was critical but received no response. Again, Mr Cooke - this is at the top of the page
25 - the rest of paragraph 46 of our submissions - Mr Cooke again indicated that while he did not agree his actions were (indistinct), he would step away and that was clearly an offer to step down, and the minutes set out at the end of paragraph 46 note:

30 "The non-Executive Directors noted they did not think such a change was warranted or necessary at that stage."

Although Ms Ward's evidence is she spoke against that, the minutes did not record that was her view.

35 Then, of course, just finishing this off then before lunch, Commissioner, this topic, as I have just taken you to in some detail, Mr Cooke had the vital task of drafting the response to the manager's reports which he co-signed with Mr Foster. Just on that, it was entirely appropriate, in our respectful submission, that it was co-signed
40 (inaudible) board response - but it was a board response to which Mr Cooke, as a board member and also as the CEO, appropriately put their name.

Then the end of it all was in paragraph 48. It was not until 10 March this year, after a number of critical tasks had been attended to, settlement of litigation,
45 responding to the manager's report, finding a new CEO for The Star Sydney, preparing and presenting the half-yearly accounts and the announcement of this

Inquiry that Mr Foster notified Mr Cooke of the board's change of heart that his continuation was no longer going to be of assistance in the company's endeavours.

5 Again, just to finish off this point, in our respectful submission, you need not conclude whether that was justified or not. It was simply an historical fact. It was the view of the board and Mr Cooke acted on it.

10 I see the time. I have probably got, I think, another half hour to 45 minutes. My learned friend, Ms Roy, I think, tells me she will have about half an hour but we will certainly be finishing this afternoon my submissions, Mr Bell.

MR BELL SC: Yes, thank you. I will now adjourn until 2 pm.

15 <**THE HEARING ADJOURNED AT 12.59 PM**

<**THE HEARING RESUMED AT 2.00 PM**

MR BELL SC: Yes, Dr Renwick.

20 **DR RENWICK SC:** Mr Bell, only a couple more matters before I hand to my learned junior.

25 So I was, I think, at paragraph 49 of our submissions in relation to the separation deed and the important point we make at paragraph - well, perhaps I can summarise it this way and come back to the detail. If you go to paragraph 58 of the submissions, we say the evidence clearly establishes those matters. So, firstly, the draft exit statement was issued - was provided by Mr Cooke two days before it was issued. He engaged extensively with The Star's external legal counsel. He made edits consistent with Mr Foster's request. He was insistent, and rightly so, to get express permission under the deed and Mr Foster and Ms Vuong signed it and, therefore - and this is really the conclusion we would seek from you, Mr Bell - you could only conclude as a matter of law and fact the board had authorised his statement.

35 Two points of emphasis, just going back, in paragraph 50 of the submission, the second sentence, you will see the reference to the exit statement being sent to Mr Foster and the lawyers for The Star on the evening of the 20th and there were few substantive differences between that and the final document.

40 The only other paragraph to take you to is at paragraph 52, which makes the point that it was Mr Cooke seeking more time to finalise his statement. So this is a text sent from Mr Cooke to Mr Foster and he says:

45 "Making my announcement this afternoon is causing me a lot of concern. It's really going to cause a lot of damage to the team as it will be uncoordinated and poorly communicated. It will not look planned. It will not look like it was an agreed exit."

I will come back to the agreed exit point:

5 "I'm struggling to get the documents I got last night reviewed adequately. Is there any circumstance this can occur next week with a more planned communications approach?"

But, nevertheless, there was strong support for that being done promptly.

10 The final paragraph, 57 - this is just on the signature of it - it is true that although Ms Ward signed the deed on behalf The Star, as did Mr Foster, we don't cavil with her evidence that she didn't read the complete deed she was signing, but we simply make the point that that can't be held against Mr Cooke.

15 Then to the analysis of the document itself. So the ASX release - this is from paragraph 61 - so clause 2.3 of the separation deed provided expressly that the employer was to make an announcement to the ASX in the terms set out in the release, and part of the announcement is at paragraph 62:

20 "Mr Cooke, and the board, consider a change in leadership to be in the best interests of the company at this time."

25 So while it is in legal form a termination without cause, it is consensual as to that result and, as we say in paragraph 63, we don't understand anyone to – in the board - to now resile from the terms of the ASX release and Mr Foster expressly affirms it.

30 Can I then take you to the CEO exit statement itself, which is at tab 45. If we could have that up on the screen, please. I'm taking you to this because - to rebut the submission made that there are false narratives in it. So there are really three points I wish to take you to. It begins at the top where he says:

35 "It's with considerable reluctance, and a heavy heart, that I today announce that I have, with my board, accepted that I will step down."

So that is entirely consistent with what actually happened, that is to say, termination without cause but with Mr Cooke's agreement. Then we go down to the paragraph:

40 "A number of matters have led to my decision today."

45 And that, on a fair reading of the document as a whole, is referring back to the decision which I have just taken you to in the first paragraph. What, however, I ask is the determining factor? It is the view Mr Cooke has formed recently that his continuing in the group was not going to be conducive to the NICC determining The Star was suitable and that was factually entirely correct in view of the expressed concerns by the NICC Chief Commissioner back in December, but also

in terms of what had been communicated to him by Mr Foster on behalf of the board, and you have our point that he had offered at least twice to go voluntarily back in December.

5 I will come back - if we go back to the document, before I come to the document - the paragraph - the next paragraph about which our learned friends assisting make much, can I just remind you, at the bottom of that page, he talks about the issues that the business has faced in - and the achievements of the last 16 months. But he says:

10

"It is rare that a business faces as many issues simultaneously as we have dealt with."

15 And he says it is not an exhaustive list. He lists it and if you could just go over the page, please, down to the bottom, and he says:

"I know that I have done everything that could possibly be done. However, unfortunately, I feel I have no other choice than the path outlined above."

20 Again, that is referring back to the two paragraphs that I have taken you to:

"To my team..."

25 You will recall, Commissioner Bell, this is something under clause 2.3 which is specifically going to the 8,000 staff with the capacity to send it to others as well. But the main audience is the team. We say it is entirely appropriate, and, indeed, avoids mischievous uninformed rumours, rather than to have a complete silence or a one page that Mr Cooke is no longer with us, it is entirely appropriate given all they have been through, to send out this factual document and to express the view:

30

"You all know this has been a role I have genuinely loved and you are a team I have been proud to be part of and have had the privilege to lead."

35 That is not as surprising, not an unusual, but it is an entirely appropriate message from a CEO who is leaving after, frankly, a very complex time.

Can I then take you back to the paragraph in the preceding page which is said to give rise to the factual inaccuracies. That's the paragraph which begins with:

40

"That view..."

45 Which is referring back to the view he has that staying in the role was not going to be conducive. So at paragraph 70 of our submissions, it is not correct to characterise Mr Cooke's exit statement as my learned friends assisting put it at paragraph 255. My learned friends assisting say:

"To the extent the exit statement suggested Mr Cooke was being pushed out by the regulator, that was false."

5 Well, it doesn't say that. However, it is true that the regulator had lost confidence in him and I have mentioned this a few times, Mr Weeks' evidence, but in paragraph 72 and 73, you will see a reference to Mr Weeks' unchallenged evidence to this Inquiry that the Chief Commissioner had himself said to the board on 7 December that the NICC had lost confidence and the minutes are consistent with that. So that view really can't be contradicted here.

10

Mr Weeks, at paragraph 75, disavowed the notion that the persons who he and Mr Cooke had disagreed about pertaining or not were bad actors and that was consistent with Mr Cooke's statement. There was no evidence to that effect.

15 **MR BELL SC:** What do you say about - or do you make any submission about the evidence from Ms Katsibouba that, after months of relative lethargy, she was put under pressure to finalise her exit arrangements in the couple of days leading up to 22 March, and that she was unaware and had not been told by anyone, that her departure was going to coincide with that of Mr Cooke.

20

DR RENWICK SC: Yes. Can I deal with that directly. It's from paragraph 85 to 95 in our submissions, Commissioner. We deal with this in terms. So we reject the submission by Counsel Assisting that the language at that paragraph on the screen gives rise to any suggestion that Mr Katsibouba was a bad actor and we note, at the end of paragraph 55, that Ms Page said that will be drawing a long bow.

25

So the next point, at 86, is that Mr Cooke's exit statement was largely for an internal audience, although there were limited third parties, and we say to the extent the timing of the statement gave rise to a risk of third parties during an adverse inference to Ms Katsibouba, well, that's not our fault.

30

We do say that this whole view that Mr Katsibouba has, with all respect, is an example of hindsight bias. We set out the relevant statement from former Chief Justice Gleeson in *Rosenberg v Percival*, at paragraph 87, and we respectfully submit, in paragraph 88, that, adopting that, the Commission should not reason in a way which involves failure after the event to take into account the context and, over the page, we explain what the context is and we do understand that Ms Katsibouba can be understood to be sensitive to matters.

35

40 In paragraph 90, we remind the Commission that, actually, Mr Cooke was clearly one of Ms Katsibouba's supporters. He had advocated for her elevation. Once the time had come for her to move on, he was encouraging, and it was clear there was some frustration having done so earlier.

45 At paragraph 91, we set out references to the evidence from the Chief People Officer who gave Ms Katsibouba to feel - pressure for her to go faster with her

termination deed and that the company were hoping to announce her departure by that Friday.

5 But the key point, really, about Mr Cooke and this exit statement and opposed to The Star and this exit statement is the next sentence. Mr Cooke had not settled and was unaware of the terms of her ASX release. Having previously agreed with her, that her departure should be characterised as a resignation, he had no reason to expect her departure would be described differently in the ASX release which he had no role in settling.

10 We make the important point in paragraph 92 that, because of the message I took you to earlier - a minute ago in paragraph 52, that, actually, Mr Cooke was seeking more time, not less time, and had that been acceded to, they wouldn't have happened at the same time and that, perhaps, would have ensured that
15 Ms Katsibouba didn't have a feeling that she had. That is why we conclude in our submissions in paragraph 93 that it is not open to find that we advanced a narrative - sorry, that Mr Cooke advanced a narrative that the Chief Commissioner had forced Mr Cooke out or that either Ms Katsibouba or Mr Hughes were bad actors.

20 There, of course, was another false narrative that Counsel Assisting put forward and that was that Mr Cooke had suggested incorrectly that he was resigning but that is not so. So we set that out as well.

25 In paragraph 83, I perhaps should have gone to this first before dealing with Ms Katsibouba. Mr Cooke's unchallenged views were that he didn't consider it appropriate or fair to terminate employees with no evidence. So that is an important point as well.

30 We simply say that there is nothing factually incorrect about the CEO exit statement. It doesn't blame the NICC. It is not a fair reading to suggest that any bad actors referred to, in the paragraph on the screen, including Ms Katsibouba or anyone else, and no quibble can be had with the way Mr Cooke describes what, in substance was, a termination without cause with his concurrence. That is to say
35 not fought by him.

So the only other two topics, Mr Bell, before I pass to my learned junior, if I can take you to paragraph 161 and following, in view of the comprehensive
40 submissions from my learned friend, Mr Livingston, of senior counsel, about the text messages from Mr Cooke and the key point is they almost - sorry, let me start that again. Mr Livingston convincingly demonstrated the context in which Mr Foster's texts to Mr Cooke were made and what they say and what they do not say. The key point, we say, is that they are not texts - almost none of them are texts from Mr Cooke to Mr Foster. Rather, Foster - Cooke is doing is properly
45 responding to views from the Chair, even if they are half-formed views received late at night, and he responds appropriately. We set that out in paragraphs 161 to 171.

We also there deal with the issue of Mr Foster and Mr Cooke discovering, to their surprise, that there is to be a meeting by the regulator in what amounts to The Star's - or what is The Star's boardroom directly next to Mr Foster and Mr Cooke and the short point is this: they do find out about it, not through nefarious means, but because it is booked with their secretary. They find out about it. Mr Foster, in particular, makes some inquiries about who the addressees are and he sees a name there of a person who used to be a lawyer with Malleasons, that is, to say Star's lawyers, and he expresses the concern that if that person were still with Malleasons, there would be a conflict of interest. In fact, he is told that they are no longer there and he no longer has a concern.

Nevertheless, Mr Cooke accepts that there were probably better ways to dealing with that issue but there is nothing nefarious about what happened even if it was a bit clumsy. That then takes me to, really, the last few points before Ms Roy takes over. So from paragraph 177 to 179, we make some general submissions about the respectful engagement with regulators. We make the point that it's perfectly open to those who are regulated to respond directly and transparently and honestly with their regulators. Lawyers routinely make such submissions and engage in such correspondence. It is not intended personally. It is not to be taken personally. And, in those circumstance, we say there is nothing out of the ordinary in the correspondence with which Mr Cooke has engaged.

But the two remaining matters which I can deal with very briefly, firstly, the whistleblower complaint, and you have our point, Commissioner, that there is some evidence from Ms Ward and others. So, Ms Ward's evidence is at paragraph 180, that the - while she recognised the email, and this whistleblower complaint was untested, she said the bare fact some members of Mr Cooke's team were unhappy, and that's her assumption, you will assume, about the anonymous authors:

"...were unhappy with aspects of Mr Cooke's management style and conduct was a factor to be taken into account."

In deciding to move to terminate him without cause. I questioned her said:

"I suggest that's not fair."

She says, at the bottom of paragraph 180, she couldn't say whether or not it was fair. So with all respect, an anonymous whistleblower complaint about which the subject of the complaint is not even told but then it is acted on as a factor in insisting on termination without cause is not a fair process.

At paragraph 181, we also make reference to what Ms Thornton and Mr Hodgson said, that it was a factor in their decision-making leading to termination.

We say that the better approach, the correct and fair approach, is that set out by Ms Page at paragraph 182. She says, with respect correctly, in her experience:

5 "Whistleblower complaints, until a proper investigation has been conducted, one needs to be very careful with what one infers from it."

MR BELL SC: But you say, do you, that I should conclude that Mr Cooke's departure was a joint decision of the board and Mr Cooke himself?

10 **DR RENWICK SC:** So we say, just to be clear, that, in legal form, it is a termination without cause as recorded in the separation deed to which Cooke and Star sign. It was mutual, as Mr Cooke sets out that - and in his CEO exit statement he says:

15 "I accept I will step down."

He could have fought it. He didn't. That is entirely consistent with the evidence that he offered to go back in December. So that's really the bottom line there.

20 Just to complete the submission about the whistleblowers, we do, respectfully, rely on what Megarry J said in John v Rees about unanswerable charges which, in the event, completely answered open and shut cases which somehow were not inexplicable conduct which was fully explained. Just as a matter of procedure, the better course would have been either to put the allegations to Mr Cooke or to not
25 take them into account in any way.

The final matter from me, Commissioner, Mr Bell, is the declarations from continuing executives. So this arises because, at The Star submissions, I wasn't surprised to read that paragraph 522, that it was Mr Cooke's fault principally:

30 "For failing to follow up on Mr Humphries' declaration.

We respectfully reject that and it is because of the matters set out in paragraph 186 and following. So what there happens - and I don't think that any of this is
35 disputed - is that, on 13 March, Mr Cooke sends an email to relevant executives, copying in the relevant staff member, with a declaration for execution. Mr Humphries responds the next day indicating two disclosures - and we have the details for those - and the relevant staff member, that is to say the one copied in, them, themselves, responded to Mr Humphries' email that day offering to discuss
40 disclosures, and shortly of that Mr Humphries submitted his declaration. So it happened in a very short time. And this was the time when Mr Cooke was barely a week away from departing and we say it is not fair or appropriate to say the fault for failing to follow up was principally with Mr Cooke in those circumstances.

45 So subject to what Ms Roy is going to say now in relation to Mr Ivanoff's evidence and subject to any assistance we can provide further, Mr Bell, those are our submissions on behalf of Mr Cooke.

MR BELL SC: Yes. Thank you, Dr Renwick.

MS ROY: Excuse me one minute, Commissioner.

5

Mr Bell, the final matter that we will address you on is the divergent account of the 6 September 2023 meeting and that's addressed in our written submissions from 96, at paragraph - paragraph 96 to paragraph 160, I have three propositions to develop orally. The first is our primary position, which is there is no need to resolve this question at all. The second is that Counsel Assisting for The Star agree that if the matter is to be believed, no-one has deliberately lied. We make the same submission to the extent that Ms Ivanoff may be suggesting otherwise in her written submissions, it would not be open to the Inquiry, on the evidence before you, to make that finding. Our third proposition is that, in any event, Mr Cooke's account should be preferred because we say it is plainly more coherent, more consistent with the documentary record and -

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MR BELL SC: Ms Roy, the first point you make, is it, that it's not necessary to resolve the difference of evidence about this?

20

MS ROY: Yes.

25

MR BELL SC: I have been reflecting on this. Misleading the regulator is obviously a serious matter. Do I not need to make a finding as to whether or not there was a misleading of the regulator and of this Inquiry which required correction by The Star?

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MS ROY: In circumstances in which at least Ms Ivanoff aside - neither Counsel Assisting the Commission, nor The Star, has suggested that there has been a deliberate deception, then if there was a misleading representation in December, it was the result of a mistake and it was also done in circumstances in which the November - I withdraw that. The December communication to the NICC, describing the circumstances of Ms Ivanoff's departure, set out the fact that she took a different view until the fact of the dispute was disclosed and, in those circumstances - and I may come to this in a minute - we say it is appropriate for The Star to withdraw its characterisation of our conduct as unacceptable in that respect when it is not in our submission that we deliberately concealed the fact of a written resignation letter or the fact this Ms Ivanoff had resigned.

40

We do say, with respect to our third proposition, that even if the Inquiry did not prefer Mr Cooke's account, the reference that I will take you to would not permit you to prefer Ms Ivanoff's recollection.

45

Our primary position, being that it is unnecessary to resolve the dispute, is premised on the fact that Mr Cooke and Ms Ivanoff are, in fundamental respects, aligned with respect to their accounts and they disagree on two matters, that being whether a letter of resignation was given to Mr Cooke and whether their

agreement should be styled as a marker for notice which is going to be revisited in two months time or a resignation with the possibility of revoking that resignation two months later. These differences, in our submission, can be attributed to the vagaries of memory and do not require your resolution and particularly, in the
5 circumstance I have mentioned, that Mr Cooke and The Star disclosed the fact of the divergent views, to the extent that they were known, to the NICC.

We set out in writing, from paragraph 103 - and I won't repeat it at length - but that, on any view, The Star should not be congratulated for rushing to embrace
10 Ms Ivanoff's account and describing our conduct and correspondence with the NICC as unacceptable. That submission is made in response to the submission of Counsel Assisting, at paragraph 290 of their written submissions.

It is also the case that, as we understand it - and this the only reason why Counsel
15 Assisting submits that that - it is necessary for this Inquiry to resolve that difference, that is, whether or not The Star responded appropriately to Ms Ivanoff's evidence. We would say that is - in circumstances, again, where there is no allegation coming from Counsel Assisting that there is deliberate
20 misrepresentation, that that would not be a sufficient reason for this Inquiry to concern itself with that dispute.

I adopt our full written submissions on the issue between paragraphs 103 and 114. Again, I say The Star has now landed - where The Star has now landed on the
25 issue, it would not make sense, in our submission, for you to go to the trouble of resolving those recollections.

Coming to my second proposition which is that there is a suggestion of some deliberate misrepresentation coming from Ms Ivanoff's submissions. Neither
30 Counsel Assisting or The Star have made that submission. We are not saying Ms Ivanoff lied. It would not be open to find, in our submission, that either Mr Cooke or Ms Ivanoff were deliberately deceptive.

To the extent that Ms Ivanoff appears now to go further in her submissions and suggests some deliberate misrepresentation, first, that's an incredibly serious
35 allegation, second, it is being made against an officer of the court, which Mr Cooke is, and, third, it brings with it all the attendant standards and due cautions.

We have set out the seminal passage from Neat Holdings (1992) 67 ALJR 170 at
40 171 in paragraph 100 of our written submissions, which, in turn, picks up the well-known Briginshaw passage. I'm not reading it out but I do emphasise, in particular, that it is not just a matter of the seriousness of what is being alleged and the practical standards of evidence that are required to support such a finding but
45 also the reminder there that members of our society do not ordinarily go about lying, much less lawyers and much less officers of publicly listed corporations and, if nothing else, it would be quite an illogical thing for either of them to do particularly in such a heavily regulated environment.

The submissions to this effect, which are in Ms Ivanoff's submissions, I think, at paragraph 18 and paragraph 23, are purely based essentially on the fact that she has a different recollection to Mr Cooke.

5

MR BELL SC: I'm sorry to interrupt you, Ms Roy, but just going back to the first proposition, if you're criticising The Star for acting too hastily in apologising for a misrepresentation, don't I need to decide whether there was a misrepresentation, whether innocent or not?

10

MS ROY: I certainly do not criticise and I'm sorry if I suggested that. Criticise The Star for correcting the misrepresentation, it - well, I suppose, in the characterisation of a misrepresentation. I do criticise their characterisation of Mr Cooke's conduct, though, which was the language used, being unacceptable, which was also the language used. If they wanted to say his conduct was unacceptable, I think it is appropriate to put to him that he had done something deliberate in his representations to NICC and that, having not being put, and now not submitting he did it deliberately, even if they would prefer Ms Ivanoff's account, and for reasons I will come to, we say they should not, but assuming it's open to them to do that, they may consider they need to correct the record, they have now found a document that Ms Ivanoff emailed to herself. So, to that extent, there was a document sitting in The Star's records because it was sitting in Ms Ivanoff's account but that's different to characterising Mr Cooke's conduct as unacceptable and apologising for it in those terms. That's what we take issue with, Commissioner.

25

We say that nothing in the objective evidence - and we dealt with this more in writing - indicates that Mr Cooke did deliberately misstate events. The submission, to that effect from Ms Ivanoff, appears to be based primarily on her recollection and, therefore, there is no basis to conclude that it was deliberate and this Inquiry would fall into error if it made such a finding.

30

My third and final proposition, which is the longest, is that, in fact, when the document - the record is carefully considered, it is clear that Mr Cooke's account is to be preferred. This is, again, only if you find that it is necessary to resolve. We say it is inherently a more credible and coherent account that two executives of a publicly listed company would behave, with respect to the potential exit of one of them, and that Mr Cooke's account is also significantly more consistent with the documentary record.

40

Again, we address this at some length in writing between paragraphs 115 and 160 and that's because the evidence in support is extensive, I won't repeat every point that is made there but I will highlight the nine core reasons why we say Mr Cooke's account should be preferred. I will ask that a few of the key documents be put on the screen while I do that. There is a consolidated PDF document similar to the one that Mr Renwick used. If I can just ask that that document be standing by and I will come to it in a minute.

45

Our first proposition is that, as to why Mr Cooke's account is more credible, is that it is more coherent. Ms Ivanoff's version is of a so-called offer to allow her to revoke a resignation. This has, in our submission, a number of problems. First of all, she agreed that it is harder to revoke a resignation. That is not really a recognised mechanism. Effectively, it would be a renegotiation of her hire. She agreed it was harder to do than that it is to protect her position with a marker. So that formal resignation could be made later if she so wished and she is, thereby, not prejudiced in terms of her notice period. But she also then does not have all the complications of having actually resigned.

Mr Cooke's version, in this respect, is more consistent with her expression of what she wanted, which was, evidently, to start the proper notice, to protect her in that respect, but to try to make her position at Star work. She recognised it was not a good look to leave after four months and she did not want the fact that she was thinking of leaving to be widely known at the time while she considered her options.

In our submission, if the General Counsel of a publicly-listed corporation had, in fact, resigned, it would not be open to either of them to go about, in a cloak and dagger manner, pretending that that had not happened while she considered whether or not to change her mind. Mr Cooke's version is the only one that would properly protect Ms Ivanoff's desire not to hide the fact that she was weighing her options widely known at that point.

It would be striking, in our submission, if the General Counsel of a publicly-listed company thought that they could, in fact, formally resign and then just not tell anyone for a few months while they considered whether or not to change their mind. But this is not how the General Counsel of a publicly-listed corporation behaves, or ought to behave, and that Mr Cooke could not reasonably have interpreted her acceptance of his offer to revisit the matter in two months to be an agreement that she, would in effect, had secretly resigned.

I should add - and we didn't do this in writing - but Ms Ivanoff was taken to it in her evidence, that she also told the NICC on 21 December 2023 that she wanted to keep her resignation confidential. That was in her communication to the NICC, which is INQ.5003.0002.0001, just for the record.

It is also our submission, large and full, to use the language of offer and agreement, which is what is reflected and what Ms Ivanoff's evidence was, that, to describe Mr Cooke's version of events, because Ms Ivanoff comes away from the meeting with something more than she had going in, as does Mr Cooke, that is, her notice period is protected, Mr Cooke does not immediately lose his Chief Legal Officer, they both get another chance to make the relationship work.

But it is not logical, in our submission, to use that language to describe Ms Ivanoff's version. On her version, she resigned. An offer, so (inaudible), to

allow her to revoke that decision in two month's time does not really give either of them anything they didn't already have. She could always try to revoke her decision and Mr Cooke could always try and persuade her of this. There is nothing relevant to agree in that respect.

5

We set this out in writing between paragraphs 126 and 131. I should pause here to note that, in our submission, it is clear that, in cross-examination - the cross-examination of Mr Cooke by Ms Ivanoff's counsel, in relation specifically to the expression of "an intention to resign at that meeting", it is evident, on a fair reading, that the witness and examiner were at cross-purposes during that examination. Mr Cooke has always described the meeting on 6 September as concerning Ms Ivanoff's unhappiness and, clearly, concerning her desire to leave, his attempts to persuade her to defer her decision by giving her a marker for her notice period have always been part of his narrative.

10
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Mr Cooke was adamant in his account that Ms Ivanoff did not resign or say that she was, in fact, going to do so. But he has never denied that the meeting was about whether or not she would stay at The Star. That was clearly the subject of the meeting. To the extent that Ms Ivanoff's submissions proceed on the basis that Mr Cooke was, in some way, denying the nature of the meeting, we say it proceeds on the misunderstanding of his evidence and, to the extent that that is relied upon those submissions should be disregarded.

20

The second reason Mr Cooke's account is more credible is that the earliest record of the conversation is more consistent with his account. I will ask now that we go to tab 2 of the PDF bundle, which is the email from Ms Ivanoff to Mr Cooke at 4.25 pm on the afternoon of 6 September 2023. If that could be put on the screen. This is, for the record, STA.8517.0033.8914. It is tab 2 of the chronology of the consolidated PDF.

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30

It's document tab 2 in the consolidated PDF, beginning on page 3 of the PDF. The email from Ms Ivanoff to Robbie Cooke dated 6 September 2023. It is a different PDF that had been provided. I think this is Mr Renwick's PDF. That's the one. Thank you. I want to highlight three things about this email. The first is, as you can see from the very top of the page, that Ms Ivanoff has subjected the email marker. That is consistent with Mr Cooke's account because it was allowing her to shorten her notice period and would require a marker for this date. It is not consistent, in our submission, of having, in fact, resigned because if she had resigned there is nothing to recognise with the marker. She would have resigned.

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MR BELL SC: Isn't that exactly what Ms Ivanoff was saying? That she agreed to reconsider in two months time?

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MS ROY: To that extent, we say they are consistent with each other. They are looking into whether or not she would move on in two month's time. But Ms Ivanoff's account which we are being asked to meet is that she actually resigned at that meeting but she was going to be allowed to change her mind. We

say if she actually resigned she would not need a marker. A marker is more consistent with Mr Cooke's view, which is that she is deferring a resignation decision but had a marker so that her notice period would not extend six months from the date she decided to confirm that she was resigning.

5

MR BELL SC: Am I wrong in recollecting that Ms Ivanoff said she would agree to reconsider in two months time?

10 **MS ROY:** I will come to that. This is the extent to which we say this is largely a matter about minor details. The core agreement from both witnesses' perspective is that in two months time they were going to revisit this decision. The issue being was there a letter of resignation handed and was there, in fact, a resignation? For the reasons that I am developing, we will pursue, it is really only credible that it was a deferral of a decision to resign and not a resignation on that date. One
15 doesn't need a marker if one has, in fact, resigned even if one agrees that they will in two months time think about retracting that resignation. There is a resignation. It doesn't need to be marked. We make a similar comment about the general tone of the letter, which is:

20 "Thanks for the chat this afternoon and, agreed, let's see how the next two months ago."

Again, that's consistent, in our submission, with an informal chat and an agreement that there would be a marker and not a formal resignation.

25

Our third submission on this document is that the attachment that you can see to that email is actually a personality analysis that compares Mr Cooke's personality to Ms Ivanoff's using personality analysis tools. It is not the resignation letter of 6
30 September.

30

Now, she gave evidence that - and she said this in her letter to the NICC in December in regards to her - that she didn't attach this, her 6 September letter, because she did not want Mr Cooke's EA or her EA to read it.

35 Now, I have already said we submit it would not be open to these two senior executives to have privately agreed her resignation and not communicated that. She also gave evidence that she did not ask Mr Cooke specifically to keep things confidential, to keep the fact of her resignation confidential, and if she had handed
40 him a hard copy of the letter that was effecting a resignation, it would be very reasonable for her to assume that he would give it to his EA to scan in if she was not providing a soft copy.

Indeed, Mr Cooke gave you evidence that the reason he was so convinced he had not received this letter is he would have given it to his Chief People Officer and
45 his Chairman of the Board.

A further thing that militates in favour of Mr Cooke's account is the terms of the 6 September letter itself. I think that may be what, Commissioner, you were getting at. If I can go to page 1 of this PDF, the document that we are in - I'm sorry, page 2, which is the letter dated 6 September. First of all, the letter itself says, in the first sentence:

"Further to our discussions..."

And the short point about that is this: accepting Ms Ivanoff's account that she drafted this in advance and took it to the meeting, which she must have done, as she describes it, it is clear that it was intended to be handed across after they had had a discussion. But by the time the meeting and - that they would have a discussion, she would resign, she would hand them the letter. But by the time the meeting had concluded, on her own account, the discussion had moved on and this letter would no longer reflect the full terms of what they had agreed, which is that in some way her resignation, even on her account, was going to be revokable or she could take it back. It wouldn't be binding until she had revisited the position in two months time.

So we say, in those circumstance, it is inherently credible that she never handed across the letter, as she had initially perhaps intended to do, because it no longer reflected the position between the parties. But her evidence was also that it was contained in that envelope. So we say, even accepting her account, given her recollection is she brought it to the meeting, that envelope may never have been opened and, regardless of who took it away, of course, we say Mr Cooke says he never saw it, but it is entirely consistent with her account that he did never see it. She brought it in an envelope and what happened to it at the end of the meeting is unknown.

Our fourth point is connected to that one which is that, in writing the letter in this way in advance, referring to events that have not yet happened and that may never happen, that it is actually evidently a part of Ms Ivanoff's practice. If we could please have tab 4, which is also page 4 of the PDF - that's not the right page, page 4 of my PDF is a letter - thank you. This is the draft email. It emerged in evidence it was a draft from Ms Ivanoff to Mr Cooke, Ms Hammond and Mr Foster dated 1 December. Contrary to what was stated in that first paragraph I draw your attention to - the second sentence:

"I have informed my direct reports, some of the GLT and also discussed with Anne Ward, given she played a role in me coming to The Star.

She's making a statement of having already discussed this with Ms Ward, accepting this is a draft that was not, in fact, sent. Ms Ward gave evidence that at this point, that is, 1 December, Ms Ivanoff had not had the conversation referred to. The evidence is set out in paragraph 140 of our submissions.

We are not criticising Ms Ivanoff for having drafted a letter in advance in those terms but we do say it is a reflection of the practice to draft things in advance, referring to events that have not actually occurred, and that this does risk creating a misleading representation, including possibly to Ms Ivanoff herself when she then goes back and reviews her documents as to what has, in fact, occurred.

We also observe that this email is consistent with Ms Ivanoff having recognised that a resignation would require notification to a number of people and she accepted that in her evidence. We also say the second paragraph is consistent with Mr Cooke's account that was given to the NICC on 20 December. That in respect - I mean, on 15 November, she and Mr Cooke had discussed the future capacities of the legal team in anticipation that she would exit and, just on that meeting, I will just pause to note, they both agree that that meeting concerned her continuing desire to leave and they both agreed that that meeting, this is the meeting of 15 November, she did not resign at that meeting.

Now, it would appear they were at cross-purposes. If she thought she already had resigned and he thinks she has not yet resigned. But, in any event, she did not resign at that meeting and that is agreed.

Our fifth point is that Ms Ward's evidence, more broadly, also does not reflect that Ms Ivanoff had indicated an immovable intention to resign, as she herself says she did not, at any point prior to 4 December. That is set out in - that is, Ms Ward was not aware of that at any point prior to 4 December. That is set out in 142 to 143 of our submissions.

Our sixth point is that Ms Ivanoff's handwritten notes on the letter - and I might ask that we go back to tab 1, page 2 of that bundle - that her handwritten notes are inconsistent with the account in a couple of important respects. If you look at the handwriting, she says:

"Meeting with RC on 6 September."

Then "tendered". It's consistent with her having commenced the meeting by indicating her desire to resign. Then she says:

"Agree to give it two months to consider if would retract."

This is consistent with her being persuaded to revisit her decision in two months on both of their accounts.

We say the use of the word "retract" specifically, which is what - now drives her narrative of that meeting, may either reflect imprecise shorthand, which has then potentially infected her later recollection, or it may have been a bona fide misunderstanding from the very outset of that meeting. But - and that fact would be consistent with the clear evidence that she had previously considered that she and Mr Cooke had had the same conversation with different recollections.

I have already covered why retracting resignation makes inherently less sense than deferring one and having a marker on the notice period. But I come to the next handwritten note - and we say this is very highly significant - she says:

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"If no changes, RC would accept I resigned 6 September."

If she had, in fact, resigned at that meeting and considered that she had, it is irrelevant whether or not Mr Cooke would accept that fact at the relevant time.

10 That the only reason that he would accept she had resigned on that date is if it was not, in fact, a resignation but would only be confirmed to be such in the future upon the contingency that there had been no change to the state of her dissatisfaction and in circumstances where Mr Cooke had agreed he would try to work on their relationship.

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Other seventh point is that Mr Cooke's recollection has been consistent, coherent and firm throughout the various accounts. These are set out in our submissions from paragraph 151, including 4 December, email exchanges with Ms Ivanoff, the 20 December 2023 letter to the NICC and the later responses to an RFI request from this Inquiry and further inquiry from The Star.

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We reject Ms Ivanoff's submissions at paragraph 29 that there could be any rational utility in Mr Cooke pretending that she had not resigned and that submission should be rejected. We certainly say, in that regard, that there would be no utility in Mr Cooke reminding Ms Ivanoff, as he did in his 4 December email, of the requirement to provide written notice if he, in fact, had recollection of having received a letter because he would naturally presume that she would immediately then provide a copy of the letter. There is no point asking for written notification if you think it has already been given and you're going to be immediately proved wrong.

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Our eighth point is related to that fact. The failure of Ms Ivanoff to produce or even refer to the 6 September letter is conspicuous - I mean, in her 4 December correspondence with Mr Cooke. The timeline appears to be this: if we can go to tab 6 of the PDF, the second page of that document, which is page 11 of the PDF, at the bottom of that page is the email from Mr Cooke dated 4 December 2023 which instigates these exchanges:

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"Subject to your position..."

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And then it's timed 1.39 pm. Above that, Ms Ivanoff replies at 1 pm. I think we have heard evidence in the Inquiry that that is likely to be the result of the time difference between Sydney and Queensland and it is more likely that the responses were, therefore, within an hour of each other. On the page above, this is page 10 of the PDF, if you can zoom out, Mr Cooke responded at 2.11 and that's that response there at 2.11 pm. Denies some of the details of the recollection and, specifically, he says:

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"Definitely not my recollection of our interactions and in no shape nor form did I consider our conversation to be a resignation."

5 And at the bottom he draws her attention to the need for written confirmation -
written notice. Now, her response at the top of that page - and as for the note - the
time, it's 3.15 pm, and she says:

10 "I confirm my notice of resignation as below effective 6 September 2023."

Again, "effective" suggesting a backdating. And could I ask you to keep that time
relevant. If we then go back to tab 4, which is page 5 of the PDF, this is
Ms Ivanoff's email to herself dated 4 December and the time there is 2.15. Again,
15 having regard to the time change, this could be the same time or it could be an
hour before she replies to Mr Cooke. Either way, it is certainly contemporaneous
with that email exchange with him and she emails herself a copy of the resignation
letter but she does not email it to Mr Cooke.

20 We simply make the point that if she was confident at that time that she had
handed it to him and that her handwritten notes reflected her version, the logical
thing would be to provide it to Mr Cooke and The Star at that point, or, at the very
least, refer to the fact of it but she does not do this.

25 Ninth and finally, there has been no evidence adduced from other people
mentioned that may be able to give relevant contextual or corroborative evidence
from Ms Hammond, the Chief People Officer, nor were questions put to Mr Foster
on this issue. We say they presumably may have been in a position to comment on
the conversations with Ms Ivanoff and Mr (inaudible) were not asked and, for all
of those reasons, we say you would not and could not prefer her version of events.
30 If you felt it necessary to resolve the vagaries of memory, you would prefer
Mr Cooke's account, but again, our primary position does remain that it is
unnecessary.

35 Unless I can assist you, Mr Bell, further, those are our submissions on that issue.

MR BELL SC: Yes. Thank you, Ms Roy. I will adjourn now until 10 am
Wednesday for closing submissions in reply from Counsel Assisting.

<THE HEARING IN PUBLIC SESSION ADJOURNED AT 2.59 PM