INDEPENDENT LIQUOR AND GAMING AUTHORITY OF NSW

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

THE HONOURABLE PA BERGIN SC
COMMISSIONER

PUBLIC HEARING
SYDNEY

WEDNESDAY, 11 NOVEMBER 2020
AT 10.00 AM

Continued from 9.11.20

DAY 53

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MR A. BELL SC, MS N. SHARP SC, MR S. ASPINALL and MR N. CONDYLIS appear as counsel assisting the Inquiry
MR H.C. WHITWELL and MR K. LOXLEY appear for Crown Resorts Limited and Crown Sydney Gaming Proprietary Limited
MR N. HUTLEY SC appears with MR T. O'BRIEN and MR A. D'ARVILLE for CPH Crown Holdings Proprietary Limited
MR J. STOLJAR SC appears with MS Z. HILLMAN for Melco Resorts & Entertainment Limited

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

MR HUTLEY: Thank you, Madam Commissioner. Before we come to the detail, the substantive topics with which my clients are concerned, can we commence with some comments about suitability.

COMMISSIONER: Yes.

MR HUTLEY: Of course, under the terms of reference, paragraph 16(a) and (b), you are directly concerned with the suitability of two entities: the licensee, Crown Sydney; and Crown Resorts. Counsel assisting has submitted that, in carrying out that review, one looks to matters set out in paragraph – section 13A, subsection (2), of the Casino Control Act, and we don't dissent from that proposition. We accept that in looking at those factors, you may consider attributes of close associates of the licensee in Crown Resorts, but, of course, solely for the purpose of assessing the suitability of those two entities. For that reason, we accept that you can consider the relevant characteristics of my clients, CPH, Mr Packer, Mr Johnston and Mr Jalland, for those purposes.

Insofar as questions of suitability arise in respect of our clients, those are matters which we will address. We will not be making any submissions about the suitability of Crown or the licensee; that is a matter for those representing Crown. We, of course, may pass to a degree upon facts which will be relevant to your consideration of that issue to contextualise your consideration of the position of my clients.

It follows from that that it may be that, because of the order in which we are addressing you, Madam Commissioner, once we've heard what Crown has to say about suitability, we will wish to say something about that, but we would seek to do that in written form at a later date, subject to one matter which I'll come to in due course, and that's this: in particular, where you have invited the parties to make submissions about what should be done in the event that the Crown or the licensee are found not to be suitable for one reason or another, that, as we say, is a matter for Crown. And to the extent that such proposals affect our clients, of course, Crown's formulation of their response will be matters in respect of which our clients can form no part in their determination for obvious reasons.

Now, it's for that reason we do not propose to make submissions about matters which affect, directly, my client as opposed to indirectly as such matters as apply to Crown qua Crown. Were proposals to be brought forward which affect, as it were, the interests of CPH or any one of my individual clients directly through Crown, which will be, of course, a matter for Crown, we would seek the opportunity to address you about those shortly, and we would seek an opportunity to do so orally, although we are conscious that you are constrained to conclude the oral hearings, as we understand it, next week. But should that arise, if we were to be given an opportunity to speak, perhaps for an hour or so about those issues, should they arise – we just don't – we're not privy to what may or may not arise in that regard. And we'd seek the Commission's indulgence in that regard and – yes.

Now, turning, then, to the way in which matters affecting our clients are relevant to the suitability of the Crown entities, one of those matters which has loomed large in this Inquiry is the questions of persons being of good repute, and good repute in the sense used, as you would know, Commissioner, in section 13A(2)(a) and, in similar terms in, (2)(g) of the Casino Control Act 1992. Should I call out the PIN number in respect of the legislation?

COMMISSIONER: No, Mr Hutley, there's no need. I have it here on the bench with me. Thank you.

MR HUTLEY: Thank you, Commissioner. And you will see 13A(2)(a) is sufficient for present purposes. It says for the purpose of this Act the Authority is to consider whether each of relevant persons is of good repute having regard to character, honesty and integrity.

COMMISSIONER: Yes.

MR HUTLEY: Now, there is a difference, of course, between a person's character and a person's reputation or repute. The latter can be a reference to the public perception of them. And Justice McHugh, when sitting in the High Court, in Melbourne v Queen (1999) 198 CLR 1, at page 15. And we've given – delivered to you, Madam Commissioner, a list of authorities. And it's sufficient, I think, if I read this out rather than take you to it. It is:

> *…character refers to the inherent moral qualities of a person or what the New Zealand Law Commission has called "disposition", which is something more intrinsic to the individual in question. It is to be contrasted with reputation, which refers to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person.*

Section 13A(2) is concerned with the public perception of a person, but only to the extent that the perception is justifiably based on objective characteristics, namely, character, honesty and integrity. It is not, in terms, dealt – concerned with what would be familiar to you in your legal capacity, as fame, which can be wholly unjustified. So the point is that section 13A(2)(a) uses a composite phrase. The

question of good repute is to only be judged by reference to characteristics, in fact, of the person. And that will have significance in relation to the issues raised in relation to junkets, for reasons which would be apparent to you. And we'll come to that at the end of the submissions.

Now, pursuant to paragraphs 21 and 22, if we can move to another topic, by way of introduction, of the procedural guidelines for this Inquiry, if it's to be said of any witness that he or she should not be believed or was lying, it was necessary for that to be put to the witness. In the light of that, it is notable that counsel assisting made no attack on the credit or evidence of Mr Packer or Mr Jalland. Nowhere has it been suggested that those witnesses were not telling the truth in their evidence before the Inquiry. That is a matter which is highly relevant to any assessment of their character, honesty and integrity.

COMMISSIONER: I think the only difference in that is that, notwithstanding that I agree with you, Mr Hutley, it was put to your client, Mr Packer, as I recollect, by Mr Bell, how could the Authority have any confidence in Mr Packer to act in a particular way. It wasn't said that he was misleading or telling me things that were not true. It was another aspect of that character, honesty and integrity that was challenged of him, I believe.

MR HUTLEY: I will come – and you are there referring to MFIA, I think, and - - -

COMMISSIONER: Aspects of that evidence related to it, yes, his admissions about what he had done.

MR HUTLEY: I will come to that in due course, but we would say that that evidence establishes, and would give you confidence in his character, integrity and honesty. The frankness with which - - -

COMMISSIONER: Yes, I see.

MR HUTLEY: - - - it was put before you was, and you heard him and it was in confidence – was a hallmark of a man of real character, real integrity and real honesty.

COMMISSIONER: Yes, I understand your point.

MR HUTLEY: Now, can I turn shortly, by way of introduction, to outline the scope of the attack upon Mr Johnston.

COMMISSIONER: Yes.

MR HUTLEY: His credit was impugned, at least directly in respect of one matter – two matters, and perhaps indirectly in respect of a third. The first, which is the indirect, is in respect of what is said to be a refusal to accept responsibility for a failure in respect of China, and counsel assisting's submissions in this regard are at

transcript 4953, lines 30 to 4954, line 15. Now, for the reasons we will come to, you will not be satisfied this was a failure by Mr Johnston. In any case, a differing view about responsibility is not a matter which suggests that Mr Johnston was giving other than truthful evidence. It's an evaluative judgment about which minds can and will differ.

The second is in relation to Mr Johnston's evidence about whether he attended a particular Crown board and committee meetings. We will seek to demonstrate shortly that Mr Johnston's evidence should be accepted, and even if it were not, there could be no real suggestion that Mr Johnston's evidence was dishonest. The overwhelming likelihood, if you come to the conclusion, it would just be a failure of recollection.

The third is in relation to whether Mr Johnston reviewed the Crown deed of 10 May 2013 carefully. We will address this when we come to the Melco transaction, but the short point is Mr Johnston's evidence is consistent with the relevant board meetings, and as we will point out, others were not asked about the very matter which could have elicited clarity in relation to this subject matter. Now, once we've addressed those questions, we will submit that, Commissioner, you will accept Mr Johnston as a witness of truth, honesty and integrity. Now, as we understand it, the only ways in which CPH and Mr Packer are said to make Crown Resorts or the licensee unsuitable in this relevant forward-looking sense is what is put in the section entitled The Influence of Mr Packer Since November 2018, and it's really issue C1 of that statement of issues.

COMMISSIONER: Yes.

MR HUTLEY: We will address that topic in a moment and what we will submit you will see, Madam Commissioner, is that there is no evidence that there was such influence on the activities of Crown Resorts and, further, we will deal with the significance of MFIA, and at the appropriate time we will seek a short interlude in confidence.

The second is that it's said that the conduct of Mr Packer, Mr Jalland and Mr Johnston in relation to the Melco transaction made Crown, or the licensee, unsuitable, principally because of alleged breaches of regulatory agreements. That seems to be issue C2 of the Melco transaction statement of issues. We will address that topic when we come to the Melco transaction. We will submit, firstly, that there was no breach of the regulatory agreements. Secondly, even if you were to find there was such a breach, no criticism can be made of Mr Johnston, Mr Jalland or Mr Packer in the light of their knowledge and positions at the time, and the no breach could be – is on two bases, just to indicate.

We say that there was – even at the fulfilment of the transaction there was no acquisition by Great Respect, directly or indirectly, of an interest in Crown Resorts. And secondly, there was no breach because there was no knowledge upon the part of

Crown Resorts such that its obligation under the VIP agreement or the – I always forget the name of the agreement – the Crown consents deed could be engaged.

COMMISSIONER: Could you say that again for me, please?

MR HUTLEY: I'm sorry. I turned away because I forgot the name of the document.

COMMISSIONER: That's all right.

MR HUTLEY: There was no breach because either no acquisition directly or indirectly of an interest.

COMMISSIONER: Yes.

MR HUTLEY: And secondly, no breach because the provision did not, was not engaged by reason of the state of knowledge of anyone within CPH, relevantly, Mr Jalland and Mr Johnston by reason of their directorships of Crown Resorts. The way, as we understand, it's put with respect to Mr Packer having brought about a breach by Crown Resorts of those agreements is that it is contended that Mr Packer was a de facto director of Crown Resorts at the relevant time and his knowledge is to be imputed.

Now, we say there is no imputation of any of the individuals' knowledge to Crown Resorts and, secondly, there was no relevant knowledge to be imputed to Crown Resorts such that Crown Resorts would be brought into breach. And there are some other subsidiary ..... that even if information was imputed there is still no breach because there is no power of the relevant - - -

COMMISSIONER: Because there is no what?

MR HUTLEY: Power of the relevant variety to be able to prevent the transaction.

COMMISSIONER: Yes. Thank you.

MR HUTLEY: So a series of levels. Now, we say it follows that no suitability concern can arise, that is, suitability of Crown Resorts or Crown – or the licensee, directly or indirectly per the medium of close associates, Mr Johnston, Mr Jalland or Mr Packer by reason of the transactions associated – described as the Melco transaction. That is the extent of the case that is put against my client as how they affect the suitability of Crown Resorts and the licensee. We say, shortly put, there is nothing in the sense of there is nothing of concern for this Commission in relation to those matters when fully exposed. Now, the other point, of course, we mention - - -

COMMISSIONER: I think there is an additional aspect to the Melco transaction and I fully understand the legal confines within which you have made the submissions, but there's an additional aspect to that transaction which was that those

three individuals were exquisitely aware of the concerns about Mr Ho senior, and at the very least at the time they should have checked, etcetera, if they were to be exercising care for Crown's concerns and safety. So there's an aspect to it that's additional to the overlay that you've put on it.

MR HUTLEY: I will come to it, but there's a circularity in that also. If one has the honest belief, which we would say you would find of each of those individuals of non-involvement, there is no risk, even assuming imputation against me, which is difficulties which will be apparent to you, Madam Commissioner, there is no risk of bringing this organisation into breach. And there could be no step taken by Melco, without approval, to become involved in any way in the management, etcetera. So one can, in effect, with respect, construct a problem out of no problem and, in our respectful submission, one has to be clear that one doesn't, in effect, assume one's conclusion to construct a matter going to suitability. We submit, at the end of the day, that last point is circular.

COMMISSIONER: Well, it may present as circular, but let's have a look at it, Mr Hutley.

MR HUTLEY: Of course. Of course. I intend to deal with it, but - - -

COMMISSIONER: Yes. All right.

MR HUTLEY: Certainly. Now, as I – as we observed a minute ago, past events are only relevant if they are meaningful nexus speaking to present suitability. Now, for example, one of the topics you're asked to consider is the question of information provided to Mr Packer under a protocol agreed between Crown Resorts and CPH. That agreement has been terminated. As a consequence, you'll be required to consider whether the evidence you have about information provided to Mr Packer under that historical document provides any current concerns about suitability. Now – and can I now turn to the – just to give an outline of the order in which we propose to deal with the topics.

COMMISSIONER: Yes. All right.

MR HUTLEY: Firstly, we'll deal with the question of what is said to be Mr Packer's influence over the activities of Crown Resorts; secondly, we will deal with the Melco transaction; thirdly, we will deal with the China arrests and what is said to be Mr Johnston's and Mr Packer's involvement in the VIP business; and, finally, we will briefly address junkets and other matters which arise in respect of our clients. In the time that has been available, we have not yet completed detailed written submissions and we propose, with the leave, to follow the course that's been followed by our learned friends on behalf of the Commission and supply those in due course.

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

MR HUTLEY: Can I now turn to the influence of Mr Packer. The topic is the topic guideline which is – I will just turn it up if I could. It's the influence of James Packer since November 2018 is the topic. Now, can I just give you an indication of how we proceed. The form, supplied to us, of these documents is a form which identifies matters not in issue, contentions to be determined, and then questions ultimately to be determined. In respect of matters said not to be in issue, we will identify those aspects with which we agree and those aspects with which we don't agree. To the extent that they are matters going directly to Crown as opposed to involving our client – my client – we will not engage with them; that will be a matter for Crown to deal with at the relevant time, and it would be presumptuous for us to say what nuances, or the like, there are with respect to them because it's not within our province.

Now, turning to this topic, which I will call for shorthand is the influence of Mr Packer, being conscious that it is influence limited to a period, can we outline in broad terms the position we take. We acknowledge that this Inquiry has heard evidence which are matters of significant concern, including what could be characterised as failings within Crown Resorts. We accept that the Inquiry should consider those matters in their fullest context. However, in this part of our submissions, we respond to counsel assisting's approach whereby they seek to attribute at least some of the blame for the apparent failings of Crown Resorts to Mr Packer and CPH. Now – and I'm concentrating here on the relevant period.

COMMISSIONER: Yes.

MR HUTLEY: We submit, Madam Commissioner, that this is an unwarranted and unfair characterisation of Mr Packer's role, which is simply not supported by the evidence before this Inquiry. As I've submitted already, you heard honest and candid evidence from Mr Packer, who acknowledged that a lot of things that he had seen or heard in this Inquiry had been a total shock to him; that's transcript 3618 lines 14 to 16. He expressed, frankly and candidly, his incredible disquiet about the approach of VIP international business in China because it was, and I quote here:

> *…not the culture of the company that I was trying to build and I led for a considerable period of time.*

That's at transcript 3619 lines 3 to 27. At no point during Mr Packer's examination was it seriously suggested that his evidence was anything other than frank. To the contrary, it was, you will find, thoughtful, honest and clear. And that's a context in which we come. Now, the evidence upon which counsel assisting rely in making good their contentions against Mr Packer relate to a seven month period, November 2018 to May 2019. November 2018 is the commencement of the period, because CPH and Crown entered into the controlling shareholder protocol on the 31st of October 2018. May 2019 is when the Melco transaction was completed. Counsel assisting rely upon a small number of emails between Mr Packer and various Crown executives in order to seek to demonstrate Mr Packer's – and we quote from

paragraph B4 of the statement of issues – "profound influence over the affairs of Crown Resorts".

COMMISSIONER: Can I just ask you to pause there, Mr Hutley, so that we're not at odds. You indicated that counsel assisting has asked me to attribute some of the blame for the serious corporate failings of Crown to Mr Packer and to CPH. And you've also indicated that that is unwarranted and unfair as it relates to Mr Packer's true role. You've taken me to the evidence that you say is unchallenged that he was totally and utterly shocked and he had disquiet about what had happened, but Mr Packer did say that he accepted some responsibility for the corporate governance failings of Crown. So - - -

MR HUTLEY: I accept that completely.

COMMISSIONER: All right.

MR HUTLEY: I accept that completely, but - - -

COMMISSIONER: All right.

MR HUTLEY: - - - one here is talking about - - -

COMMISSIONER: So we're not at odds.

MR HUTLEY: No, no, no. We're talking – as – this topic is entitled The Influence of James Packer since November 2018.

COMMISSIONER: Yes.

MR HUTLEY: And we understand that to be concerned with those factors.

COMMISSIONER: That's to do with the power that he had allegedly by reason of the information he received in the controlling shareholder protocol. But I understand we're not at odds: you accept that Mr Packer has said that he accepts responsibility for the corporate failings that have been identified prior to that date.

MR HUTLEY: He accepted some.

COMMISSIONER: Yes. He said some.

MR HUTLEY: As every - - -

COMMISSIONER: He said some, but not all.

MR HUTLEY: Yes, he accepted some during the period when he was executive chairman. Every – and it will be a matter for you to determine the degree of that and, with respect, every director would have to accept some in respect of those periods.

COMMISSIONER: Yes.

MR HUTLEY: We are not in any way – and I will come to deal with that particularly in the context of the China arrests, but I'm dealing here with this submission which is dealing with the matters which go to present suitability.

COMMISSIONER: Yes.

MR HUTLEY: That's what's said to, in effect, present suitability, and that's the influence of Mr Packer since November. The only departure from that, as we understand it, is the concern referred in ultimate questions C3 with – I'm sorry, I do apologise. I'm wrong with that.

COMMISSIONER: Yes.

MR HUTLEY: C2 - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - which harkens to MFIA.

COMMISSIONER: Yes. Correct.

MR HUTLEY: That's the only, as we understand it, aspect outside that period which is being asked quoad Mr Packer is being asked for you to consider going to the suitability of the licensee and Crown Resorts going forward, by reason of Mr Packer's position.

COMMISSIONER: Yes.

MR HUTLEY: Now, can I deal, firstly, with two key contractual documents which you are familiar with: firstly, the CPH services agreement and, secondly, the controlling shareholder protocol.

COMMISSIONER: Yes.

MR HUTLEY: Now, the services agreement is exhibit Y13. Its number is CRL.525.001.0001. It relevantly commences at 0004.

COMMISSIONER: Yes. Thank you.

MR HUTLEY: Now, this is a document which, as you know, under which CPH executives provided services to Crown from time to time. As you know, prior to the agreement, prior to 1st of July 2016, CPH had provided services to Crown informally and Crown Resorts received the benefit of services being provided for no charge, and you can see that at recital A which is on 0004. Now, we don't need to take you to the detail, Commissioner, but there is evidence from various directors and other

shareholders about the very significant value provided to Crown Resorts by CPH. Mr Brazil gave evidence. The references, Madam Commissioner, we will put in the written document unless you wish me to quote them for the transcript. The same for Mr Craigie, Mr Mitchell.

There was a letter from what's called the Egan letter, exhibit O40 and also exhibit AH15. Now, in August 2015 CPH proposed that those services be paid for on a commercial basis moving forward and that the arrangements be formalised. The CPH services agreement underwent a thorough review process by the Crown Resorts nomination and remuneration committee. The committee comprised only independent directors. The process commenced on the 12th of August, and you will see that from exhibit R14, and concluded on the 15th of June 2016 which is reflected in exhibit AA31. When the agreement returned from the committee and was approved by the Crown Resorts board, and those – you can see that from the board minutes which I've referred to of the 12th of August and the 15th of June.

The process of the committee included obtaining two reports in relation to the rates provided in the agreement from Egan Associates, a well-known and respected third party remuneration consultant. In both reports Mr Egan's opinion was that the fees proposed represented reasonable remuneration for Crown Resorts' board to endorse. The first report is exhibit AA29 and the second – and we notified overnight of the second report which is, if I can give the PIN number for, and of course it will be a matter for – we haven't heard from counsel assisting as to whether they are not tendering this document and I understand in accordance with usual practice we can assume it will be tendered, and if it's not we can apply to tender it in due course.

COMMISSIONER: Yes.

MR HUTLEY: But just to give you the PIN reference, it's CPH.001.718.0001. On the 15th of June in 2016 the Crown Resorts board received the Egan Associates reports and legal advice and approved entry into the CPH services agreement. The CPH nominee directors had absented themselves from the meeting, of course. Can we now turn to the content of the agreement. You have been through this document to some extent already, and could we now just consider one of the clauses. If you go – it's exhibit Y13, CRL.525.001.0001 at 0004, and could one then move on to clause 14.4 at .0017. That may come up so I should wait, I think.

COMMISSIONER: That's all right. Yes. Thank you.

MR HUTLEY: It's not coming up with us. Anyway. Under clause 14.4A of the services agreement, the parties agreed that CPH and certain CPH executives had been provided with and would continue to receive confidential information of Crown Resorts. That is not just for the purposes of CPH providing the services under the agreement. This is one of the alternative conditions clause 14.4A(ii) but not only – and – but not the only one. If you could look at 14.4A(i) and (iii).

COMMISSIONER: Yes.

MR HUTLEY: And clauses 14.4B and C provide that CPH may use such confidential information of Crown Resorts for its own purposes and may disclose such confidential information to third parties on certain conditions. Yes, and you see that the third parties have provided an undertaking for the purposes of 14. It's for a lawful purpose and (iii) I need not trouble you. So that's the services agreement. Can we then turn to the protocol. The protocol is exhibit Y7, CRL – sorry, I do apologise. I'm sorry. Yes, hang on, I will come to it. Yes. Right. Now, I better set out the background before I come to it. On the 22nd of August 2018 Mr Johnston, on behalf of CPH, wrote to Mr Barton of Crown Resorts - - -

COMMISSIONER: I think it was the 23rd.

MR HUTLEY: Is it? Thank you. Right.

COMMISSIONER: That's all right.

MR HUTLEY: Thank you. Sorry about that.

COMMISSIONER: That's all right.

MR HUTLEY: Proposing a minor amendment to the CPH services agreement with the object of allowing Crown Resorts to continue to provide confidential information to Packer as it had done in the past, and that's – and you can see that, and Mr Johnston gave evidence about this at transcript 3028, lines 10 to 3029, line 23 and 3196, lines 22 to 31. That proposal was considered by the nomination and remuneration committee. The committee consisted of Mr Dixon, Mr Horvath and Mr Mitchell who were all independent directors of Crown Resorts, and you can see what was done at exhibit AB45 which is CRL.709.0001.0001, and the relevant consideration of it commences at 0003 over to 0004.

COMMISSIONER: Yes.

MR HUTLEY: Now, Mr Barton gave evidence about that matter at transcript 2736 lines 20 to 2737 lines 10. Now, if one goes to exhibit AB45, at 0004:

> *The committee rest solved that rather than amending the CPH services agreement it would be preferable for a standalone controlling shareholder protocol to be established.*

So, in other words, the committee took a different view to the proposal made by Mr Johnston. And they resolved that a draft protocol, which had been prepared by Crown, would be presented to CPHs solicitors and that management be authorised to negotiate any changes for review and approval. Now, while we're looking at the document, Commissioner, you will see that the minutes refer to Mr Johnston as being an invitee to the meeting.

COMMISSIONER: Yes.

MR HUTLEY: That's at 0001.

COMMISSIONER: Yes.

MR HUTLEY: And there is no notation of Mr Johnston absenting himself during the discussion of the proposed protocol. Mr Johnston's evidence was that he believed that he would have absented himself during the discussion of the proposed protocol, and he gave that evidence at transcript 2992, lines 34 to 319 – and at 3191 lines 35 to 3191 line 39. This is something about which counsel assisting made various submissions in relation to Mr Johnston, so we need to deal with them. Now, counsel assisting submitted, at transcript 4924 lines 31 to 47 and 4954 lines 14 to 15, three matters: that the minutes should be accepted as an accurate record of the meeting; secondly, that Mr Johnston's evidence that he left the meeting should be rejected; and that that reflected poorly upon Mr Johnston's credit. None of these submissions, with respect, should be accepted.

The members of the committee were Mr Mitchell, Professor Horvath and Mr Dixon. Apart from Mr Johnston, the other invitees at the meeting were Mr Barton and Ms Manos. Mr Mitchell's evidence was that it was likely that Mr Johnston absented himself, and that's at transcript 3889, lines 6 to 9. Professor Horvath was not asked about the meeting and Mr Barton and Ms Manos were not asked about Mr Johnston's presence during that part of the meeting. Mr Barton was – this meeting was addressed at transcript 2736 lines 20 to 2737 lines 10, and there was, in the confidential evidence of Ms Manos at transcripts 18 lines 34 to transcripts 19 to 20.

Mr Dixon was asked about his normal practice in respect of minutes, which is that they were checked at the next meeting and he had no reason that they think that was wrong; that's Mr Dixon's evidence at transcript 4664 lines 21 to 38. However, Mr Dixon was not asked about the possibility of the minutes being incorrect in the light of Mr Johnston's and Mr Mitchell's evidence which had come before Mr Dixon's evidence; that's transcripts 4664 lines 40 to 4665 lines 10. Mr Dixon - - -

COMMISSIONER: Not asked by anyone.

MR HUTLEY: Anyone. No, no, I accept that. He was not asked about his practice in respect of whether minutes always reflected the movements of non-voting attendees in the meeting. There is also no reference to Mr Johnston, in that part of the minutes, which records the discussion of the proposed protocol, but I accept there's no reference to him at other parts as well. Now, can we turn, then, to the meeting of the next meeting of the committee.

COMMISSIONER: Yes.

MR HUTLEY: That took place on the 23rd of October 2018. That's exhibit AB35, PIN number CPH.001.658.2699 at – relevantly, the PIN number for the document is 2798 – sorry, 2978. I'm sorry. My note - - -

COMMISSIONER: That's all right.

MR HUTLEY: Now, at that missed meeting you will see, Commissioner, that Mr Johnston was an invitee. And the minutes record that he left the meeting when the protocol was discussed. Now, this – there is no reason to think that Mr Johnston would have adopted a different practices for different meetings. I mean, same subject matter, etcetera. Finally, Mr Johnston accepted he took steps to correct inaccurate meetings where they came to his attention. To be fair, that was asked to him, and that's transcript 2907 lines 39 to 43. Now, but there was no reason for the minutes of the 19th of September meeting to come to Mr Johnston's attention. Mr Johnston was invitee at both meetings. It's a matter of commonsense that the responsibility for accuracy of the meeting lay with the members of the committee. In the light of the totality of the evidence, we submit you should find that Mr Johnston absented himself from the first meeting and the credit attack on Mr Johnston should be rejected.

In any event, even if the Inquiry were to proceed on the assumption that Mr Johnston's evidence was mistaken and he was present during the discussion of the protocol, there is no evidence that the committee's consideration was affected by Mr Johnston's presence, and his absence from the next meeting, where the thing is properly – is fully considered, meant any such departure would be of little significance. It's also obvious that the committee members would be aware Mr Johnston was a CPH nominee director of Crown Resorts on the Crown Resorts board.

Now, returning then to the process for the preparation of the protocol, at the next meeting – at the same meeting, the 23rd of October 2018, the committee resolved that the protocol be recommended to the Crown Resorts board for approval. And you'll see that at 2978 – PIN number 2978. Right. Now, can we go to the 31st of October Crown Resorts board meeting. That's exhibit Y6, PIN number CRL.506.006.5500 at 5509 is the relevant PIN.

COMMISSIONER: Thank you.

MR HUTLEY: Ms Manos, you will see, advised the Crown Resorts board that, following Mr Packer ceasing to be a director, it was proposed that Crown Resorts enter into the protocol, and Ms Manos advised that the nomination and remuneration committee had considered the proposal in detail and recommended the board approve the entry into the proposal. And you will see the resolution of the board.

Now, another submission is sought to be made in relation to Mr Johnston. The minutes reflect Mr Jalland and Mr Poynton leaving the meeting, but not Mr Johnston. Mr Johnston's evidence was that he did leave the meeting. And you'll see that evidence at transcript 2992 lines 22 to 34 and transcript 3191 lines 35 to 39. Counsel assisting, at transcript 4954 lines 14 to 15, submitted that Mr Johnston's evidence that he had left the meeting was wrong and reflected poorly upon his credit. Again, we'd submit the submission should be rejected. Mr Johnston's evidence is consistent

with logic. If Mr Jalland and Mr Poynton were absenting themselves, there's really no logical reason one can imagine that Mr Johnston would remain. No other directors were asked about Mr Johnston's presence at the meeting. Ms Manos was asked, at a confidential hearing:

Why didn't he leave the meeting?

But the possibility of the minutes being inaccurate was not put to Ms Manos; that's P18 of the confidential hearing.

COMMISSIONER: I think the – that's a public exhibit.

MR HUTLEY: Yes – thanks – of the confidential hearing. CPH parties were not present at the confidential hearing and one can imagine – you could imagine what would happen if such a question was asked, it would logically lead to an objection, because it assumed - - -

COMMISSIONER: Well, wait a minute, Mr Hutley. Just wait a minute. That document is a public exhibit, and Ms Manos was called to give evidence, and any questions that arose from that line of questioning could have been put by you or yours at any stage.

MR HUTLEY: I understand that.

COMMISSIONER: So I don't have to imagine.

MR HUTLEY: No, no. With respect, Commissioner, if a leading question is asked which makes that assumption within it - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - it doesn't necessarily have to return to deal with it. It suffers from the difficulty of assuming its conclusion.

COMMISSIONER: Of course.

MR HUTLEY: And that's the observation: the reliability of that evidence is necessarily affected by that process, and - - -

COMMISSIONER: Well, this could have been explored, if necessary, but – and Ms Manos could be recalled – but I understand your point in respect of whether he left or not it's not going to make much difference, you say.

MR HUTLEY: Firstly, that; secondly, the logic of him remaining there seems odd, to put it mildly, but, secondly, having regard to his manifest position of conflict and there's no suggestion by any person that he in any way participated in the exercise. Even if you found his recollection is incorrect - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - it doesn't reflect upon his credit in any way. That's all I'm concerned with - - -

COMMISSIONER: Yes, I understand.

MR HUTLEY: It is, but it is – and I wouldn't have troubled you with it - - -

COMMISSIONER: That's all right.

MR HUTLEY: - - - except that counsel assisting has put some significance to it.

COMMISSIONER: That's all right.

MR HUTLEY: Now, the protocol was then entered into – are you proposing to take a short adjournment having regard to the Remembrance Day?

COMMISSIONER: I am.

MR HUTLEY: It's five to 11 now.

COMMISSIONER: Yes. When it's convenient to you.

MR HUTLEY: It's convenient now. I'm going – I'm still dealing with – I'm about to go to the aspects of the protocol. It might be a convenient time to deal with that now.

COMMISSIONER: Yes. I shall return at about two and a-half minutes past 11.

ADJOURNED **[10.53 am]**

RESUMED **[11.03 am]**

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

MR HUTLEY: Thank you, Madam Commissioner. Now, could I turn to, firstly, the benefits to Crown Resorts from the protocol. There's significant evidence about the benefits of the protocol to Crown Resorts. The protocol at clause 2.5, and I won't take you to it, outlines the various real benefits for Crown. Mr Alexander gave evidence at transcript 3471, line 38, of the extensive successes that Mr Packer has, and I quote:

...brought to Crown on behalf of all shareholders over the years –

including a number of very valuable transactions, including Burswood, Macau, Betfair, Aspinalls and Barangaroo. In respect of Crown Resorts' Macau venture at transcript 3471, line 38 to 3472, line 9 he said he conceived Macau:

> *When I first went to Macau with James, the Cotai strip was a swamp and in six years it was the world's greatest gaming precinct. Crown obviously subsequently sold its investments there for six times earnings.*

Other directors gave similar evidence of the extensive benefits that Mr Packer brought to Crown, and the references to that evidence will be set out in our written document, but those include Mr Barton, Mr Dixon, Mr Mitchell and Mr Demetriou. Now, you've been taken to the contents of the protocol and you've been taken to clause 2.8 which formalised the sharing of Crown Resorts' information with Mr Packer. The sharing with Mr Packer was on the basis he provide a confidentiality undertaking and Mr Packer did so on the 15th of October 2018, and that undertaking is exhibit AB38.

Clause 3.2 of the protocol, if we can bring that up; I will give you the reference again to CRL.509.014.8430. And if I can take you to clause 3.6 which you will find at .8435. The protocol was capable of being terminated by Crown Resorts at any time.

COMMISSIONER: Yes.

MR HUTLEY: One matter – and also you will note clause 3.2.

COMMISSIONER: Yes.

MR HUTLEY: There was an obligation to keep its very terms confidential.

COMMISSIONER: Yes.

MR HUTLEY: Unless authorised by the company which, of course, is Crown. Now, one of the matters, which we don't think is before the Inquiry yet, is that both the CPH services agreement and the protocol have been terminated by Crown Resorts with the agreement and at the request of CPH. There are two further - - -

COMMISSIONER: I think I do have that understanding. I think there was an ASX announcement, yes.

MR HUTLEY: Yes. I don't think that's been given an exhibit number. There's a letter from Mr Johnston of the 21st of October 2020 which hasn't yet been given an exhibit number which is CPH.001.715.0002.

COMMISSIONER: Yes.

MR HUTLEY: And the Crown ASX announcement of termination of both agreements which is CPH.001.715.0001.

COMMISSIONER: Yes.

MR HUTLEY: So from the 21st of October those documents are no longer in force.

COMMISSIONER: I don't have any – in reading that letter, I don't have any indication from the letter as to why it was terminated, do I?

MR HUTLEY: No.

COMMISSIONER: No. Yes.

MR HUTLEY: Could we now turn to the submissions of counsel assisting that the protocol meant that Mr Packer had a profound effect upon the activities of Crown Resorts. Can we first start by making some general observations. The Inquiry has before it hundreds of emails summonsed from Crown Resorts and CPH which were sent to Mr Packer during the relevant period pursuant to the protocol. In fact, the number – and we will refer to this, sent to Mr Packer was some 246 – I'm sorry, 287, and you will have seen in the submissions a large number of them, not referred to, were where Mr Barton sent updates as to the EBITDA of the organisation.

COMMISSIONER: Yes.

MR HUTLEY: The responses – we will give you the details of the responses in number form at least from Mr Packer which are relatively small. Now, from those hundreds of emails, counsel assisting have identified only six documents which are said to give rise to concerns about Mr Packer's influence and we will come to the details of those in a moment. But the fact is that such a small number of emails which are said to give rise to the concern about Mr Packer's involvement in Crown Resorts demonstrates there is no, in our respectful submission, real foundation for the contention that Mr Packer was involved in any substantive way in the decisions of the board of Crown Resorts or its senior management in the relevant period.

Rather Mr Packer's role was that of a keenly interested 46 per cent shareholder who from time to time provided advice as sought by the organisation. Now, can we go to the six emails. The first of those is - - -

COMMISSIONER: Just pardon me. You're not suggesting that this provided advice as sought by the organisation – are you suggesting that that was the situation after November 2018? Or October 2018?

MR HUTLEY: They were supplying to him information about, for example, the EBITDA of the organisation.

COMMISSIONER: Yes, that was very, very regular.

MR HUTLEY: And he was expressing opinions about the position of the company. That was wholly in accordance with the aims of the protocol. He wasn't instructing – the aim of the protocol was to allow that this sort of information be supplied to him. Not necessarily supplied to him for, potentially, his insights.

COMMISSIONER: I see. So you say it was a two-way street.

MR HUTLEY: Quite. It was – the protocol made clear that it was a two-way street.

COMMISSIONER: Yes.

MR HUTLEY: I mean, that was the purpose and object. But also we want to concentrate on the relatively limited scope of the subject matters dealt with. Now – and the importance of this is that the basis – just to tell you where we're going, our learned friends make a submission that Mr Packer was in this period a de facto director of this company. Now, I will come to the authorities in relation to it, but in our respectful submission that submission simply cannot be supported by reference to any principles associated with that field of discourse. Mr Packer simply was - - -

COMMISSIONER: So – yes. Assuming - - -

MR HUTLEY: - - - not a de facto director. I'm sorry.

COMMISSIONER: Assuming that is so, the communications and the documents are still highly relevant to the considerations that I'm asked to deal with.

MR HUTLEY: We say they're communications made pursuant to the protocol.

COMMISSIONER: Yes.

MR HUTLEY: And the protocol itself gainsays the possibility of being a de facto director, because it's been supplied under a contract with the company with the company entered into - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - for its profit-maximising purposes. Now - - -

COMMISSIONER: Can you just take me, if you wouldn't mind, so that we don't lose it, if I can just go back to the protocol for a moment, Mr Hutley.

MR HUTLEY: Certainly. I'll just have it turned up.

COMMISSIONER: If I could just have a quick look at that. I think it's 509.014.8430.

MR HUTLEY: Yes.

COMMISSIONER: If I could just go to the next page, please, operator, if you wouldn't mind. And so it's the sharing of the board and the management of the company and the ultimate owner.

MR HUTLEY: Yes.

COMMISSIONER: And that is the stated bald purpose. And then I'm wanting to – because it had been the subject of some evidence that this particular street was one-way rather than two. And you've put a submission that I just want to understand, in terms of the contractual provisions, as to where I glean from this that this was a – the purpose was one to gain advice from Mr Packer, or is that something that you say comes from context, or what is it?

MR HUTLEY: Clause 2.5, if you'd go, at 8432.

COMMISSIONER: Thank you.

MR HUTLEY: It is recognised that real benefits can be obtained for the company through its close relation as its controlling share. Such benefits will be the benefit of all share – might include – including a whole series of matter – advice – providing advice to the company, advice relating to knowledge, experience of CPH in certain areas, such as financial modelling.

COMMISSIONER: And that's the advice of Mr Packer, you say?

MR HUTLEY: It's – if one goes back to the purpose, the management with CPH and the ultimate owner of the CPH, Mr Packer.

COMMISSIONER: Yes. And so that's the clause you say that I get the purpose was to get Mr Packer to provide advice to Crown?

MR HUTLEY: The purpose was to the sharing of information, but sharing - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - of information is an end, in a sense, not in itself. It's an end, but to merely say I share information with one says the next question is how might it be deployed? To what purpose am I doing that? So one then goes to the company's relationship with CPH.

COMMISSIONER: Yes.

MR HUTLEY: And then they refer to the benefits – they see all these arranged benefits perhaps coming from the relationship with the controlling shareholder and, inferentially, Mr Packer.

COMMISSIONER: Yes.

MR HUTLEY: And then it says, at 2.1:

The company acknowledges that its directors can act in the interests of CPH when where to do is in the interests of the company –

etcetera:

…the duty of the directors to act in the interests as a whole, including due regard to the interests - - -

COMMISSIONER: Next page, please, operator.

MR HUTLEY: I do apologise, yes, 8431. Then that's why it's got - - -

COMMISSIONER: Just a minute, please, Mr Hutley. Wait, wait. They'll catch up with you.

MR HUTLEY: I do apologise.

COMMISSIONER: That's all right. 2.1. Yes.

MR HUTLEY: And you see that, Commissioner.

COMMISSIONER: Yes.

MR HUTLEY: And then 2.2, obligation to keep it confidential, subject to various matters.

COMMISSIONER: Yes.

MR HUTLEY: And then consideration for the disclosure, at 2.3.

COMMISSIONER: Yes.

MR HUTLEY: Next page:

The company acknowledges that each director as ..... carefully before revealing information to anyone else including … must consider –

etcetera. And then disclosure - - -

COMMISSIONER: So I just wanted to understand that. I think it's 2.5, subparagraph (c), which you say supports your submission that this protocol was entered into for purposes, including a purpose of obtaining from Mr Packer, advice.

MR HUTLEY: Quite.

COMMISSIONER: Thank you.

MR HUTLEY: In other words, this agreement – to speak of it in the metaphor of a two-way street itself might overly simplify. It's obviously quite a sophisticated agreement which has been developed by Crown. That's why I said to you it was developed by Crown, not by CPH. They developed the structure of it. We say they developed it for profit-maximising reasons. Because they perceived – and those profit-maximising reasons were wholly rational when one has regard to the fact that the benefits which Mr Packer's acumen had brought to this company over the years. And that's why I referred to the evidence of all the directors, or many of the directors, who said this and, particularly, Mr Alexander's observations about the opportunities brought.

COMMISSIONER: Yes.

MR HUTLEY: In other words, this wasn't, in effect, a gift to CPH. It was an agreement whereunder Crown envisaged it would obtain benefits sufficient to merit the consequences of the agreement.

COMMISSIONER: So that Crown was entitled to have an expectation that Mr Packer, in dealing with this information, would act in its best interests to give it the advice.

MR HUTLEY: When it certainly – when he, certainly, gave that advice he certainly would be acting in their best interests.

COMMISSIONER: Yes.

MR HUTLEY: They concede that, in giving that advice, he would – as a majority shareholder it would only be, but they certainly didn't imagine that they were, as it were, going to act on his advice. The most classic example, which I'll come to in a moment, is Mr Packer urged upon the company to take up the Wynn transaction.

COMMISSIONER: Yes. I saw that.

MR HUTLEY: The board acted as one in rejecting that.

COMMISSIONER: Well, I don't know really what happened there. Somebody said it was because of a leak, but, look, it's a situation that was, I think, embryonic at the time.

MR HUTLEY: But it had been rejected by the board before the leak.

COMMISSIONER: I don't know that it had been rejected. I think that the particular non-binding offer that had been put by Wynn was one that had been indicated that, in that form, it was not acceptable.

MR HUTLEY: Quite. That's - - -

COMMISSIONER: But I think negotiations were, at that stage before the termination of them were still ongoing, but can I just come back to this just – thank you for taking me back to that for the moment. I understand your submission. But this is the first time, really, that there has been an indication that Mr Packer was in fact in an advisory role. And that's why I wanted to understand your submission, because prior to this it was really a matter that he was entitled to receive the information and did so, but now it's slightly different in that Mr Packer, on your submission as I apprehend it, was taking on at least an advisory role to Crown by receiving the information and giving to it any of his wisdom on that information.

MR HUTLEY: That was contemplated to be an aspect of that relationship.

COMMISSIONER: Yes, all right.

MR HUTLEY: Again, the agreement speaks for itself, and obviously one of the benefits contemplated to be available under the agreement was the potential for Mr Packer to express views about things.

COMMISSIONER: Yes.

MR HUTLEY: And the emails that you're taken to, he does express views about things.

COMMISSIONER: He certainly does.

MR HUTLEY: And they – we – what's characterised, and I will come to the emails in a moment, as instructions, diktats, what you have, they're not though. They're information supplied, has been supplied by this organisation to Mr Packer. He has, in accordance with this agreement, expressed views. What they do with the views is a matter for them. And he had no – anyway, can I – that's what I want to come to now. Can I come to exhibit AA71.

COMMISSIONER: Yes, of course.

MR HUTLEY: This is CRL.568.043.2762. This – one starts with the email from Mr Alexander below. He says:

I'm in Perth and just wanted to let you know those dates –

etcetera, etcetera:

Is there anyone else –

etcetera –

who has a key role.

And he writes that. And then he – Mr Packer says:

I don't believe Ken's financial year forecast. Can you please ensure you have thought and believe the numbers that are being brought to me in Aspen. Happy –

etcetera. Now, Mr Packer had obviously been supplied with a financial year forecast for his consideration, and the application of his acumen to a consideration of that, and he, acting in the interests of Crown Resorts, expresses a frank view about his lack of faith in them, and since they're to have further discussions, again, pursuant to the agreement laid on, he asks:

Bring forward numbers which you've got confidence in.

Now, if you're seeking the acumen, as we say this agreement was, of Mr Packer, it seems strange to criticise him in the aspect which his advice is being – view is being sought, that is, the forecast, not to express them frankly. Anything else, one would have thought, would be a lack of faithfulness, a lack of loyalty to the organisation under which he's got an agreement. Now, Mr Packer accepted in his evidence that he expected Mr Alexander to review that forecast and then provide it to Mr Packer. That's transcript 3648, lines 18 to 3649, line 9. But that's just obvious, and the expectation is because there's not much point, with respect, having an agreement where one is seeking the views of a person with Mr Packer's experience and acumen and then, when he gives advice, he expects that that advice will be followed through to bring forward the numbers.

It doesn't mean that – they're just numbers. It doesn't mean that the board has to accept them, it doesn't mean that anybody has to accept them, just to bring them to him.

COMMISSIONER: Well, you present it in this benign way, Mr Hutley, but he did remind Mr Barton that he had to make the figures conservative because he was getting angry, and he said that he was getting angry because we are always "missing our plans", and this was – this is the sort of evidence that needs to be weighed up with your submission. So when he says to Mr Barton, "Look, I'm getting angry", advisers are usually less forceful on one view of it, but it does seem that you need to deal with those sorts of communications that suggest that it was a little bit more than just proffering some business acumen.

MR HUTLEY: He was a shareholder, and a large one. He was interested at a personal level in the outcome. And that is how he's different to being what might be called the classic adviser but, with respect, that doesn't mean he's in a position of control. None of this is decision-making. Budgets have to be accepted by boards. Financial forecasts are accepted by boards. They're not determined before a board accepts them, on the recommendation of management. This organisation had a very

formalised process of budgetary preparation. This is nothing – this is advisory aspect as an adjunct to those considerations. Mr Packer doesn't control it. He's not in any board meeting where this is adopted or not. He doesn't have control over any board pack as to its content.

People are coming to him for his views. He's expressing them, and he may be expressing them, in a sense, with some directness, and I accept he has, because he's a 46 per cent shareholder, in effect, real concern about their accuracy. But that's no more than any shareholder would properly have if his views were sought about the budgets, as they are, pursuant to an agreement which this company sought. The extraordinary thing about it is that once the protocol is seen as a profit maximising agreement, the company is entitled to expect frank, forthright expressions of views, and that's what it gets. It's not bound to follow them. He's got no decision-making power. They can be rejected.

And in our respectful submission, the characterisation of this in the way it's sought to be done is simply misconceived, and also this is just one aspect of an immensely complex corporation. I will come to, in a little while, and refer you to – and you haven't been taken to these – the number of issues that this company was dealing with at board level. There were dozens and dozens and dozens of them of profound significance with which Mr Packer had nothing to do. Nothing. And one has to keep in perspective the limited role he took after he had left as a director, executive – and the limit being a limit of dealing with, essentially, management in respect of matters which management chose to send to him, subject to matters which management chose to engage with him. Can I next go to exhibit AA72, CRL.501.062.4997. This is a communication to Mr Barton. I do apologise.

COMMISSIONER: It won't be long, I hope, Mr Hutley.

MR HUTLEY: Should I call the number again in case - - -

COMMISSIONER: I think we're okay. Thank you very much, Mr Hutley. Yes.

MR HUTLEY: Now, one starts with an email from Mr Packer to Mr Barton. He says:

> *I know Mike has spoken to you about preparing a downside plan for me. I don't believe and I'm sick of always missing budgets and being unlucky in VIP. Please prepare something for me I can bank and look at the next debt levels at those conservative prism. That's it.*

And then he says "yes". Now, this, again, is a person who is expressing forceful views, and appropriately forceful views about the situation where he's concerned that financial planning within the organisation is not up to snuff. Now, what possible wrong or impropriety is that in a situation where one has an agreement of the variety that this company has put in place? It can terminate the agreement at any moment it wants. If it doesn't feel that there's value coming from the agreement, if the board

doesn't consider it is assisting them, they can terminate it at any moment. Not on notice, nothing.

The next one which is relied upon is exhibit AB32, CRL.501.032.9065. I'm sorry, can I just – I took you to AA72.

COMMISSIONER: Yes.

MR HUTLEY: To a similar effect is AA 78 and AA93, I'm not going to – where Mr Packer is requesting financial information from Mr Barton and it's being provided. I don't think - - -

COMMISSIONER: Yes, thank you.

MR HUTLEY: One can only – now, can we go then to exhibit AB32. Has that come up?

COMMISSIONER: Yes, it has.

MR HUTLEY: Yes. Thank you. In that email, Mr Packer told Mr Johnston and Mr Barton that they should make sure they met budgets for 2020 which had previously been prepared, and that was the subject of evidence at transcript 3653, lines 30 and 3655 to 3655, line 6. In that respect, the proposition that a person in Mr Packer's position is advising a company that it should meet budgets which have been set is so obvious that it can't seriously be suggested that Mr Johnston and Mr Barton would only work towards the goal of preparing an accurate forecast because of Mr Packer's request.

COMMISSIONER: But it's the flavour, you see what was emphasised here in one sense during the course of the evidence was Mr Packer said, "Make sure for your own sake that we achieve it", and that may be, as you might want to put, a bit of flourish, but if you look at it in the whole of the communications from November 2018 through to the middle of 2019 across – and it's not just the six emails to which Mr Bell referred, it's the whole of the communications, to get a flavour of whether he in fact was giving instructions, and I understand that you say he wasn't, but when he says "for your own sake that we achieve", etcetera.

MR HUTLEY: Quite, because - - -

COMMISSIONER: How do you characterise those words, Mr Hutley?

MR HUTLEY: Any executive would realise – firstly, Mr Packer had absolutely no control to sack this individual, but it's – as a quotidian state is for your own position, your own standing, for your own sake, and for that matter, your remunerations are no doubt affected by performance and the like, for your own sake you've got to make budget in that you should seek to make budgets in the case. I mean, there's nothing unique about this sort of communication. You would see this communication – any

person giving advice about how one would approach these questions would express this view. Now, the idea that this is somewhat – something extraordinary or showing kind of control, in our respectful submission is really just arch. They're seeking his views about the financial position of this company. He's expressing his views in clear terms.

You need to bring – this company needs to bring sensible budgets into existence which are met, and any person who knows anything about the stock market would realise that if a company produces budgets which are the published – the announced financial and don't meet them it's going to hurt them. And the submission is made that this is a reference to Mr Barton's job being on the line, but there's absolutely no evidence that his job was at risk at all, or could be at risk. It would be a matter for the board to determine his position. One doesn't even know, it may be a matter for the chief executive officer to determine it, but it would probably be a board decision.

Mr Packer's not on the board. It's a matter for others. What he's really saying is for your own sake, for your own sake do this. You've got to assume your conclusion to make – give this the content that the counsel assisting is submitting it has.

COMMISSIONER: You say that was just another piece of advice, do you?

MR HUTLEY: In one sense it's just the obvious. It's a statement of the bleeding obvious to an executive. If you're constantly missing your budgets, producing budgets, one would know from a matter of ordinary experience if a company is constantly under-performing in relation to its forecasts, it hurts the company's standing, and this is a publicly listed company and, frankly, it will hurt the standing of an executive who is responsible for it. I mean, in our respectful submission – I mean, to suggest that this is kind of the – firstly, to suggest that this is the act in some way of a director simply is misconceived. It's the act of a person you've agreed to communicate with to seek their views about these materials this company has and he's expressing them.

It's not just advice. If one goes to the agreement they're seeking, in effect, things like strategic direction from Mr Packer and the like. He is, as a result of being supplied with information pursuant to an agreement, exercising in the interests of the company. What he said that he would expect from them is views. They would expect from him his views, and he is giving them. They're not bound to follow them. There's no suggestion that these, for example, views have been reported to the board and said, well, Mr Packer has said this. Let's fall in line. No suggestion that any of this is going to the board of this company.

COMMISSIONER: Well, I think the difference is that the numbers are going to the board and the numbers are adjusted according to the discussions with Mr Packer and that's how that works.

MR HUTLEY: Well, not all the numbers are being adjusted in accordance with the discussions with Mr Packer by any means. It's not proved that Mr Packer just

identifies a number and so it is. Mr Packer merely criticises budgets which he doesn't have faith in. He doesn't – there's no evidence that he determines the numbers. It's for other people to assess the numbers. Now, can I next go to AA74. CRL.501.027.1601.

COMMISSIONER: Yes.

MR HUTLEY: And it starts at 1602. This is the email chain between Mr Packer and Mr Alexander about his travelling, and Mr Packer suggests to Mr Alexander that he should not be overseas and all hands should be on deck.

COMMISSIONER: Yes.

MR HUTLEY: Now, we submit that that could be a communication which any shareholder who found that the chief executive was being on a world trip might express a view about.

COMMISSIONER: But is this advice, really?

MR HUTLEY: I'm not saying it has to be advice, with respect.

COMMISSIONER: Well, what is it? Telling the chairman not to do something. I mean, really.

MR HUTLEY: He's not telling the chairman not to do something.

COMMISSIONER: Yes.

MR HUTLEY: He's expressing the view that he thinks, in the position that this company is, that one should not be, in the view he has, travelling around. He thinks it's excessive.

COMMISSIONER: So this communication was as a shareholder as opposed to an advisor.

MR HUTLEY: Well, I don't think it needs to be characterised, with respect, Commissioner. It's an expression of a person, who's a significant shareholder, of concern about what he perceives is not in the company's interests, and what happened - - -

COMMISSIONER: But that was – this is a communication that was returned to the Commission, or returned to the Inquiry as a communication under the protocol.

MR HUTLEY: I'm not sure.

COMMISSIONER: Yes, it was.

MR HUTLEY: But let that – let that be accepted; that may be because of the content of the next email from Mr Alexander where he refers to financial materials.

COMMISSIONER: I see.

MR HUTLEY: Financial matters. I don't know whether – since it's an email chain, I'm not sure that it's necessarily selected by the first email. It may well be the second email, but - - -

COMMISSIONER: All right.

MR HUTLEY: - - - Commissioner, to merely say that one communicates that one's concerned about a person travelling around and spending money – and does Mr Alexander say I will be back on Tuesday? Of course he doesn't. He sets out and explains - - -

COMMISSIONER: He says he agrees. He says he agrees that – and he's going to start doing things by teleconference rather than getting on planes.

MR HUTLEY: Quite.

COMMISSIONER: So he understands Mr Packer's point.

MR HUTLEY: But he says firstly, "I am not on a world trip. I'm with Peter Crinis. And we will be in New York and London to close out two restaurant deals," etcetera.

COMMISSIONER: Yes.

MR HUTLEY: So, in other words, he launches back into Mr Packer and says, "Your characterisation of what I'm doing is wrong, and this is what I'm going to do – this is how I'm going to behave." Now, that's just, with respect, robust communication between individuals. Characterising it as showing that we are under – in controlling the company is, in our respectful submission, just plain wrong. It's just a communication. It says what it says. It wouldn't be the first person who has criticised the behaviour of organisations with which a person has a shareholding relationship without it being - - -

COMMISSIONER: Mr Alexander says to Mr Packer that all he's doing is trying to do something that Mr Packer will be proud of.

MR HUTLEY: Yes.

COMMISSIONER: You see, there are many characteristics to this. And I understand that you're making submissions on the legal issue about directorship, but there's a wider picture here that needs to be reviewed, and it may be that it's not going to trouble you. But it does – there's explanation needed for what happened with all the serious corporate failures in Crown during this period. And one of the

things that your client discussed was – or discussed with me was his powerful personality. And, you see, you've got the chairman saying that he's really just wanting to make Mr Packer proud. And I understand the human nature in this, Mr Hutley. Don't get me wrong. But there are two issues here – and I know you're addressing the legal issue and I understand that – but there is a wider issue of what was the real relationship and whether the board was supine to wanting to make themselves in a position to be proud or have Mr Packer proud of them, and that's – every shareholder should be proud of the board, I know, but – so there is a broader issue, but I do understand your submissions on the legal issues.

MR HUTLEY: But in our respectful submission, at the broader issue - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - a communication by an individual who's a shareholder to its board, to directors who they know, is not improper. It happens all the time. There's nothing improper about that.

COMMISSIONER: I don't think there's an impropriety here. There's not an impropriety being put.

MR HUTLEY: And if there's not an impropriety, then it's not going to the suitability of Mr Packer then that's the case. What one – if one's concentrating upon not Mr Packer, but the attitude of the directors to Mr Packer, then that's a matter strictly for Crown.

COMMISSIONER: It is. But it's also caught up here.

MR HUTLEY: Well, if all that one is saying is that the directors are paying – a conclusion is made that a director is paying too much attention, whatever that is, to Mr Packer, that's not a criticism of Mr Packer. Mr Packer is a shareholder and is entitled to express opinions at this stage. In fact, one would have thought it's in the interests of a company that it hears from its shareholders if they have concerns, particularly overlaid here with an agreement where they have entered into a protocol to get views and supply information to Mr Packer. So there's no impropriety in that.

Now, if the Commission is concerned that some or all directors didn't do their job, that's a matter for Crown. I'm not saying they didn't. I'm not here to defend Mr Alexander. In our respectful submission, Mr Alexander reacted appropriately in this email by pointing out what he was doing and, like any director would say, we are aiming to make our shareholders proud of our performance. How many times would one have heard that in public announcements of a public company: the directors are working hard to return benefits to shareholders. All we're doing is our shareholders will be proud of this company. Now, one doesn't want to over-read what might be called quotidian observations by people in a position of directors as to their aim to maximise contentment for their shareholders. And merely saying it's Mr Packer is

no more than if it had been some other shareholder, say you, or shareholders in a whole; that's just, in effect, an accident of the communication.

What one is saying here is that – one's talking here about the potential of the suitability of Crown by reference to the position of Mr Packer. Now, firstly, these communications, of course, are taking place in the context of the protocol that has gone. But even in the context of the protocol, so even at the time, our submission is there's nothing of concern in these communications as viewed from the perspective of Mr Packer. In fact, they're wholly appropriate. What's done with them is a matter for assessment by you of what the sequelae was. And one of the things to note: there is no suggestion that any harm came to the company during this period from Mr Packer's suggestions – some people call them instructions, whatever that means – about the financial accounts of this company, not a shred of suggestion of harm. No one is saying that he's pushing the company or advising the company in a wrong direction, and no submission is made to that effect.

So one's got to, in effect, approach this question, in our respectful submission, is what are we asking here? If it's going to – if one is considering the suitability of Mr Packer, none of this should bear adversely upon his suitability. We say it's wholly appropriate, sensible, and, on all the evidence, right views to express. It seems strange that one's expressing views about the state of how the accounts could be where there's no criticism at the end, in any event, in any way and, in circumstances where he had a role to do that, and he is – anyway, you understand our submission.

COMMISSIONER: I do.

MR HUTLEY: Now, reference is made in this email, that's AA74, to the cost cutting plan. And Mr Packer accepted that that was a plan which he had put forward at transcript 3655.5-17. That's exactly the form of advice you'd expect from a person under the protocol. And the mere fact that it is taken up doesn't show control unless you can say the organisation didn't want to do it, it wasn't in their interests to do it, but they felt compelled to do it because Mr Packer put it forward. Now, in fact, the evidence – the position can be encapsulated by a short bit of transcript between Mr Packer – between Mr Bell and Mr Packer. And if it could be brought up on the screen, transcript 3658, lines 6 to 10. Where my learned friend said:

> *And in the period after the protocol was entered into, you made requests to the executives of Crown Resorts which you expected them to carry out, didn't you?*

Mr Packer:

> *I expected them to listen to me and push back if they disagreed.*

Now, for an organisation which enters into the agreement which they had, which supplies the information pursuant to the agreement, which they did, which was essentially of the financial variety which addressed Mr Packer's particular acumen, that response is, with respect, all that one could expect of Mr Packer.

Now, in fact, Mr Alexander's evidence about the relevant email chain was to similar effect. Mr Alexander categorised the request referred to in Mr Packer's email as a "reasonable request" and agreed with the notion that limiting executive travel was in the interests of controlling costs. That's transcript 3467 line 21 to 4367 lines 34. And he rejected counsel assisting's suggestion that Mr Packer was keeping "fairly close control over the management of Crown Resorts at this time"; that's transcript 3471 line 18. And, in that regard, if you're keeping close control over the management, you'd be looking at a broader scope of management activities than just these matters to do with financial accounts. And there's no suggestion we had any involvement in relation to those.

Mr Alexander, in fact, went on to give evidence that he saw value in Mr Packer's suggestions not because he was the larger shareholder, but in light of contributions that Mr Packer had personally brought to Crown for the benefit of all shareholders over the years; transcript 3471 lines 38 to 3474 lines 8. So – and Mr Alexander concluded, at transcript 3472 lines 9 to 10:

> *So when Mr Packer was making suggestions about the business, I had cause to listen.*

Not cause to listen because he was obliged to. Cause to listen, because he recognised, as the protocol recognised, that Packer had real experience in this field that had brought enormous benefits to this organisation and his views were worthy of attention. Now, finally, in the email you'll see reference to travel and Mr Alexander said, "I need authority to control it across the company." That's at – to bring back CRL.501.027.1601 at about .9 in the very – second-last – third-last sentence.

COMMISSIONER: Yes.

MR HUTLEY: Contrary to our learned friends' submissions, at transcript 4931 lines 9 to 13, Mr Alexander's evidence was that this was a reference to the board's authority, not Mr Packer's authority; that's transcript 3470, lines 3 to 16. Now, it couldn't be Mr Packer's authority because it would be unintelligible in that sentence. He would say, "I need your authority," which would be a bizarre statement, because Mr Packer was advocating it. What he was saying is, "If I'm going to do this, I've got to go to the board," the very antithesis of the suggestion that it was our dicta – my client's dicta, rather.

Our submission is, as Mr Alexander says, that he was receiving advice from a person whose advice he valued, and valued for good reason, but was not determinative, would need board authority, and he would seek it if he continued to be of the view that it was correct. Now, when it was suggested to Mr Barton, the then-CFO of Crown, that Mr Packer gave him instructions, Mr Barton's evidence:

> *Mostly, it was requests for information, Mr Bell. I don't recall too many instructions.*

That's transcript 2741.16 to 20. And this was – and you will find this in our submissions. Mr Barton sent 246 emails to Mr Packer in this period and received 20 in response. And if one goes to those emails, the only thing which might be called an instruction was please give me – "could you get me this document?" Now – so - - -

COMMISSIONER: Are you going to address that top one? I think you need to.

MR HUTLEY: I'm sorry, the top one? I'm sorry. Yes.

COMMISSIONER: Where Mr Packer says he's "over being Captain Good Guy" and then tells Mr Alexander:

> *Go hard my friend. You have my blessing.*

MR HUTLEY: Quite. Well, he's perfectly in a position to express – yes, quite. He says:

> *Let's be very clear. Hitting the numbers is more important to me than Crown Sydney. If we don't hit the numbers I won't be here as a shareholder and Crown Sydney will just be an apartment to me.*

He's saying, "If this organisation can't achieve desired returns, I will leave it." Not, "I'll take control of it." "I won't be there." And he's saying I'm sick – I am "over being Captain Good Guy. If you can't make the numbers, I will be out of here." This isn't control. This is the very antithesis, "I will leave."

COMMISSIONER: And this is in an advisory role, is it?

MR HUTLEY: No, this is there – is a major shareholder saying, "If this organisation can't perform, I will leave."

COMMISSIONER: But, you see, that's the last thing they would have wanted, I would have thought. And what am to make of it, Mr Hutley? In one sense he is advising them. In another one, he's saying, "I'm out of here." I think the lines were blurred and I think Ms Coonan told us that. But I do think the lines were blurred here in respect of his role either as an adviser or a shareholder. It's very difficult to ascertain. But if it is as a shareholder I understand your submission perfectly. If it is as an advisor, it's a little more complicated, I think.

MR HUTLEY: But in our respectful submission, he's making clear to a company that if it cannot achieve what it keeps promising, he, as a shareholder, will not remain as a shareholder.

COMMISSIONER: Correct. Yes.

MR HUTLEY: Every shareholder as the right and expectation, we will say it, and they can vote with their feet in a whole series of ways. Now, that is something which a company ought know.

COMMISSIONER: No. I'm just asking you to deal with this particular email - - -

MR HUTLEY: Yes.

COMMISSIONER: - - - how you characterise it and then we can move on.

MR HUTLEY: Well, that's how we characterise it.

COMMISSIONER: All right.

MR HUTLEY: Yes. And, in effect, where it says:

Go hard my friend. You have my blessing.

COMMISSIONER: Yes.

MR HUTLEY: All he's saying is - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - no more than do the best you can to achieve the outcome, which you've adumbrated below, of approaching the board to seek the board's authority to proceed with the cost cutting.

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

MR HUTLEY: And "you have my blessing" is the sort of phrase – is a phrase not of instructions, not of – and to read it as a blessing, it's obviously simply an everyday observation that people make of encouragement, no more than that, "You have my blessing." So - - -

COMMISSIONER: Thank you.

MR HUTLEY: - - - in our respectful submission that's it. Now, next, the evidence demonstrates that Crown Resorts executives had no qualms about taking a different course to that preferred by Mr Packer, where they considered that in the interests of the company. The first example of that is the email from Mr Alexander referred to above where he immediately pushes back in respect of Mr Packer's complaint about his travel. A further concrete example is the takeover proposal from Wynn Resorts which is, obviously, is a most important decisions of the board of Crown Resorts during the relevant period.

In respect of Wynn Resorts, the consequence of events was as follows. Wynn twice asked Mr Packer whether he would be supportive of Wynn engaging in a controlled transaction, that is, that is a takeover of Crown. Now, that's in the statement of Mr Johnston, exhibit CJ2, paragraphs 30 and 34 at WIT.CHP.001.0001. It's not necessary to go there. On the second occasion, Mr Packer indicated that he would support such an approach by Wynn to Crown. That's the statement of Mr Johnston at paragraph 34 of the document I gave you. And it's also – if you go to exhibit AA99 at AND.500.001.3614, which is an email from Mr Demetriou - - -

COMMISSIONER: Yes, I remember this.

MR HUTLEY: - - - at about point 5, you'll see,:

> *Simplistically, I think we should engage with W. Their latest offer, I believe, is one we should accept.*

COMMISSIONER: Yes.

MR HUTLEY: That's from Mr Packer to Mr Demetriou. Mr Demetriou's response is interesting:

> *I hear you. Certainly has created an opportunity to look at ourselves and where we want to be in the future. Of course, you are right to stay –*

"to say" I think that must be:

> *…it is a compliment that they are looking at us, also the opportunity to tap into the global brand and its operation is compelling. I haven't seen the latest offer after we wrote back. I expect that that will be made known to us. Should be interesting board meeting. I absolute confidence that the board will consider all before it and make the right call. I look forward to discussing the next chapter with you. Previously, I remain committed to the best interests of Crown and, most importantly, you-*

which is – etcetera. Now, can we see what happens. Now, Mr Packer's view was made known to the board. Mr Demetriou says that at transcript 4056 lines 1 to 12. Right. Wynn having approached the chair of Crown, Mr Alexander, and made an indicative non-binding change of control proposal on or about the 22nd of March 2019, that's exhibit AP1 – part of exhibit AP1, CRL.501.049.4728. You probably don't – you're probably recall this communication.

COMMISSIONER: I do.

MR HUTLEY: And I don't think it's necessary to go. On the 25th of March 2019, the Crown board rejected the proposal; that's exhibit FA59, CRL.500.008.7378 at 7380, referred to by – in Mr Demetriou's evidence at transcript 4057 line 25 to 28. Now, the board minutes, which are in exhibit FA19 at – sorry. FA 59; that's

CRL.008.7378, and the relevant entry is 7380 – 7379 – I'm sorry. I probably didn't give the right number, I'm told. CRL.500.008.7378. I do apologise.

COMMISSIONER: That's all right.

MR HUTLEY: Now, at 7380 you will see the resolution. Now, it does not indicate any dissent from the resolution despite Mr Packer supporting the Wynn proposal. So it would appear that for all one knows that the entire board agreed to the resolution. It's noteworthy that Mr Demetriou was an apology. Now, that's an example of a very significant decision about which the Crown Resorts' board had a different view to Mr Packer and acted unanimously, apparently, enacting what it thought was the best interests of the shareholders as a whole.

COMMISSIONER: So what was happening, though, as I understand the minutes, was that the board wanted to – or the board understood that Wynn could revert with a superior proposal.

MR HUTLEY: I understand that.

COMMISSIONER: So as I said to you before, I think at this stage what we have is the proposal that was put to them originally, if they weren't rejecting engaging with Wynn - - -

MR HUTLEY: I accept that.

COMMISSIONER: - - - they were in fact suggesting that a better proposal might be put if they pursue some further negotiations with Wynn, I think. I don't know that it's right – sorry?

MR HUTLEY: Mr Packer was suggesting we should grab the proposal. His advice was that's the – you should accept the proposal.

COMMISSIONER: But I think that what you're saying to me is that this shows that the board was independent of Mr Packer and it made a decision inconsistent with Mr Packer's. Putting the position in context ,I think it's that the board was saying, "We will continue to negotiate with Mr Packer" – I withdraw that – "with Wynn in respect of the offer but get a better one".

MR HUTLEY: I understand that, but of course as you would know, one runs the risk in not taking a proposal that the proposal will go away. In fact, that is exactly what the – occurred. You will recall I took you to exhibit AA99, and the view of Mr Packer was I believe it was one we should accept.

COMMISSIONER: Yes.

MR HUTLEY: The latest offer.

COMMISSIONER: Yes.

MR HUTLEY: The board, in effect, acting in what it thought was the best interests took the risk of not following Mr Packer's view, seeking to engage and improve the position of shareholders, presumably because they thought acting in the interests of shareholders as a whole, not the interests of Mr Packer and his substantial shareholders, it was worth taking the commercial risk to engage with all that that entails and not accept the proposal and go further with negotiations.

COMMISSIONER: Yes.

MR HUTLEY: And that is a commercial risk of a very significant variety, contrary to the wishes of Mr Packer and, for reasons not – as things turned out because of publicity the proposal went away. In other words - - -

COMMISSIONER: That was the stated reason by Wynn, wasn't it?

MR HUTLEY: Well, so far as we know. The stated reason, I accept that, Madam Commissioner, but of course if one doesn't accept a proposal because one wants to further negotiate, you put the position at risk for a multifarious series of reasons, change of heart, etcetera, etcetera. That's the commercial risk which the board elected to take in the face of the desire of Mr Packer.

COMMISSIONER: Yes. Thank you.

MR HUTLEY: That's the quintessence, we say, of an independent board. Of course, they wouldn't reject and say to Wynn, "I never want to talk to you again", because if the money – if Wynn was prepared to go up a long way, they may have then accepted it. But they took a very significant, as it turned out, risk which led to the proposal as a – in temporal terms, led to the proposal disappearing, contrary to the desires of Mr Packer. We say that can only be viewed as what might be called the fundamental expression of independence, that is, about ownership.

Now, an important consideration in any assessment of Mr Packer's role is a recognition of the wide range of matters with which the Crown Resorts board was dealing during the relevant period, and in respect of which there is no suggestion of Mr Packer's involvement. Now, this can be discerned from a consideration of board minutes of Crown over the period and, for example, you have exhibit AB43. Now, I don't want to go through the details of the business dealt with at those meetings outside the ones with which you've been troubled, but you will see they cover a wide range of topics of great significance to the fortunes of Crown Resorts Limited, and we will give you some – in our written submissions – a list of these board minutes, and you will see that there is a vast range of topics covered by these organisations by its board.

Now – and no suggestion is made of Mr Packer's involvement in relation to any of them other than perhaps the matters dealing with, in effect, the accounts, ie, the

budget which is telling of a number of matters, of the absence of Mr Packer's status as a de facto director and, secondly, the independence of this board. Now, there are two other minor matters referred to in the submissions for counsel assisting which should be dealt with. First, the submission was used that Mr Packer's language was "peremptory" such that Mr Packer would, and I quote:

...not tolerate any argument, dissent or polite refusal.

That's in our learned friend's counsel assisting's submissions at transcript 4928, lines 27 to 31. We submit that there's no evidence of that. For example, in the email to Mr Alexander upon which counsel assisting relied it cannot be said that Mr Packer didn't tolerate dissent, it was more mature discussion than that. In addition, withdrew Wynn's takeover proposal. There's no suggestion that Mr Packer didn't tolerate the unanimous dissent by the board from his suggestion or made any complaint about it. From time to time in the emails Mr Packer refers to a collective effort:

Make it conservative as I'm getting angry about always missing our plans.

But that's not not tolerating argument, dissent or polite refusal. That's an expression of frustration that the organisation was doing – had developed an unfortunate practice of producing budgets which turned out to be unrealistic, and that's AA93 is the reference there, CRL.501.059.7562. Now, counsel also suggested that Mr Packer's referring to Mr Barton getting forecasts right "for your own sake" was to – he's getting his job on the line. That's in their written submissions at 35, and I've dealt with that so I don't need – secondly, counsel assisting also contended that the evidence shows Mr Packer "did not deny", to use the phrase in quotes, that he was acting as a director of Crown Resorts in the period after the protocol. That's transcript 4934, lines 20 to 30. That, with respect to my learned friend, is not accurate, and can we go to the transcript at transcript 3658, lines 16 to 23.

COMMISSIONER: I think he said that he was under the impression – when he was asked that question.

MR HUTLEY: Quite.

COMMISSIONER: When it was put that he was still a director he said, "I was under the impression that I could communicate the way I was communicating".

MR HUTLEY: Quite.

COMMISSIONER: And so I think that's where that submission may have come from.

MR HUTLEY: Quite. But in our respectful submission that's – the transcript – that's it. Mr Packer was asked questions about specific emails and then whether those emails – in those emails he was acting as a director of Crown Resorts.

COMMISSIONER: Yes.

MR HUTLEY: Mr Packer answered that he was under the impression he could communicate in that way.

COMMISSIONER: Yes.

MR HUTLEY: In our submission, that answer was, in fact, the only proper answer to the question asked.

COMMISSIONER: Well, no, I think he could have said, "No, I disagree".

MR HUTLEY: But it's a complicated question as to whether a particular act was an act of a director. That's a matter - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - for you, Commissioner.

COMMISSIONER: Yes, of course. I don't need to hear you further on this point.

MR HUTLEY: Thank you.

COMMISSIONER: That's all right.

MR HUTLEY: Thank you. Now, for all those reasons, the contention advanced that Mr Packer played an active and important role in significant management decisions, performed functions one would reasonably expect to be undertaken by an appointed director of the company and had a profound influence over the business affairs of Crown during the relevant period is not supported by the evidence, in our respectful submission. Now, can we now deal with the specific points in the statement of issues. Firstly, part A; could I ask you to bring up – it doesn't actually have a - - -

COMMISSIONER: No, it's not, it's just - - -

MR HUTLEY: For the reasons we know.

COMMISSIONER: I have the hardcopy, Mr Hutley.

MR HUTLEY: Thank you, Commissioner. Can I go to – if I could ask you to take it up.

COMMISSIONER: Yes.

MR HUTLEY: The influence of James Packer since November. I just want to say the parties agree with paragraph A1, we do. We agree with paragraph A2 other than

the word "extensive", because the information which was shared was of a – really, with respect, of a relatively narrow compass in relation to this company, and I've addressed you in relation to the character of what was communicated. Now, the parties agree with paragraph A3 and note that under the terms of the protocol CPH was required to keep that document confidential. In addition, as we've already mentioned, CPH had initially proposed an amendment to the CPH services agreement which did not contain a confidentiality provision. That was insisted upon in the protocol by Crown.

Now, in respect of paragraph A4, the CPH parties agree that Mr Packer used the protocol as a mechanism to provide requests to board members and senior executives from time to time. Clause 2.2 of the protocol anticipated such requests. 2.12. Sorry. I misread my notes every now and again. For the reasons we've already submitted, those requests were not instructions other than at a trivial level of "give me a document", in the sense of directives about the business of Crown Resorts which Crown executives considered they were required to comply with, and no-one has given any evidence from the Crown Resorts side that they considered they required to comply with it, and Mr Alexander – and I took you to his evidence – gave a nuanced explanation as to how he viewed those matters.

COMMISSIONER: Yes.

MR HUTLEY: In respect of A5, you've heard Mr Packer's full and frank evidence about the emails, however, those emails are characterised however they're characterised. What is clear is they amounted to conduct of Mr Packer which was not usual and was sent while Mr Packer was under the influence of a profound psychiatric condition for which he is now being treated, and I will come back to that in confidential session in due course. Transcript 3583 lines 40 to transcript 3586 line 4. There is no basis to suggest that any such conduct is likely to be repeated.

Now, can I now go to the next page, the contentions at part B. Underlying most of the contentions in part B is the proposition that Mr Packer exercised control or influence over the affairs of Crown Resorts in the relevant period to such an extent that he was a de facto director of Crown Resorts. For the reasons we've already given, the evidence does not support that contention. Contention P1 is that Mr Packer had available to him more information than Mr Alexander during the relevant period. And at transcript 4933, lines 41 to 47, counsel assisting outlined the contention. If that could be brought up shortly. The transcript.

COMMISSIONER: I have it.

MR HUTLEY: Yes.

COMMISSIONER: I have it. Thank you.

MR HUTLEY: But in the period from November to May, at least, Mr Packer had at least the same amount of confidential information as the executive chairman, Mr Alexander.

COMMISSIONER: Yes. Thank you.

MR HUTLEY: Now, I've made my submission about the matters covered at the board meetings.

COMMISSIONER: Yes.

MR HUTLEY: Now, that just self-evidently, with respect to my learned friend, incorrect. You just have to go to those board meetings and the areas covered. And there's no suggestion that Mr Packer had access to that – all the materials associated with all - - -

COMMISSIONER: Yes.

MR HUTLEY: Counsel assisting then went on to refer to the various sources from which Mr Packer received information, being Crown executives, CPH executives and CPH nominee directors, Mr Demetriou and Mr Alexander. That's at transcript 4933 lines 47 to 4934 lines 4. Now, there is no evidence of the actual extent of the information that was available to Mr Alexander or to any board member, ie, the entire universe. Without that matter being demonstrated, it is impossible to prove Mr Packer had more information available and a mere passing acquaintance with the board minutes would suggest that Mr Packer had but a tiny proportion of the relevant information about the affairs of this company compared to that which the chief executive officer and chair would have.

COMMISSIONER: I think that's – the transcript reference seems to be it is limited to the confidential information. It seems that that's what was put.

MR HUTLEY: But even at that level, Mr Alexander could have received whatever information he wanted.

COMMISSIONER: Of course. But it's under the protocol, I think – Mr Bell can correct me if I am wrong. But when I'm reading the portion of your reference, it's to do with the mechanism about which counsel assisting was speaking. And I think it is – had, at least, the same – of confidential – and it's in the context of the controlling shareholder protocol, I think, Mr Hutley. But, in any event, if it's not, I understand your point.

MR HUTLEY: And even if it is, one hasn't explored the extent of information that Mr Alexander had and, as the chief executive officer, he would have access to whatever information he wished and may have availed himself of it. In other words, the universe simply hasn't been inquired into. And, in any event, even if it was established that Mr Packer was given from time to time information perhaps of an

inchoate or draft variety which Mr Alexander didn't get, because he got it from Mr Barton, one may ask rhetorically: so what? He's been consulted by Mr Barton pursuant to the agreement.

COMMISSIONER: Yes.

MR HUTLEY: And therefore – so the point, in our respectful submission, goes nowhere. Mr Packer did not attend board meetings, and there's no evidence that he received board packs. And it's also been submitted, at transcript 3620 lines 25 to 27, during the Inquiry that senior management were not given Mr Packer bad news because they didn't want to displease him. Now, if that contention were correct, the fact that Crown officers were not providing information to Mr Packer would evidence Mr Packer's lack of control during the period.

COMMISSIONER: I think that's when he was chairman, wasn't it?

MR HUTLEY: Well - - -

COMMISSIONER: I think that was the context of 3650, but I'm not sure, but I think it – when he was a director.

MR HUTLEY: But, anyway, if it's solely limited to that period I don't need to address it here.

COMMISSIONER: No, you don't.

MR HUTLEY: But the fact that Mr Packer's not getting information during this period across a whole range of things tends to show that he's not a director, not to show that he is a director.

COMMISSIONER: I understand.

MR HUTLEY: Yes. Now, can we then go to contention B2.

COMMISSIONER: Yes.

MR HUTLEY: That is that – played an important role in significant management decisions of Crown Resorts. Now, we've dealt with that and I don't think we need put any more. That all leads up to contention B3: was a de facto director. Now, Commissioner, you would not accept that submission as a matter of fact, that Mr Packer had significant effect on significant management decisions of Crown Resorts. In the written submissions we're preparing we'll set out some of the key principles in respect of a person who's a de facto director, and I'm not going to go through all those now. I'm not sure whether you received the decision of the Court of Appeal in Buzzle Operations v Apple Computers in the case - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - tab.

COMMISSIONER: Yes, I know of it.

MR HUTLEY: It's 81 NSWLR 47. You're familiar with it, of course.

COMMISSIONER: I am, indeed, Mr Hutley.

MR HUTLEY: And I'll just read from paragraph 193, if I can, Justice Young's statement of the position:

> *A difficulty arises, both in shadow director cases such as the instant and de facto director … when one comes to identifying actions that are properly characterised as those of a director.*

It then refers to Lord Collins statement in "the very difficult problem of identifying what functions were in essence the sole responsibility of a director or board of directors."

> . *A difficulty arises both in shadow director cases such as the instant de facto directors when one comes to identifying actions that are properly characterised as those of a director.*

And then referred to Lord Collins' statement in Revenue and Customs v Holland. I don't think you've got it, Commissioner, I'm told, I'm afraid.

COMMISSIONER: I have got Buzzle.

MR HUTLEY: Yes. Thanks. It's page 71 in the report, paragraph 193.

COMMISSIONER: Yes.

MR HUTLEY: I won't read it out.

COMMISSIONER: Yes.

MR HUTLEY: And then he went on to refer to Justice Madgwick's statement in Deputy Commissioner of Taxation. You will see that.

COMMISSIONER: Yes.

MR HUTLEY: And then – and you see that statement. And then we've given you also the judgment of Justice Black in re swan services Pty Ltd.

COMMISSIONER: Yes.

MR HUTLEY: And at paragraph 27, if you would go there, he said that it is:

…necessary to show that he or she exercises what might be called the actual and statutorily extended top level of management functions.

Now, finally – and the cases show this – a person is less likely to be labelled a de facto director where they do not attend board meetings, the work they do is carried out pursuant to an agreement, such as a consultancy agreement, or he or she does not hold themselves out as a director. Now, we will give you all those authorities in due course. You are familiar with them.

COMMISSIONER: Yes. Thank you.

MR HUTLEY: It is apparent from what we have said previously that the evidence does not establish that Mr Packer was making decisions for the Crown board. He received information from a limited number of directors and management. He occasionally provided valuable advice upon discrete matters from time to time. The evidence is that the board had access to far greater levels of information than was provided to Mr Packer including extensive information contained in board packs. There's no evidence that he was involved in management decisions at all let alone providing directions in respect of that decisions. There's no evidence, in respect, such a fundamental decision as the Wynn transaction the board completely departed from his views. Now, in the light of those matters, there is simply no basis for finding that he was a de facto director. It's simply this company had an operating board which was meeting regularly, was carrying out the functions of a board. Mr Packer was never involved with those decisions, never participated in them, never attended. And that, we submit, is the end of the matter.

Now, could I now turn to contention B4, that's:

Mr Packer had a profound influence over Crown which caused harm to Crown Resorts and the public interest.

And I'm not going to repeat what I've said about the profound influence. There's no evidence that Mr Packer's activities – and I will come to the Melco transaction in due course – caused any harm to Crown Resorts or to the public interest. To the extent that you've been taken to his activities in this period, there is not one suggestion that anything he advised upon caused one ounce of harm to Crown Resorts. In fact, his suggestions about the financial position, you would infer, assisted them. And if it assisted them, that assisted the shareholders as a whole and could not have caused harm to them.

No argument has been advanced, nor could it be, that there was any harm by the request for conservative budgets, financial plans, and the like. We will – and we say to the contrary. The only matter of harm which counsel assisting appear to contend arose from the protocol is the Melco transaction. Now, I'm going to deal with that separately, dealing with that after lunch. However, we submit there is no evidence of harm by that. Had the transaction gone ahead, Melco would have been required to

undergo probity checks before any nominee joined the board. In any case, the transaction has been unwound.

Can I now turn to contention B5, is that:

> *The influence of Mr Packer would lead a reasonable bystander to question the independence of directors of Crown Resorts.*

Now, there is an issue about what the significance of the reasonable bystander in your analysis, Commissioner. If the board is, in fact, independent, then whether some reasonable bystander might question it, in our respectful submission, is beside the point. This is about the suitability of an organisation. It's suitable if suitability can't be impugned because some bystander – reasonable – call it a reasonable bystander might question the independence of "the directors of Crown Resorts", whether all of them or some of them. Now, in any event the question, in our respectful submission, should be rejected.

There is no evidence of Mr Packer or any CPH officer, representative or the like pressuring any director – other director as counsel assisting contends. It was not suggested to any director or executive of Crown Resorts that they felt pressure either explicitly or implicitly from Mr Packer or any matter or that Mr Packer caused them to do anything different from what they would otherwise have done, or that he remonstrated with them for a decision taken at the board level, or the like.

We deal with the evidence in relation to the various directors in turn, firstly with Ms Halton. It appears to be suggested, and this is at transcript 4936, lines 1 to 4, that Ms Halton was pressured into agreeing to the July 2019 advertisement, and that Mr Alexander, who is said to be a CPH representative in this meeting, was the person who pressured her. Can we go to the evidence which, if the controller would bring up transcript 4314, line 25 and split on the screen to 4315, line 3. This is in the examination of my learned friend, Ms Sharp. It starts with:

> *Who did you feel applied pressure to you?*

COMMISSIONER: This is in relation to the advertisement.

MR HUTLEY: Yes. Yes.

COMMISSIONER: Yes, yes, I recall this, and she said that the chairman had.

MR HUTLEY: She said – I think it's important that one reads the entirety of it. If it comes up. Have you got it, Madam Commissioner?

COMMISSIONER: This is the evidence of Ms Halton?

MR HUTLEY: Yes. Yes.

COMMISSIONER: Yes, yes, I recall it.

MR HUTLEY: It's not on the screen, that's all.

COMMISSIONER: No, you can read it, and I recall it, Mr Hutley.

MR HUTLEY: Yes. But it has to be read beyond just her first answer:

I think there was pressure from the executive chairman and some others.

And then Ms Sharp says:

Who were those others?

My memory will fail me but certainly – let me just pause so I can think about this very carefully if I might, Ms Sharp.

Please do.

I don't want to mislead you about my memory on this which is why I'm pausing, because I think it would be unreasonable of me to. I mean as you know, Ms Sharp, memory is a difficult thing, particularly when you have heard now so much material. So there was a strength of view about the response. I think it would be unfair of me actually single out anyone, to be honest with you, Ms Sharp, in the context of the discussion, but certainly the chairman I can be confident of that.

Well, let me ask you, did you feel that pressure came from the independent directors or from the CPH directors?

I wouldn't actually divide it in that way, Ms Sharp. That's not my sense of it. I think there were a number of – a couple of independents who probably stood strong in relation as others.

And that's it.

COMMISSIONER: Yes.

MR HUTLEY: So this is not pressure emanating from other directors. This is, in effect, the concern being expressed in a board meeting by certain directors, one of whom may have been the executive chairman, about that there should be something done. That's not – that's the sort of discussion which will happen, and some people may feel pressured because certain people within a meeting may feel strongly about a matter, but it doesn't in any way redound to a conclusion such as contention B5 that a reasonable bystander would question the independence of the directors of Crown Resorts. This matter being advanced at this meeting is not a matter on behalf of CPH.

It's a matter which obviously directors within the company, and different ones, some independent to the extent – Mr Alexander certainly – felt was obviously a matter of deep concern for the company. And Ms Halton felt, because people were expressing strong views, some pressure upon her. But that's got nothing to do with the independence of the directors of Crown Resorts. That may be a manner problem in the particular meeting and, in effect, the character of Ms Halton. But it can't redound against the contention in B5. It's not emanating in any way from CPH. We just say – and her evidence doesn't suggest that CPH was applying pressure. She doesn't identify the CPH nominees as pressuring her.

COMMISSIONER: Does not.

MR HUTLEY: Rather, the pressure appears to have arisen that the remainder of the board wished to go ahead with the advertisement. Now, that's a matter of – we don't suggest she's expressing other than honest evidence, but she felt that. Directors sometimes may feel pressure at a meeting because the bulk of directors want to do A. It's up to that director, if he or she wishes to dissent, to dissent.

COMMISSIONER: Yes, I've got this point.

MR HUTLEY: Now, can we go now to Mr Mitchell. It was suggested that Mr Mitchell was not independent because he was provided an interest-free loan by Kerry Packer in 1987. Mr Mitchell rejected any suggestion; his evidence was as follows at transcript 3899.3 to 11, Mr Aspinall:

> *Do you feel you owed a favour to the Packer family?*

He said:

> *No, no, no, we didn't. In our business we didn't – you didn't operate that way. That isn't the way it works.*

Now, there's no reason to doubt that evidence. Now, the examination was based on an article about Mr Mitchell at exhibit AG52 which is at INQ.550.004.0001. The thrust of that article – and it's not necessary to go to it unless you wish the relevant parts – it's come up – was that the interest free loan was provided by Mr Kerry Packer for strategic reasons relating to Mr Mitchell's business. It wasn't some selfless act because he – you know, kind of they were old family friends. That's not consistent with an ongoing debt owed by Mr Mitchell to Mr Packer. It was quite apparent it was a profit-maximising exercise by Mr Packer for strategic reasons.

COMMISSIONER: I thought it was a debt, but I thought it was forgiven.

MR HUTLEY: Quite.

COMMISSIONER: Mr Mitchell told me of the emotional situation with Mr Packer and the words that he spoke to him, and the irresistible inference that I've taken from it is that the debt was forgiven, Mr Hutley.

MR HUTLEY: Quite. Well, but that's not forgiven out of – and if you go to transcript 3886, line 39 to 47, there's this question:

> *Do you have any discussions with Mr Packer about what was happening at Crown during the period he was off the board?*

Mr Mitchell says:

> *The main thing that Mr Packer and I spoke about in the years that followed was how to keep your weight down, so in respect of Crown there was no talk, none at all.*

COMMISSIONER: Correct.

MR HUTLEY: So in other words, Mr Packer didn't even approach Mr Mitchell about nothing. And we say, therefore, the attack on his independence is, with respect, completely without foundation. Professor Horvath – the criticism of he, that he had ties to the Packer family extending back more than a decade; the position is that Professor Horvath led the team that looked after Kerry Packer at Royal Prince Alfred hospital and he got to know James Packer moderately well over the period, as he recalled it. That's transcript 4158, lines 19 to 20. None of that evidence suggests that his independence was in any way affected or could be affected.

I mean, Mr Dixon – the criticism of Mr Dixon is similar. He has ties to the Packer family extending back more than a decade. The real question is what was that tie. In this instance, the sole evidence of the tie is that Mr Dixon and Mr Packer had been on the board Qantas together. That's transcript 4674, lines 34 to 4676, line 39. Now, if that's the case, it's probably pretty hard to find any independent directors in this country if you just happen to have sat on the same board as another person who is sitting on major public companies. We submit the matter is simply without substance.

Mr Demetriou, the attack on him on independence arises from an email exchange which I took you to, that's "serving the best interests of Crown and, most importantly, you". Now, whatever the reason for putting that in, it's really no evidence of lack of independence. He frankly acknowledged that if a reasonable bystander read the email there may be a question as to whether he was truly independent. That was at transcript 4059, lines 1 to 5. But that was a private email. That was a private email in which he was basically saying to Mr Packer, "I know what you want, but the board is going to look at it and we will make sure we're acting in the service of the company and ,most importantly, you". So he was in effect - - -

COMMISSIONER: No, that was an email that was said by Crown to be a communication pursuant to the controlling shareholder protocol, so there it is.

MR HUTLEY: Madam Commissioner - - -

COMMISSIONER: Yes, Mr Hutley.

MR HUTLEY: - - - one sent a broad subpoena in the terms which says something which is pursuant to that and there's some information in – the characterisation of it in the response by reference to a particular category is, with respect, not something which one necessarily would take would be determinative of anything. I mean - - -

COMMISSIONER: Except for the fact that Mr Demetriou understood that he was communicating with him on that basis. So – but look, I understand your submission and Mr Demetriou accepted that a reasonable bystander would have a view about it, and I think we can move on. It's unnecessary to dissect it any further, unfortunately. Yes.

MR HUTLEY: Now – yes. But Mr Demetriou gave evidence he was free, he had no business relationship with my client, and he strongly disagreed that he was not independent. That's at transcript 3996.

COMMISSIONER: Yes.

MR HUTLEY: Now, then we have Ms Korsanos. She was appointed a director of Crown Resorts on the 23rd of May and she gave evidence she had never met Mr Packer at transcript 4081, lines 18 to 21. So in other words "the submission", we respectfully submit that whatever the significance of a reasonable bystander to question, isn't a submission that they are not independent. It's a submission which, we submit, is of no relevance to the suitability of my clients and, in our respectful submission, of no relevance to your assessment of the suitability of anyone, and in effect implicitly accepts that those people are independent.

Now, contention B6 is that the impact of Mr Packer caused reporting lines to be compromised. Now, counsel assisting appears to rely on two matters, firstly, the China arrests which seems to be outside the period which is a period of going – within the period to which the submission is directed, because that's obviously a period when my client was not affected – was not between the entry into the - - -

COMMISSIONER: The controlling shareholder protocol.

MR HUTLEY: - - - protocol, November 2018 to May 2019.

COMMISSIONER: Correct. Yes, that submission can only be looked at in terms of what I'm dealing with in the other area.

MR HUTLEY: Quite.

COMMISSIONER: That's quite right.

MR HUTLEY: And therefore, in our respectful submission, it is not relevant to the continuing suitability of my clients, in our respectful submission, but I will deal with the China aspect of it when we come to that, if we can.

COMMISSIONER: Yes. Yes.

MR HUTLEY: Secondly, in oral and written submissions in relation to junkets, counsel assisting submitted that Mr Packer set what she described as a dubious tone from the top in relation to junkets, and "drove a culture that put the pursuit of profits above all else". And when I come to this I will deal with this in a little detail. In our respectful submission, that characterisation is unfair in its vagueness, "a dubious tone from the top". It suffers from many difficulties. One, it's so obscure that it is almost impossible to address: "and drove a culture that pursuit of profits above all else" in our respectful submission is, again, unfair because although there was a desire for profits there is no evidence that Mr Packer was putting that above all else.

COMMISSIONER: Well, Mr Packer told me that he didn't know a great many of the things that were going on in China.

MR HUTLEY: Quite.

COMMISSIONER: And – but in respect of junkets, which has a little combination with the China aspect of the Inquiry, but I think insofar as bringing junkets in and also driving profits in China, I think I would appreciate hearing from you about whether it's accepted that what was happening in China – and I know you're going to address this in due course – was a drive for profits blinkered in circumstances where I think you might address Mr Johnston's involvement in the VIP business, but - - -

MR HUTLEY: I'm going to – I'm sorry.

COMMISSIONER: I do understand your submission about the expression, and I don't need to hear you on that any further, Mr Hutley.

MR HUTLEY: I will come to the junkets now. Now, can I now turn to the ultimate questions, question C1:

> *Whether the influence of CPH and Mr Packer renders the licensee of Barangaroo facility unsuitable.*

Now, we've dealt in great part with the contention in relation to Mr Packer and CPH having some overbearing influence, and I'm not going to repeat that. Now - - -

COMMISSIONER: I think it's better, if you don't mind me asking you to do this, that it would be better for you to address the ultimate position at the end of your submissions, taking into account all your other submissions.

MR HUTLEY: About – well, at the moment it's the influence of CPH and Mr Packer renders the licensee and that is put here in the context of the period from November '18 to May 2019. So that's the context in which I'm dealing with this question. So I'm quite content to defer it, but I'm dealing here with the C1 as expressed in this topic.

COMMISSIONER: I understand that.

MR HUTLEY: I will follow whatever course, of course, is convenient to you, Madam Commissioner, but the – that – it was addressed in this context by my learned friend, Mr Bell, and that's what I was proposing to deal with. It wasn't dealt with, as it were, after you had heard from the other counsel assisting, particularly Ms Sharp or Mr Aspinall. So that's as we conceived as how it was being put against us, but of course I can return to it at the end if that would be convenient and it may be a more convenient time from your perspective to deal with the matters troubling you or not troubling you.

COMMISSIONER: It would, because you're going to address me on the Melco transaction, aren't you?

MR HUTLEY: I am. I am.

COMMISSIONER: Yes.

MR HUTLEY: I'm content with that, of course. Now – but I would at some particular point of time like to deal – because a submission was made about the significance of MFIA, and - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - our submission is the reliance upon that as going to the suitability of my client is, with respect to my learned friend, unfair. It is - - -

COMMISSIONER: Well - - -

MR HUTLEY: - - - remote in time. It is quite – there is – you have seen hundreds and hundreds of emails from my client. Those acts, and I want to deal with the detail of them and some further evidence in confidential hearing, but I do want to say in open Commission, it is quite apparent that that conduct, however you characterised it, was wholly aberrant. Wholly aberrant. And my client took responsibility and expressed what he expressed in open Commission about it, and you would be satisfied there is no threat of any such conduct ever being repeated. None. And nothing has been pointed to to suggest that there is a remotest likelihood of that occurring again, and my client's dealing with it showed and demonstrated a man of character, honesty and respect, not least for this Commission, and an appropriate response into all questions dealing with those matters.

In fact, dealing with that redounds, we would say, to his complete credit and should be a matter of respect rather than criticism of a man who it's quite clear was in a position of profound distress, and we would expect for the Commission to show the compassion and understanding to such conditions in relation to those matters. But then I would like to address you shortly in confidential session, and I see the time. Would you like that to be dealt with before or after lunch?

COMMISSIONER: What I will do is I will just move straight into confidential session now and I will adjourn the public hearings till approximately – how long do you think you will be in addressing your medical matters, Mr Hutley?

MR HUTLEY: Maybe 15 minutes, I think.

COMMISSIONER: All right.

MR HUTLEY: It might be best done after lunch. Would it be best done after lunch?

COMMISSIONER: No, I can do it now and then I will adjourn until 2.15.

MR HUTLEY: Thank you.

COMMISSIONER: I will adjourn the public hearings to not before 2.15 and I will hear your submissions now in respect of the confidential private matters. If we could then, please, operator, move to the confidential private hearing in respect of the medical matters. Thank you.

ADJOURNED **[12.57 pm]**

RESUMED **[2.18 pm]**

COMMISSIONER: Now, Mr Hutley, can I just indicate, just before we went into the private hearing so I could deal with the confidential medical matters, we were dealing with those aspects of the MFIA and the admission by your client that his conduct in respect of that was disgraceful. What we didn't deal with in the public hearing was the exhibit which was the concurrent exhibit which in fact Mr Bell dealt with in the public section, so I think if you could just put to me those submissions in respect of that other email, exhibit AB – just let me see. That's the one – AB22, is it? Yes, it's exhibit AB22, if that could be brought up. And I think that was at about the same time, and I think you wanted to put submissions about that particular email which was suggested to be quite reasonable language and sensible.

MR HUTLEY: Yes. That has – the reasonableness of that email has to be looked at in the context of its content by reference to the surrounding circumstances. Mr

Packer – my concern, Madam Commissioner, is that this evidence was given in confidential session, I think.

COMMISSIONER: No. No, it wasn't. What happened – if I can just put this in context, Mr Hutley, to assist – what has been put in the public session and what has been put publicly in submissions is that your client did indicate in response to questions that one of the things that he would say about the unsatisfactory emails, if I can call them that, was that he was not well.

MR HUTLEY: Yes.

COMMISSIONER: And that the emails said more about his health than it did about anything else, and what has been put is that, really, the concurrent email at around the same time shows that that wasn't really affected by any health issues, and so if you could – I assume that your submission is that that email may well be evidence that you wish to have me consider in the same vein. I'm not sure.

MR HUTLEY: Those emails speak to commercial activity which, you would have to assess, was rational commercial activity from the point of view of Mr Packer having regard to the concerns he then had. We would submit, and have submitted, that it was irrational activity because it was subjecting Mr Packer to hugely increased burdens, the very thing he was concerned about.

COMMISSIONER: Yes, I see.

MR HUTLEY: So although the language may not be of the precise – of the character of the other emails - - -

COMMISSIONER: Yes, there's no florid language in that. Yes, thank you.

MR HUTLEY: Thank you, Madam Commissioner.

COMMISSIONER: Yes.

MR HUTLEY: Can I now turn to the Melco transaction.

COMMISSIONER: Just before we leave this particular topic, as I apprehend it, you're submitting that this – these events are not affecting presently any suitability of Mr Packer.

MR HUTLEY: Yes. Quite.

COMMISSIONER: Thank you.

MR HUTLEY: They are wholly aberrant.

COMMISSIONER: Yes.

MR HUTLEY: Now, the next issue is the Melco transaction which is the subject of the paper which I will come to now. We propose to address you on the following topics concerning Melco. First, we will address the question of any breach of the VIP agreement or the consents deed as a result of the Melco transaction. Secondly, we will briefly address the question of any breach of the licence or other regulatory agreements as a result of the Melco transaction and explain why there is no such breach. Thirdly, we will address the question of suitability in relation to the regulatory agreements, whether there was or was not a breach of them. And fourthly, we will address the related but separate issue concerning draft financial plan.

The only regulatory instruments which counsel assisting has suggested have been breached are the VIP agreement and the Crown's consents and approval deed which we will refer to as the consents deed. They are, relevantly, identical so only one task of construction in substance arises. It's notable that CPH Crown is not a party to either agreement so it cannot have breached them. Firstly, could we deal with the facts known to the parties to those agreements. Prior to entering into the consents deed on the 10th of May 2013 and the VIP agreement on the 10th of July 2014, ILGA and Crown Resorts were aware of a number of matters which are relevant to the proper construction.

First, at the time of the consents deed and VIP deed – agreement, Crown Resorts had a joint venture agreement with Melco International pursuant to which each held, through subsidiaries, a substantial shareholding of approximately 33 per cent in Melco Resorts which was a joint venture company to operate casinos in Macau and elsewhere. You can see that's clear when it's referred to in Mr Johnston's evidence, paragraph 12, exhibit AA223. I don't need to bring it up.

Secondly, Great Respect owned 20 per cent of Melco International. On the 18th of September 2012, as part of a probity check it was undertaking concerning Crown Resorts' proposed acquisition of more than 10 per cent of Echo, ILGA requested Melco International and Mr Lawrence Ho to provide information to the authority relevantly concerning Great Respect and the convertible notes, which information was provided on the 11th of September 2012. Now, this is a document which is yet to be tendered. We've given notice of it. It's CPH.119.029.8519. In particular ILGA was provided with a copy of the convertible loan note instrument of the 5th of September 2005 issued by Melco International to Great Respect.

And secondly, the deed of amendment concerning the same dated the 16th of December 2009. Thirdly, a summary of Great Respect's convertible notes, and fourthly, confirmation that Great Respect had exercised a conversion right under the convertible bond and a copy of the Melco International announcement concerning the same which confirmed that Great Respect's shareholding would increase to 19.50 of Melco International. That is the document CPH.119.029.8535. I don't think it's necessary to take you to them, Madam Commissioner, unless you wish to go through them.

COMMISSIONER: I don't think so. I think we've been through the convertible notes in other evidence as well.

MR HUTLEY: Thank you. Thus, ILGA was informed that Great Respect held 19.5 per cent of the shares in Melco International, which held in turn approximately 33.7 of Melco Resorts. It was known to Crown Resorts, because that information was forwarded to it. Thirdly, each knew that the probity of Melco Resorts, Melco International and Lawrence Ho had been considered as business associates as part of ILGAs probity checks of Crown Resorts, once simultaneously with the entry into the consent deeds, and the second time simultaneously with the entry into the VIP agreement. Now, can I now ask you to open, if you would, the VIP – and I propose to use the VIP agreement, if I might – the management agreement because the point is the same - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - with respect to each. That is exhibit Z12 which is INQ.080.120.1298 is the agreement. Now, the - - -

COMMISSIONER: Yes, thank you; bring it up, please.

MR HUTLEY: - - - relevant clause, as you know, is clause 2.4 of schedule 1 which is at pinpoint 1315, I think, or I hope.

COMMISSIONER: It is.

MR HUTLEY: It is.

COMMISSIONER: No, that's 4.2. You want 2.4.

MR HUTLEY: 2.4, I'm sorry. I do apologise.

COMMISSIONER: That's all right. So you will have to go back, please, operator.

MR HUTLEY: I have to go back to it. I'm sorry. I do apologise.

COMMISSIONER: That's all right.

MR HUTLEY: It's 1340, I'm sorry. I hit the wrong number.

COMMISSIONER: That's all right.

MR HUTLEY: Thank you. 1340. Thank you so much; I do apologise.

COMMISSIONER: That's all right.

MR HUTLEY: Now, the - - -

COMMISSIONER: 40, not 48.

MR HUTLEY: Yes.

COMMISSIONER: Thank you. Yes, we have it now.

MR HUTLEY: I've got a degree of dyslexia. Anyway.

COMMISSIONER: That's all right.

MR HUTLEY: Can I take you to the clause.

COMMISSIONER: Yes.

MR HUTLEY: It says:

> *To the extent to which it is within its power to do so –*

so that's the operative condition of the obligation –

> *...Crown will ensure that it prevents (a) any new business activities or transactions of a material nature between Stanley Ho –*

if I can use it –

> *...and Stanley Ho associates or a Stanley Ho associate and Crown or any of Crown's officers –*

etcetera, (b) which is, we understand the relevant one –

> *...Stanley Ho or a Stanley Ho associate from acquiring any direct or indirect beneficial interest in –*

importantly –

> *...Crown or Melco Crown, or for that matter a subsidiary of Crown.*

Now, so the preclusion was concerned with not only Crown or a subsidiary of Crown, but also Melco Crown. Now – and we say the – Melco Crown, of course, is Crown Resorts. So one starts immediately with the clause apparently taking the view that none of those entities had a direct or indirect or beneficial interest in Melco Crown. That would appear to be the natural interest because one was prevented from acquiring a direct or indirect beneficial interest. Not increasing – inquiring or increasing from acquiring. Now, as you know, the Stanley Ho associate was defined in schedule 2 which is to be found at 1347 and following, which included Great Respect amongst a large number of companies stretching over two and a quarter pages.

Now, the extension that – the restraint included to a Stanley Ho associate and "Stanley Ho associate" was defined at 1339, being:

> *Those entities listed in schedule 2, any additional entities controlled by Stanley Ho of which Crown becomes aware, and any additional individual identified who from time to time the Authority may be considered associated with Stanley Ho.*

It is noteworthy that it doesn't say "any additional entities of which Stanley Ho has an interest, a shareholding." So it's concerned with the entities listed in schedule 2 and any additional entities controlled by Stanley Ho of which Crown becomes aware. Now, we submit, making every other assumption against one as to the operation of this clause, that the Melco transaction did not cause Crown Resorts – sorry – to be in breach because a Stanley Ho associate did not acquire any direct or indirect beneficial interest in Crown or a subsidiary of Crown.

And secondly, Crown – if that be wrong, Crown Resorts was not relevantly aware of the Melco transaction before the share sale agreement was executed, so could not prevent it. That is the knowledge of the CPH representatives of the proposed Melco transaction is not attributed to Crown Resorts and, in any event, Crown Resorts probably had no power to prevent it from occurring.

Now, can we firstly deal with the direct or indirect or beneficial interest. The gravamen of the submissions against us is that, as we understand it, Great Respect acquired an indirect interest in Crown by virtue of the transaction. Can I deal with that issue.

The issue of construction, of course, is the entire phrase "Stanley Ho or Stanley Ho associate from acquiring any direct or indirect beneficial interest". A direct interest is obviously a holding of shares. A beneficial interest might be seen as someone holding shares on a trust for another or through some other arrangement, such as to give some equity in the company. But what are the limits of "indirect interest"? A similar phrase has been considered in the context of what was section 50 of the Trade Practices Act 1975 and, particularly, in TPC v The Gillette Company which was reported in [1993] 45 FCR 366. That's a decision of Justice Burchett and, of course, one immediately accepts it's dealing with legislation, and legislation of a particular character, but it is informative of the problems which are thrown up. At 373, Madam Commissioner, you will see the legislation under consideration. I'm sorry. Do you have it?

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

MR HUTLEY: You see a corporation shall not acquire, directly or indirectly any shares in the capital or any assets of a body corporate if certain things would follow from it. Now, at 374, you will see that there had been consideration of this issue in a number of cases beforehand, one by Justice Davies and one by Justice Lockhart.

And if you take it up at about point 6, you will see a reference to Australian Meat Holdings.

COMMISSIONER: Yes.

MR HUTLEY: In Australian Meat Holdings v Trade Practices Commission, Justice Davies said:

> *…the word "indirectly" may not inevitably be limited to a circumstance where the beneficial ownership of property resides in the acquiring corporation. Section 50 should be given a wide operation for it is intended to deal with cases of domination in the market place. The words "acquire, directly or indirectly" should be read as encompassing all forms of acquisition and may encompass the situation where assets are acquired in an indirect way, as through the interposition of a wholly owned subsidiary.*

And then there's a reference to the observations of Justice Shepherd. And then one turns to the decision of Justice Lockhart in the Trade Practices Commission v Australian Iron & Steel. He discussed the meaning of the words directly are indirectly in 50 commenting:

> *I find it a little curious that words appear in the subsection at all, because I doubt they add anything to what would otherwise be the construction of the subsection.*

He was of the view, because he thought an acquiring corporation must have acquired some legal or beneficial ownership of the relevant property. Referring to the views of Justice Davies as dicta, Justice Lockhart said:

> *I do agree that the interpretation between acquiring a –*

interposition, I do apologise:

> *…between the acquiring corporation and the target body corporate of a wholly owned subsidiary of the former may fall within … 50, but in my view only where the subsidiary acts as agent or otherwise for or on behalf of the corporation as principal, otherwise, the well-established principle –*

and then it's referring to the Macaura case –

> *that a holding company does not own the assets of a subsidiary would be in conflict with the dicta. As section 50 is a penal provision, I'm not satisfied –*

etcetera:

The conflict between the proposition stated by Justice Davies … and Justice Lockhart … leaves the law on a very important question of what is meant by an indirect acquisition in some doubt. That

question:

…is not lessened by the fact that Justice Lockhart placed emphasis, in reaching his final position on section 50 being a penal provision which should –

etcetera. And then refers to the observations of sir Anthony Mason in Devenish Foods. And then he – and you see the relevance of that and the underlying provisions. And then there's a discussion of these problems across the world. And could I drop over to the conclusion at 377. The conclusion – this is the first full paragraph, Madam Commissioner:

The conclusion seems clear that, in the antitrust law of the United States … the expression "directly or indirectly", in a context similar to that of … 50, would be understood as suggested by Justice Davies. It may be added that such a usage would not be unique –

and then refers to Revlon:

…described a trade mark of a company as "remotely" an asset of its holding company. But, in the present state of the authorities, the correct construction … in this respect, must be regarded as still somewhat unsettled. One proposition which does seem to emerge with clarity is that, wherever the line is to be drawn, the section is intended to have an extensive reach.

And I would:

…not dismiss a prima facie case as wholly untenable –

etcetera, and he goes on. So he favours the view of Justice Davies. Now, this was considered by Justice Nettle in a different context in the Commissioner of State Revenue v Polites, and the media neutral citation of which is [2004] VSC 126. This was a case, your Honour – I'm sorry – Madam Commissioner, dealing with section 31 of the Duties Act 2000 (Vic), you have that. And section 31, you will find, Madam Commissioner, at page – at paragraph 9 - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - on the second page of the reason. And you'll see, at 31(1)(b) there's a reference to acquiring, whether directly or indirectly, the whole or any part of the rights under the agreement.

COMMISSIONER: Yes.

MR HUTLEY: And his Honour directed attention to these questions from paragraph 21 onwards, on page 8 of the print, where he took the various analyses which – of Justice Lockhart, comparing that with that of Justice Burchett in relation to these questions, and he repeats various paragraphs of Justice Lockhart there and then – in 21. In 22, he turns to Justice Burchett's views, which I've taken you through. And, in 23, he says:

> *The better view now therefore is that an "indirect" acquisition of shares within the meaning of … 50 … includes the acquisition of shares by a subsidiary of the acquirer, even though, of course, the shares in the subsidiary do not give the acquirer a legal or equitable interest in the shares –*

and then he applies – and I won't go through it in detail, but you may find it, as everything said by Justice Nettle, profitable of dealing with the Duties Act, which had a slightly different context, from paragraph 24 through to 29. The important point to note is that he sought the effect of the extension meaning "direct or indirect" is it was, as he said in paragraph 29 about halfway through the clause:

> *In each case the transferee will receive rights or an interest equivalent to those or that which would have inured to the purchaser under the contract of sale –*

etcetera. So it's an acquainting mechanism. Now, there are three reasons that the phrase "indirect interest" extends to but not beyond the circumstances where the shares are held through a structure of group of companies which are wholly or majority owned. First, that construction is consistent with the obvious purpose of the prohibition in that what it prohibits is Dr Stanley Ho, or a designated associate of him, being able to assert influence upon a casino in New South Wales through entities controlled, or one would have thought, by him or, perhaps in the case of Great Respect, where, because of – as the uncertainties as to the nature of the trust relationship, a position of uncertainty.

Now, that appears to be the central concern of the prohibition, in particular, the definition of Stanley Ho, aside from the deemed entities, is concerned that any further entities controlled by Stanley Huang Sun Ho, not that Stanley Huang Sun Ho might happen to have a shareholding in. Secondly, if an indirect interest arose through a chain of companies which were not – had the characteristics which were observed upon in the trade practices case, it would lead to absurd results and cannot have been intended that if BHP purchased a minor holding of – in Crown Resorts, that Crown Resorts was then to prevent, to the extent it had the power to do so, Dr Stanley Ho from acquiring shares in BHP.

Thirdly, this construction explains why the clause, relevantly, seeks to prohibit Great Respect from acquiring any indirect interest in Melco Crown, yet, at the time of the consents deeds and the VIP agreement, when they were entered into, the parties were aware that Great Respect held approximately 19 per cent – 19 and a half per cent of Melco International, which, through a subsidiary, held approximately 33 per cent of Melco Resorts. The wording of clause 2.4(b) is premised upon no Stanley Ho

associate presently having a direct or indirect or beneficial interest in Crown Resorts or Melco Resorts.

COMMISSIONER: Yes.

MR HUTLEY: Because, otherwise, it passed as sense that they wouldn't have done something about that. That is because, we say, Great Respect did not have an indirect in Melco Resorts at the time because it was a minority shareholder in Melco International. Now, it's noted that counsel assisting's submissions on the Melco transaction, at paragraph 39, make the following in relation to the construction of "indirect interest". If you could go to that shortly, Madam Commissioner, and I can give you the – I don't think that has a - - -

COMMISSIONER: No, it's not.

MR HUTLEY: - - - what's a name. It says – the submission is made:

> *However, the natural and ordinary meaning of the term is wide enough to include an interest that arises under a chain of shareholding, specifically an interest that an entity has in a company on the basis of the direct interest in the company held by a subsidiary within a corporate group when the entity has a direct interest not in the subsidiary, but rather in the subsidiary's parent entity.*

We do not agree with that analysis, so far as it goes, but the submission continues:

> *That is the very kind of interest the Inquiry is concerned with in assessing that arose under the share sale agreement.*

With respect, that's wrong. In order for the company to be a subsidiary, it must relevantly be at least majority owned. That requirement is not satisfied in the case of Great Respect's shareholding in Melco International, which is only 20 per cent, so insufficient to render Melco International its subsidiary, which is each link in the chain does not involve majority ownership. In other words, there is, at a critical step, an absence of control by a either Stanley Ho or a Stanley Ho associate. That's why, we say – and we say that's wholly consistent with authority in this field; wholly consistent with the position which was taken at the time that there was no – that Great Respect did not have a direct or indirect beneficial interest in Melco Crown, and wholly consistent with the evident object of this clause is to prevent Stanley Ho having any ability to control an interest in Crown or a subsidiary of Crown.

Now, thus a direct interest in Crown Resorts arises from being a shareholder. An indirect interest arises from controlling a corporate shareholder and perhaps in other ways such as by agreement, etcetera, which we don't need to trouble you with, which is able to be sourced to the ultimate interest of such that one can say they have an indirect interest. They have acquired. And we think it's important to note that the concept is an active concept of acquiring to stop Stanley Ho or Stanley Ho interests from acquiring, and that is an active concept about Stanley Ho or Stanley Ho

interests. In other words, a single share in BHP, it would be, in our respectful submission, impossible to say that Stanley Ho had acquired a direct or indirect interest in Crown if BHP bought Crown, wholly bought it, let alone bought any share in it.

One simply – we would say that would be a misuse of the English language. It needs to be interpreted as "acquiring" there as having come to have an interest, and that, we say, just proves too much. It leads to the absurdities and would have led to a situation inevitably that there was already a breach, that there was already such a relationship. So that's why we submit that on the true construction there has not been, making all assumptions against us, a relevant acquisition. Can I then turn to the question of knowledge. Even if – there's one short point I wasn't going to trouble you with. Some reference was made to relevant interest for the purposes of section 608 of the Corporations Act in counsel assisting's closing submissions; they refer to at paragraph 35.

Whilst it is rightly acknowledged that relevant interests cannot be equated to indirect interest, we submit that section 608 is simply irrelevant; it won't assist you in addressing this question. Can I then turn to the question of knowledge. Even if Great Respect did acquire an indirect interest in Crown Resorts, it is only if Crown Resorts – Crown Resorts only can be in breach if, to the extent to which it is within its power to do so, Crown will ensure. There's got to be, in effect, a circumstance – you don't come in breach because it happens, if it happens without your knowledge, etcetera. So even if, in fact, Great Respect did acquire an indirect interest in Crown Resorts, it's only if Crown Resorts was aware of the proposed Melco transaction before it was executed, and it could have prevented it.

There is no suggestion that anyone other than the CPH nominees knew of the proposed transaction before it was executed, that is, of actual directors of CPH – of Crown. The issue is whether their knowledge obtained in acting for CPH can be attributed to Crown Resorts. There can be no such attribution of the knowledge of Messrs Johnston, Jalland and Packer for three reasons. Mr Packer, we've submitted already, was plainly not a de facto director, so no question of attribution can arise. Secondly, the common law test for attribution in respect of directors is not satisfied and, thirdly, in any event none of those – the individuals had the requisite knowledge.

The common law test for attribution is, as counsel assisting acknowledged, that where a director is a director of company A – this is at transcript 4958, lines 26 to 30 – and a director of company B, the general proposition which emerges from the authority is that information obtained by a director in the course of acting for company A cannot be attributed to company B unless the director is under a duty to disclose that information to company B. That is so, but there is a further requirement which must be satisfied before knowledge may be attributed, and that's explained in paragraph 16.220 of Ford, Austin and Ramsay's Principles of Company Law, 16th edition. I think you have the relevant print.

COMMISSIONER: I do.

MR HUTLEY: And I can take it up at:

> *Ordinarily in civil proceedings, for the knowledge to be imputed to C2, the director must be under a duty to C1 to communicate the knowledge to C2 and under a duty to C2 to receive the knowledge. Without more, the fact that two companies have common directors does not result in the knowledge of one company being attributed to the other.*

Now, this test is not satisfied for two reasons: first, there was no duty imposed upon the individuals by CPH Crown to communicate their knowledge of the prospective Melco transaction to Crown Resorts. To the contrary, that was a matter which was to be kept confidential until the share sale agreement was finalised, including because of the issues which had arisen in relation to a leak of the prospective Wynn transaction.

COMMISSIONER: Well, I don't know that, do I? Do I know that? Do I know that's the reason?

MR HUTLEY: It doesn't have to be the reason in fact. You know that it was believed by CPH to be the reason.

COMMISSIONER: I see.

MR HUTLEY: And that's sufficient to - - -

COMMISSIONER: But do I know that that is the belief? Was that in the evidence?

MR HUTLEY: Yes, Mr Johnston – I will get the reference.

COMMISSIONER: All right. Thank you.

MR HUTLEY: Mr Johnston in his second statement dealt with exactly that. I will get the reference, Madam Commissioner.

COMMISSIONER: You're only dealing with the CPH directors at the moment whose knowledge you're addressing. There was only one director of Crown who had knowledge, as I understand it.

MR HUTLEY: Yes, Mr Johnston, Mr Jalland had knowledge, and Mr Poynton had it on the morning of the contract.

COMMISSIONER: Yes, and Mr Poynton was the only director who had any knowledge – express knowledge of this transaction before it was executed.

MR HUTLEY: Being solely a director of - - -

COMMISSIONER: Crown.

MR HUTLEY: - - - Crown. Yes, shortly before - - -

COMMISSIONER: He was a nominee of CPH - - -

MR HUTLEY: Quite.

COMMISSIONER: - - - as I understood it, but he was not a director of CPH.

MR HUTLEY: Quite. Quite. Now – but I'm dealing here with the position of the CPH directors.

COMMISSIONER: Yes, I understand.

MR HUTLEY: Now, and could we take you to shortly what was said by Justice Young in Harkness v Commonwealth Bank of Australia.

COMMISSIONER: Yes.

MR HUTLEY: Which is reported at 32 NSWLR 543 at 555, and you will find at about letter – just above E, "Whilst ordinarily there will be a duty".

COMMISSIONER: What page are you on?

MR HUTLEY: I'm sorry, 555.

COMMISSIONER: 555. Yes. Just pardon me. Yes, I have that.

MR HUTLEY: Just above letter E "Whilst ordinarily".

COMMISSIONER: Yes, I have that.

MR HUTLEY: And that sentence. So there's that. Secondly – so that's the position. Secondly, the individual could not have owed Crown Resorts any general duty to disclose information received in confidence from CPH Crown in breach of their pre-existing obligation as directors. In circumstances where Messrs Jalland and Johnston were appointed to the board of Crown Resorts as nominees of CPH Crown and known to be directors of CPH Crown and CPH, such wrongful disclosure cannot be regarded as part of the function or responsibility either had assumed or undertaken to perform for or on behalf of Crown Resorts. And that's – and if I could just give you a reference, I don't think there could be any dispute about it, is to the Grimaldi v Chameleon Mining NL (No 2) which is reported in 200 FCR 296 at paragraph 179 which was quoted in the High Court with approval in Howard v Federal Commissioner of Taxation in 253 CLR 83 at 119.

COMMISSIONER: Mr Jalland was not a director of CPH Crown, the vendor; Mr Johnston was the sole director.

MR HUTLEY: Quite.

COMMISSIONER: And so - - -

MR HUTLEY: But he was under an – but Mr Jalland had received the information in confidence from CPH Crown – not from Crown – from CPH. So the position applies equally.

COMMISSIONER: He had received the information from Mr Packer who was at that time - - -

MR HUTLEY: Quite.

COMMISSIONER: I'm not quite sure what he was at the time but, so far as Mr Jalland is concerned, he is the director of CPH, the holding company of CPH Crown holdings but not the vendor in the transaction.

MR HUTLEY: I accept that, but he - - -

COMMISSIONER: All right.

MR HUTLEY: - - - received it as – on behalf of CPH in confidence. So the position is the same. Now, further, and in any event, the directors did not know the material facts relevant to attract any duty of disclosure to Crown Resorts. Counsel assisting properly accepted that the better view of the authorities is that actual knowledge is required before a duty to disclose can apply and an attribution of knowledge is made; transcript 4958, lines 41 to 43. Thus, counsel assisting has approached the issue on the basis that constructive knowledge is insufficient, and that's transcript 4958, lines 43 to 44. Therefore, any consideration of whether or not should have checked whether or not Dr Stanley Ho had an interest in Melco Resorts are irrelevant to the question of attribution.

Counsel assisting summarised the circumstances in which a director has been held to be under a duty to disclose information to company B obtained in the course of acting for company A – and we say it equally applies to a confidential agent, there's no difference – as including transcript – at transcript 4958, lines 36 to 39:

> *Where information may be relevant to a decision or course of action to be made or undertaken by company B; may be at risk of exposing company B to the prospect of harm in relation to a matter concerning company Bs operations and/or important to the affairs of company B.*

The duty to disclose the prospective transaction was said to arise because they knew certain material facts from which they are – and this I quote at transcript 4959, 17 to 20:

> *...be taken to have known that Crown Resorts needed to be informed about the share sale agreement before it was executed so that Crown Resorts could take steps to ensure that it was not in breach of the Crown deed.*

With respect, that submission should not be accepted. It is wrong. Firstly, there is a logical fallacy within the submission. It is only if Crown Resorts was aware of the proposed Melco transaction that it could possibly have been exposed to breaching the relevant provisions of the Crown's consent and approval deed in the VIP agreement because those obligations were limited to matters within its power. Therefore, there is circularity in seeking to attribute knowledge to Crown Resorts on the basis of a duty to disclose matter to it arose because it was exposed to a risk that it would breach the regulatory agreements, when the risk of breach only arose if the knowledge is attributed. So in other words it starts at the wrong proposition.

Secondly, and perhaps more practically, Messrs Johnston, Jalland and Packer did not have actual knowledge of the relevant matters necessary to attack the duty to disclose. It's not enough that there is a theoretical possibility that Crown Resorts regulatory obligations would be engaged and that the directors had not positively ruled out that possibility. What is required is actual knowledge of an actual risk facing Crown Resorts, but the evidence does not demonstrate such a knowledge. As to Mr Johnston, he simply did not know that the proposed Melco transaction would expose Crown to a potential breach of its regulatory agreements, and that's his evidence at 3055, lines 21 to 27.

That's hardly surprising given that he did not know any entities having any association with Dr Ho had an interest in Melco International in 2019 or previously, and that was his evidence at 3935, lines 32 to 37 and 3053, lines 26 to 29, nor that Dr Stanley Ho had any interest in Great Respect. That's transcript 3054, lines 26. Indeed, he simply said this: he had no understanding that Stanley Ho had any involvement in the transaction. That's transcript 3056, lines 41 to 47. Now, counsel assisting has relied on various matters to demonstrate that Mr Johnston had actual knowledge and they fall short and drift, we submit, into the irrelevant realm of constructive knowledge. In essence it was suggested that a finding of actual knowledge was supported by the following matters, and these are at transcript 4959, lines 24 to 40.

One, that although Mr Johnston did not know the details of the terms of the consent deeds, he knew that they would contain provisions intended to prevent entities associated with Dr Ho from taking an interest in Crown Resorts, and there's no dispute about that. Mr Johnston - - -

COMMISSIONER: What line are you reading from?

MR HUTLEY: I'm sorry. I'm summarising. They're set out between 21 and 40.

COMMISSIONER: I see.

MR HUTLEY: I can go through them, I just want to go through them - - -

COMMISSIONER: That's all right.

MR HUTLEY: - - - to deal with what we ..... Mr Johnston knew that Melco International had a substantial shareholding in Melco Resorts. No dispute about that. Mr Johnston knew at some point between 2004 and 2017 that Great Respect had approximately 20 per cent shareholding in Melco. Again, there is no dispute about this, although, relevantly, Mr Johnston did not know that Dr Ho had any interest in Great Respect. That's transcript 3054, line 26. He knew that an entity – the next matter is he knew that an entity associated with Dr Ho was connected with a joint venture through Melco Resorts. That's not, with respect, quite right. Mr Johnston's evidence was to the effect that he understood that the entity associated with Dr Ho had sold its interest in the City of Dreams so that it could be part of the assets of Melco PBL joint venture and was not aware that it was sold for convertible notes. That's transcript 2915, line 1 to 23.

He understood that Dr Ho had no interest in Melco International or the joint venture, and he repeated this on a number of occasions at 3057, lines 15 to 16; 3054, lines 20 to 26; and 3053, lines 26 to 29. And finally, he had not checked, since the cessation of the joint venture, whether those shareholding and associations continued such that quote – and this is my learned friend's submission at transcript 4959, lines 45 to 4960, line 1:

> *There must have been a red flag in Mr Johnston's mind when he became aware that the purchaser would be Melco or its nominee.*

With respect, there are a number of problems with that submission. Firstly, it must rely upon constructive knowledge which is irrelevant to the question of attribution of knowledge. Further, Mr Johnston gave evidence that he was not aware of any regulatory risks arising from the transaction. That's his evidence at 3055, lines 21 to 27, and he had taken legal advice, and that's in his statement of the 23rd of December 2019 at paragraph 40. That's exhibit AA223. And it was not suggested to him that he was lying or mistaken about this material issue and that, of course, engages the procedural guideline for paragraph 22.

Next, Mr Johnston did not know that Stanley Ho or any associate had any interest in Melco Resorts and had no reason to believe they did. Melco Resorts was a known entity which had been approved as an associate of Crown Resorts on two separate occasions. Further, the VCGLR had concluded following rigorous investigations, that Dr Ho had no ongoing influence over Melco International or Lawrence Ho. Therefore, even if it was relevant, which it is not, the circumstances were not such as

to raise a red flag and there's no evidence that he was conscious of a red flag. So it's necessarily constructive.

Similarly, if one turns to Mr Jalland, he was unaware that Dr Ho and entities associated with him had a shareholding in Melco International and believed that Lawrence Ho was a significant shareholder in Melco International. It was Lawrence Ho's company – and Dr Ho was not involved, and he gave that evidence on a number of occasions and you would recall that. But, for example, 3217, line 6 to 10 he was asked the question a number of times and he said it, and I won't give you each reference; that will be in our written submissions.

Counsel assisting has accepted that there was not enough evidence to establish that Mr Jalland had actual knowledge necessary to attract a duty to inform Crown Resorts for the purposes of attribution of knowledge unless a finding was made that Mr Jalland knew about the matter which Mr Johnston knew. That's transcript 4961, lines 41 to 46. However, such a finding is not open because it was not suggested to Mr Jalland that he was lying or mistaken about his lack of awareness. The only material put forward from which Mr Jalland could possibly have known of the possible links were, and these are two: (a) a draft Melco announcement circulated less than 20 minutes before the contracts were exchanged which he was not asked to and did not review. That's at exhibit AB52 and AB53.

And next, the annual reports of Melco Resorts which he did not review but read the chairman's statement, that was his evidence at transcript 3219 lines 24 to 30; and 3240, lines 46 to 47. It was suggested that these were a record which, if read, would have made the connection immediately apparent. That's transcript 4970, line 43. Even if Mr Jalland had read these reports at the time, it is doubtful whether he would have remembered what was recorded in relation to Great Respect in note 3 on page 122 of the 2016 annual report he was taken to. That's exhibit Y, CRL.506.001.4687 at 4812. Now, Mr Jalland simply can't be expected to have read that or taken that in. Now, Mr Jalland gave evidence that over 12 years until the Crown Resorts exit from Melco, Lawrence Ho had spent the better part of a decade expressing that his business interests and those of his father were separate.

He said that he was aware that Mr Lawrence Ho had been approved by many regulators – so many regulators that there was in fact that there was no real prospect that Mr Lawrence Ho would have decided to involve his father. And – now – so that's dealing, firstly, with Mr Johnston, then with Mr Jalland. As to Mr Packer, the only issue with Mr Packer only arises if you were to find that he was a de facto director.

COMMISSIONER: And if he is, he told Mr Poynton.

MR HUTLEY: What? And if he is – one – but he told Mr Poynton in the morning of the transaction.

COMMISSIONER: That's the irony of it.

MR HUTLEY: And the – but more to the fact is he told about the transaction but - - -

COMMISSIONER: He did.

MR HUTLEY: On that day, but he wasn't aware of any regulatory risk because he simply did not turn his mind to it regularly for Crown Resorts but left the matter to his legal advisers which is hardly surprising in circumstances where he'd ceased to be an actual director of Crown Resorts. That's his evidence at transcript 3671, line 20 and 3672, 4 to 15. Further, although he was aware of Great Respect's shares in Melco International at one point in time, he had forgotten that fact by the 30th of May 2019 and it was not suggested he was not telling the complete truth about that. That's at transcript 3672. Therefore, he simply did not have any actual knowledge of any risk that Crown Resorts might breach its regulatory agreement such as give rise to any duty to disclose making every other assumption against us. Now, it's not suggested that Mr Poynton had sufficient knowledge for attribution to Crown Resorts. That's at transcript 4965, lines 10 to 22.

Now, that is the end of the breach case, in our respectful submission, but – so we say there's no beach because there's no acquisition, no attribution for the reasons indicated, because of confidentiality, but in event no knowledge. That's the three steps which have to be overcome to suggest that there is a breach. But even if Crown Resorts knew of the proposed Melco transaction and it did result in Great Respect acquiring an indirect interest, there's a real question as to whether what Crown Resorts could have done, noting that its obligation is to prevent to the extent that is within its power to do so other than as opposed to taking all reasonable steps, thus it is not enough that Crown Resorts did not take steps which might have stopped the transaction. What is required is a finding that Crown Resorts failed to take steps within its power that would have stopped the transaction.

COMMISSIONER: Yes.

MR HUTLEY: And we say that – so we say - - -

COMMISSIONER: If we just go to clause 2.6 for a moment, I will have that brought up if you would be kind enough to give me the number, Mr Hutley.

MR HUTLEY: I'm sorry. I will just get you the first page.

COMMISSIONER: It's the VIP agreement.

MR HUTLEY: INQ.080.120.1298.

COMMISSIONER: Yes. Could you bring that up, please, operator, and if you would be kind enough to go to schedule 1 and clause 2.6, I think it is. If you can just - - -

MR HUTLEY: That's at 1341.

COMMISSIONER: Thank you very much; 1341, yes. So this is a – in looking at assessing what your clients say, what had to happen under this regime was that the directors – all of the directors of Crown and Crown itself had to, on a quarterly basis, do things and a biannual basis the risk management committee had to actually report to the board – if we go back to 2.4 and 2.5, please. So you will see there that not only did they have to make sure that Dr Stanley Ho or his associates didn't get in, they had to go searching, and so the searches that were done, or supposedly done under 2.5 was this constant checking to see if Stanley or his associates somehow got in.

MR HUTLEY: Yes.

COMMISSIONER: So it has to be that – and I can indicate to you, Mr Hutley, that it would appear that although there is a monitoring and reporting process from the Crown risk management committee to the board on a biannual basis, those assisting me haven't been able to find it so I should mention that in favour of your clients, but it appears that the company took this matter very, very seriously in 2014, that they would not only prevent Stanley Ho from getting a toehold, either indirectly, directly or beneficially, but they would check every quarter and every six months to make sure he had not inadvertently got in.

So I understand your clients have said, "Look, it just went out of my mind in one instance, I didn't think about it in another, and I just didn't know", that's – and I understand your arguments in respect of the construction and whether knowledge can be imputed and the like, but as for the directors' conduct in just for getting about this, that's another question, I think.

MR HUTLEY: Well - - -

COMMISSIONER: A different question.

MR HUTLEY: Could I – I accept the point, but one has got to have regard to this. If one goes to – there's a kind of known unknown in relation to these things, but one has to be mindful of what's in this agreement by way, for example, of entities or individuals deemed to be associates of Stanley Ho. That is a list of, I don't know, about 50 companies.

COMMISSIONER: Yes.

MR HUTLEY: Now, nobody would ever, ever remember those 50 companies.

COMMISSIONER: But you've got to have systems that make you remember when you're a public company with a casino licence.

MR HUTLEY: Can I say I accept that completely, Madam Commissioner, but one's got to look at that at a corporate level.

COMMISSIONER: Yes, of course.

MR HUTLEY: Of course, the corporation will have systems – they will have, no doubt, legal and other officers who, consistently with the monitoring and reporting and the compliance program, will ensure that those steps are followed. They are, of course, by their nature backward-looking. So - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - whatever the reporting would be would not show up anything of relevance until it had occurred.

COMMISSIONER: Yes.

MR HUTLEY: The monitoring is at 2.5 for the purpose of monitoring our compliance with 2.4.

COMMISSIONER: Yes.

MR HUTLEY: That would serve to as – accords with B of 2.6B, lead to Crown informing of a non-compliance.

COMMISSIONER: Yes.

MR HUTLEY: Now, the non-compliance might be where they come to the conclusion that, for example, a Stanley Ho associate had come to have a direct interest, it had bought shares on the stock market, it would strictly be not a non-compliance, but obviously the intent would be, with the agreement – the intent would be to inform that Stanley Ho had gone in – got in.

COMMISSIONER: It's not limited to that, I'm afraid because for 2.6A(1) and (2) show that they have to report, and it was a good idea - - -

MR HUTLEY: Quite. I agree.

COMMISSIONER: They have to report that they haven't paid Stanley any money - - -

MR HUTLEY: Quite.

COMMISSIONER: - - - etcetera. But this is really taking you a little off your point, but it goes to assessing how it could be that someone could forget this in the circumstances, and I understand the evidence that you've taken me to.

MR HUTLEY: But it's really important to concentrate, with respect, on the "this". The "this" is, and the only "this" is the name of a company and its relationship to schedule 2.

COMMISSIONER: Of course.

MR HUTLEY: Without knowing – I mean, and it can't be that every director has to – would ever be imagined to be, and there's no suggestion and nobody has put that they had to, in effect, memorise schedule 2.

COMMISSIONER: No, but they were very well aware, and they accepted this, that the government was very sensitive about Stanley getting any toehold or getting any interest in the company, Crown, and - - -

MR HUTLEY: I accept that.

COMMISSIONER: I accept what you say about having to memorise or think about all those companies, but not from the point of view of attributing knowledge, or your construction points, but the more general corporate matter that I'm discussing with you for which, on your view it's only Mr Jalland and Mr Johnston who are the directors of Crown at the time.

MR HUTLEY: Quite. And there may have been some form of – and although it hasn't put there – system failure within the structure of Crown not to find some means of, as it were, making sure that everybody was aware of - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - things, but that's not the way it's put. The gravamen of what I'm dealing with, Madam Commissioner, is the complaint about three individuals and an organisation's conduct.

COMMISSIONER: Yes, I understand that.

MR HUTLEY: But I accept there may have been – when one had an agreement of this character, there is obviously an institutional issue, and the institutional issue and the drafting issue was, in effect, derived to have a compliance program in 2.5 and a monitoring and reporting, but always a monitoring and reporting has the potential for, in effect, notification after the event. And the real question is how do you ensure, through the multifarious possibilities, to bring things to account. It also does point out, because of that very difficulty, is our construction, that is, a construction which denies, as it were, a sequence of tiny – a minority interest would not be apt to have one to operate to create a direct or indirect interest because otherwise it would create a scope of inquiry so broad by way of monitoring to almost make it impossible.

You would have to look at every one of your shareholders. You would have to look at every minority interest in your shareholders and then work out if that was a company which was associated with – and on – you could go into an infinite regress. If the construction advanced is right, the monitoring would go into an infinite regress.

COMMISSIONER: Yes, but you've got the difficulty of subparagraph (c) of 2.4, in respect of your control versus ownership, if you like. You see, what the parties to this agreement thought about was dealing with acquisition, direct, indirect or beneficial in (b) and then having that relevant power over the business quite separately, and I have to weigh that up in looking at all of this. So if I were against you on your first point, then it is the attribution of knowledge and it really – Mr Bell has accepted that Mr Jalland did not have actual knowledge, so the only – we get back to the only real question, apart from Mr Packer's de facto point, and I understand your submissions on that, it's Mr Johnston's points in relation to whether he had actual knowledge and you've gone through that, so I understand what you've said.

MR HUTLEY: Yes. Now – and – I will come to the significance of that at the end, if I might.

COMMISSIONER: Yes.

MR HUTLEY: Because if one – but I will adumbrate; if one went through all those hoops – and I don't mean that in a dismissive fashion – and found that there was a technical breach of the company because of a process of attribution through Mr Johnston - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - it is has to be in effect the most innocent and technical of breaches of a contract one can conceive because this is all done with legal advice. It has to be done through a very, very, what you might call sophisticated legal, and we say stretching legal analysis. So it simply couldn't, with respect, go to suitability of Mr Johnston or CPH; in effect, surrounded themselves with lawyers, as you'd expect. If, in effect, one has threaded all these needle – the eyes of all these needles and you were satisfied, it is, by the worst of bad luck you can imagine, to put it kind of colloquially, and would have absolutely no impact upon any assessment of suitability of anyone, including Mr Johnston. Can I now turn to the CPH group deed.

COMMISSIONER: Yes.

MR HUTLEY: That is exhibit 32 – F32, I'm sorry; INQ.080.120.1043. And that's an agreement between CPH – the holding company of CPH Crown – and ILGA.

COMMISSIONER: Yes.

MR HUTLEY: And it was entered into on the 8th of July as part of a suite of regulatory documents associated with Barangaroo. The CPH deed has not been addressed by counsel assisting's statement of issues and contentions in relation to the Melco transaction, nevertheless, this issue arises pursuant to paragraph 16(d) of the amended Terms of Reference, and the matter is irrelevant to an evaluation of the conduct of CPH Crown in relation to the Melco transaction and whether it and its directors should have expected to behave differently. Now, the CPH group deed is the only relevant agreement of which CPH is a party. Now, significantly, it contains no restriction on CPH or CPH Crown's selling of its shares in Crown Resorts without first informing Crown Resorts or seeking ILGAs approval.

COMMISSIONER: Right.

MR HUTLEY: Secondly, in negotiating this agreement, CPH and ILGA agreed to exclude such obligations.

COMMISSIONER: Yes. There's no doubt that your client's company, CPH Crown Holdings, was free to sell its shares.

MR HUTLEY: Quite. It imposed no obligation on CPH or its executives to take steps to prevent Dr Stanley Ho or entities associated with him from acquiring a direct or indirect – that's not to say, had they known it, how they would have behaved, of course, but, in effect, there was a clear distinction drawn by ILGA in not seeking that imposed upon my clients. Now, can I go to clause 4.1(b) of that document.

COMMISSIONER: Yes.

MR HUTLEY: I will just get the page. It's – yes. You will find it on 1057.

COMMISSIONER: Thank you.

MR HUTLEY: What the warranty there is:

> *CPH warrants it will notify in writing as soon as reasonably practical after becoming aware of any material fact or circumstance that may reasonably result in –*

and you see that – the becoming of a close associate.

COMMISSIONER: Yes.

MR HUTLEY: Or a – CPH close ceasing to be such. You see that. Significantly, Crown Resorts is expressly excluded from being a CPH group member, as defined in clause 1.1. And you'll find clause 1.1 as a "CPH group member" is defined as – at 1050.

COMMISSIONER: Yes.

MR HUTLEY: And then "CPH" is defined above, but excludes the Crown and its ..... right. Now, thus given that the Melco transaction concerned the sale or transfers of shares in Crown Resorts, it follows there was no breach of warranty by clause 4.1(b) and there was no change in CPH close associate occurring as a result of it.

COMMISSIONER: I don't think Mr Bell has put any of this. I don't think he's suggested any of this.

MR HUTLEY: Quite. Now - - -

COMMISSIONER: So there – there's no alleged breach here.

MR HUTLEY: It's just to make clear – now, and there's also – could I move on – there's no suggestion by counsel assisting that Barangaroo restricting gaming licence has been breached; that's at transcript 4968. However, it would appear that you need to at least – your Terms of Reference – there must be a report under 16DF but I will say no more as that is not dealt with. Now, can I now deal with the suitability matters concerning the Melco transaction.

COMMISSIONER: Before you leave that deed, the only aspect of the deed, I think, that was relevant to anything that Mr Bell said in relation to some of the proposals was, I think, clause .93. If we could just have a quick look at that so we don't have to go back to it.

MR HUTLEY: Clause 9.3?

COMMISSIONER: I believe it was.

MR HUTLEY: Interests in Crown guarantor.

COMMISSIONER: Yes. Just pardon me for a minute. Can you take us to 9.3, please. Yes. So the Crown guarantor was, in fact, Crown Resorts.

MR HUTLEY: Yes.

COMMISSIONER: So if you read "Crown guarantor" to be Crown Resorts. And so this – this was an acknowledgment by the Authority, that's the Independent Liquor and Gaming Authority, that it couldn't do the things that are in there. So that was referred to in counsel's final submissions, Mr Hutley, and I just wanted you to be aware of that.

MR HUTLEY: I am aware of that. That's – we haven't addressed this here because, as I indicated - - -

COMMISSIONER: Going elsewhere.

MR HUTLEY: - - - we don't know what proposals might or might not be forthcoming from Crown and how they would - - -

COMMISSIONER: No.

MR HUTLEY: - - - propose to deal with it. So as I indicated at the beginning, we're going to seek a little time at the end to deal with - - -

COMMISSIONER: Yes, I see.

MR HUTLEY: - - - anything that arises. I don't – it's simply not our – in our respectful – appropriate for us to start raising issues which have – we don't know whether they'll become a proposal, what they will be - - -

COMMISSIONER: No.

MR HUTLEY: - - - or any suggestion that we are, in effect, advocating a position in relation to it. We will respond, because it's a matter for Crown as to its response to any suitability issue. We may have a lot to say depending upon what they say.

COMMISSIONER: It was something that was raised by Mr Packer as a matter of evidence.

MR HUTLEY: Quite.

COMMISSIONER: And Mr Bell raised it in his outlines.

MR HUTLEY: I understand.

COMMISSIONER: And so I just wanted – but you're going to wait until Crown says whatever it might say.

MR HUTLEY: Yes. Whether it's engaged or whether it will concern you will depend – be a function of that and perhaps a function of any response made by - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - counsel assisting to whatever the proposal is.

COMMISSIONER: And, indeed, it may arise – it may arise independently of Crown, having regard to what I've seen, but it may not, but you're right, I will let you proceed and wait till the end, Mr Hutley, and let you address matters after Crown tells us what is proposed. Thank you. Yes, Mr Hutley.

MR HUTLEY: Now, I wish to turn to suitability matters concerning the Melco transaction.

COMMISSIONER: Yes.

MR HUTLEY: Now, if, Madam Commissioner, you find there has been a breach of the regulatory agreements, we accept that is a matter for you to take into account in assessing Crown Resorts' suitability. But as I submitted a moment ago, any breach was – will be, quintessentially, of the most innocent character. First, the transaction was undertaken whether relevant CPH representatives believed, based on legal advice, that the regulatory approval of the proposed Melco transaction was not required before the share sale agreement, and that's what Mr Johnston said at – in his evidence, exhibit AA223 at paragraph 40, and there was no challenge to that.

Secondly, CPH representatives understood and expected that regulatory approval would be sought by Melco and did not understand Dr Stanley Ho would be obtaining any sort of interests as a result of the transaction. That is, there was no intention to avoid regulatory scrutiny. Rather, such scrutiny was anticipated and accepted, whether Melco transaction was public – when the Melco transaction was publicly announced, Melco Resorts stated what appears in exhibit AA146, which is INQ.020.001.3200, and if one could go shortly to that.

COMMISSIONER: Yes. Yes. Thank you.

MR HUTLEY: And if one goes to the second paragraph:

While the announced transaction does not require it to be consummated - - -

COMMISSIONER: Yes.

MR HUTLEY:

- - - or, promptly –

etcetera. Similarly, CPHs position is it would not have voted in favour of the Melco Resorts appointment appointing directors to the board of Crown Resorts unless they had first obtained regulatory approval from all applicable gaming regulators, and that was Mr Johnston's evidence in exhibit AA23 at paragraphs 74 to 75, and that was not challenged. And, thirdly, after the regulatory issues were raised, CPH agreed to vary the share sale agreement to make it subject to, in effect, approval by ILGA and this Inquiry; that's exhibit AA213. That ultimately led to the second tranche not completing and, thus, CPH Crown losing the benefit of selling 9.9 per cent of shares above market, making these variations showed appropriate deference and respect for ILGA and this Inquiry.

Now, if there's no breach of the regulatory agreement, it's submitted that the decision of CPH representatives to proceed with the Melco transaction did not adversely affect Crown Resorts' suitability in any material way for a number of reasons: first, there was good reason to keep – the representatives believed that there was good reason to keep the transaction confidential. They understood that

confidentiality had destroyed the Wynn Resorts proposal. Now – and Mr Jalland so thought, and you can see that in paragraph 21 to 23 of his statement at exhibit AA250.

COMMISSIONER: Thank you.

MR HUTLEY: I'm sorry – and Mr Johnston. I'm sorry. Yes. I'm just getting some references, and that's exhibit AA250 of Mr Jalland – sorry – is at AA249, paragraphs 21 to 23; Mr Johnston's is paragraph 22 of AA250. Legal advice had been given, and Mr Johnston refers to that at paragraph 40 of that exhibit AA223, as does Mr Jalland at paragraph 25 of AA249. Then also the understanding, which I've just recently referred to, of regulatory approval before seeking board representation. Fourthly, any risk of Stanley Ho influencing Crown Resorts or Crown Sydney as a result of the remote entitlement which he may have, having regard to Great Respect – making all the assumptions against us – is, in fact, fanciful.

Firstly, Dr Ho is a discretionary object of a discretionary trust. We don't actually know even the terms of that discretionary trust – of the discretionary trust which owned Great Respect and could not control the voting or disposition of the shares held by the trust; that's exhibit AB55, INQ.030.001.0001 at 0103. You will recall that reference. And, by this time, Dr Ho was gravely ill and appears to have ceased all business activities, as Mr Packer, at transcript 3670 line 34. And you also see reference to that at CPH.990.001.3355. And our fifth point: it's understandable that no regulatory risks in anticipated in circumstances where there had been a previous approval of association, which you're aware of, over a number of years, and I think that's enough.

Now, can I turn to the specific criticisms made of my clients. In respect of Mr Johnston and Mr Packer it was submitted, at transcript 4969 lines 12 to 15, the following:

> *They knew of the risk that Stanley Ho may have continued to have been connected with Melco Resorts and yet they simply ignored those matters when negotiating the share sale agreement for the financial benefit of CPH, CPH Crown and Mr Packer.*

We say – and I've taken you through this in a lot of detail, so I won't repeat it at length. Neither of them knew of those matters. Neither of them knew the critical links to make that submission. And it's important that, for years in their dealings with Mr Lawrence Ho, he had been to great lengths to explain that his father had no association with the business; he had separated himself from his father. And Mr Lawrence Ho had been approved all over the world to conduct casinos in circumstances where, for example, in the United States, you know, Madam Commissioner, that it was on the express basis that there was no association with his father.

Now, I've taken you through the position of Mr Packer and the fact that he had forgotten what he had known. It's not surprising. There's a – what he'd known in 2006 and what he knew in 2019. Rare to remember what you knew 13 years later, particularly, of the particular variety. Some might say, in our profession it's rare you knew what happened a week before last, but you understand that and I'm not going to trouble you any further with that. You might think it was rare not for me, now, to know anything that happened a week prior, but, anyway, moving on.

Now – so I think I'd be reiterating what I've – but I should take you to one aspect, because much was made of this. Something should be said about Mr Johnston's knowledge of the consent deeds. Mr Johnston gave evidence that he did not read the consent deeds or the VIP agreements, but, unsurprisingly, read and relied upon summaries provided to the board and legal advice he received. He gave that evidence at transcript 2920 lines 43, 2922 lines 1 to 2 and 2922 lines 43 to 44, and 2927 lines 16 to 26. You will recall the evidence about Mr Neilson's memorandum and annexure A to it - - -

COMMISSIONER: I do.

MR HUTLEY: - - - which summarised the key terms of the draft consent deed.

COMMISSIONER: Yes.

MR HUTLEY: And that's exhibit AA6, and could that be brought up?

COMMISSIONER: Yes.

MR HUTLEY: CRL.512.001.1993 at 1995. And that was the report – memorandum which went to the board. And you see that that report, particularly, at the third last dot point.

COMMISSIONER: Yes.

MR HUTLEY: It was suggested to Mr Johnston that he must have read the consents deed in 2013 due to what the minutes record, relevantly read, having – and can I take you to the minutes - - -

COMMISSIONER: I remember the minutes, having carefully considered the - - -

MR HUTLEY: "Considered", etcetera. And that was the subject of cross-examination at 2921, lines 27 to 35. It was suggested that the opening words meant he must have read the deeds. Now, can I say the idea that one read these deeds and went to the relevant schedule and intoned out the 50 names of the 50 companies is something which your Honour – Madam Commissioner, you would be more than surprised at, because, frankly, it is so unlikely as to be – as to border on the beyond curious. Now, Mr Johnston gave the answer that – to the suggestion that reference to terms was a reference to the key terms in Mr Neilson's paper, transcript 2922 line 8.

And then it was put to him – asked him whether he was suggesting the minutes were untruthful; that's 2922, 46 to 47. Now, he denied that. And the minutes are clearly, in effect, ambiguous, because if one's had a detailed explanation, by reference to that document, it would be perfectly appropriate to express the minutes in the terms they had, but it's being suggested that Mr Johnston's evidence should not be accepted, and that it reflects poorly on his credibility, and that's transcript 4953 lines 36 to 41. Now, we submit Mr Johnston's evidence accords with the contextual reading of the minutes. The full context is, relevantly, as follows: if one goes to AA8, CRL.512.001.2231, at 2236 to 7 – if those two pages could be brought up, 2236 to 37 – you will see that it says:

Mr Neilson spoke to his paper and sought authority to execute the deed.

That's at the bottom of 2236.

COMMISSIONER: Yes.

MR HUTLEY: And then there's a resolution. In the circumstances where the minutes don't record that directors read or did a page turn of the draft deeds – and even if they had, nobody would have read out the names of all these companies. It's – and that's the critical thing. Now, secondly, Mr Jalland gave evidence that he did not read the consents deed. He was present at that meeting, as you will have seen, as – by invitation by teleconference. It was not suggested to him that the board was taken through the consents deed, clause by clause, and, relevantly, the relevant schedule name by name. Thirdly, none of the other attendees at the meeting were asked about the matter by our learned friend. Now – and we'd say that, in those circumstances, Madam Commissioner, you would accept Mr Johnston's statement.

Now, in respect of Mr Jalland, the submission, at transcript 4969, lines 21 to 26, is that whilst you would accept that he was not aware of the risk of the connection between Stanley Ho and Melco, in relation to this wider question, the point is made against him that he didn't bother to find out either. It's also said he failed to read corporate reports and records put before him that would have made the connection immediately apparent. Now, with respect, there does become an element of Rumsfeldian known unknowns and unknown unknowns in this exercise. Now, far from not bothering to check, Mr Jalland gave evidence that he did not believe there was any connection, and I've been through those.

COMMISSIONER: Yes.

MR HUTLEY: Lawrence Ho's assertion continually for 14 to 15 years of that; the joint venture had ceased; he accepted he didn't check after the joint venture and he – but he was of the view there was, and I quote, "a negligible chance of that", that is, Dr Stanley Ho becoming involved in that window 2017 to 2000 and – of Lawrence introducing his father into the business; that's transcript 3277, point 42 to 44. And, in fact, that's the case: whatever one says about the construction issue, nothing materially changed from 2012 to 2019. Now - - -

COMMISSIONER: The only change was that, if I'm against you on your first construction, point he did get in.

MR HUTLEY: Well, he was – he was in, if we're - - -

COMMISSIONER: He wasn't into Crown, he was only into Melco and, by reason of that, the joint venture.

MR HUTLEY: Quite. All I'm saying is nothing changed relevant to Melco.

COMMISSIONER: Yes, quite. I understand that point.

MR HUTLEY: Nothing changed. And it would be only the purpose of looking to see whether that had changed, which would be the point if you believed he wasn't involved before and, in fact, nothing would have changed. So, in fact, if you'd looked at it and said, well, nothing's materially changed from the time of – if you knew everything – from the time of the agreement, at which time the Authority clearly considered he wasn't involved – see the construction which I took you to and the reference to being involved in Melco Crown – then the only conclusion one would come then is nothing's changed, I'm of exactly the same view. And - - -

COMMISSIONER: But it's clear - - -

MR HUTLEY: - - - the better view is - - -

COMMISSIONER: It's clear the Authority did know because of the documents that we've seen.

MR HUTLEY: Quite.

COMMISSIONER: And the fact that they were reviewing him, that is, Melco, notwithstanding the presence of Stanley in Melco's structure.

MR HUTLEY: Quite. But it is passing curious, having regard to the construction of the relevant clause, that you are restrained from acquiring an interest in Melco Crown when, if the construction advanced is right, Stanley Ho already had one. Or – sorry – Great Respect already had one.

COMMISSIONER: But I think there's a reasonable construction to that, that you've got subparagraph (c) with the controlling issue, and you can possibly – although you rejected this construction – and it doesn't say "from increasing", you're quite right, but in considering the construction of it, you would look at subparagraph (c) to say, well, ILGA may have well been concerned about him getting a further interest that was a controlling interest in Melco Crown, but any interest in Crown, but, in any event, if the breach is there, it's spent.

MR HUTLEY: Quite. But – anyway, I would just be – I take – it's all passed now. It's gone, even if – they're not there. Now – and Mr Jalland explained why he thought Dr Ho had been excluded at transcript 3243, 35 to 41, and he explained all the things about Nevada and Pennsylvania, Victoria, and I won't go to the evidence.

COMMISSIONER: Yes.

MR HUTLEY: Now, as to the alleged failure to check the corporate read-over, I've observed – we've observed that we're talking about a small note on page 122 of a very large series of accounts. And whilst counsel assisting is an avid reader of such matters with a precision which one can only imagine, I mean, it might be considered that it's a counsel of perfection to which only he could possibly – and of course you, Commissioner – could possibly live up to. And we say that these things are, with respect, strained and not a basis for any criticism. And, in any event, none of this could affect the honesty, integrity or character of any of these individuals. Now, I think – some criticism is also made of Mr Johnston and Mr Packer that – and I see the time. I have a few minutes – I just have to deal with the financial plan and the alleged conflict.

COMMISSIONER: Yes, you proceed, Mr Hutley - - -

MR HUTLEY: Thank you. Now - - -

COMMISSIONER: - - - if you're comfortable to do so.

MR HUTLEY: Thank you, Madam Commissioner. Now, some criticism has been made of Mr Johnston and Mr Packer concerning a draft financial plan for Crown Resorts that was provided to them by Mr Barton. It's a little important to go through the facts with a little precision. On the 12th of February 2019, Mr Packer requested that Mr Barton prepare the latest financial plan which would go out to financial year 2022. That's at exhibit AA93, CRL.501.059.7562 – it's not necessary to bring it up. And he asked to make it conservative as he was getting – and I've taken you through this, Madam Commissioner – he was upset with always missing the plans, and three points should be noticed with the request.

Firstly, it was made before the Melco transaction was even contemplated. Secondly, it was a request to make budgets conservative, not to inflate it. Thirdly, as Mr Packer explained, it was part of the ordinary financial planning process for him to see budgets. On the 28th of February Mr Barton emailed Mr Packer attaching a financial year '19 re forecast as at that date, the 28th of February, and said they were in the process of preparing a forecast out to financial year '22 on the basis of that financial year '19 forecast; and that's exhibit AB32. He indicated he would be sending it by the end of the next week, unnecessary to bring it up.

That email was copied to Mr Johnston, Mr Alexander and Mr Felstead. Mr Packer responded to Mr Barton on the 1st of May, again reiterating that financial plans needed to be accurate. That's exhibit AB32; it's not necessary to bring it up. On the

3rd of May, Mr Packer sent an email to Mr Barton as follows, exhibit AA109, CRL.501.008.6079:

> *Have you got a forward financial forecast that you believe in yet? I'm only interested till the end of '22. Is the online business - - -*

COMMISSIONER: That should be "if the online business".

MR HUTLEY: Yes. Quite:

> *If the online business JA and you told me was so good goes broke, do we still have to pay the last payable and for how much? Let's assume no more buybacks. I want to see what peak debt is after we have paid for Crown Sydney 100 per cent.*

That email was copied to Mr Alexander and Mr Johnston. Counsel assisting suggested – and this is at transcript 3661, lines 14 to 3662, line 22, that this email was sent after he instructed Mr Jalland to speak to Mr Winkler because Mr Packer had in mind the possible sale of Crown Resorts shares and he wanted to see what the financial forecast looked at. Mr Packer responded that he thought it was a continuation of the budget process that Crown went through every year. He said:

> *I wasn't relying on Mr Barton's figure to determine a price in my mind for Crown shares with Mr Ho.*

Mr Packer said these figures would not have been of interest to him in assessing that price because he was over the numbers better than Mr Barton was. So in other words, he wasn't looking at this material; he was looking at this in performing such role as he had under – as we've discussed, as I've submitted, and it had no impact upon the pricing. Later on the 3rd of May – this is exhibit AA109, CRL.501.008.6079 – Mr Barton responded to Mr Packer stating that the current timing was to have detailed plans to him in the week of May 13th, and that an agreed plan should be with Mr Packer during that week. He noted that with the new plan numbers they should be able to highlight net debt, etcetera. This email again was copied to Mr Alexander and Mr Johnston.

On the 17th of May – exhibit AA116, CRL.501.006.4192 – Mr Barton emailed Mr Packer, informing him that there was a first cut of the financial plan and it had been shared with Mr Alexander, Mr Johnston and Mr Kady, and they needed a few days to review and give comments. That email was copied to Mr Alexander, Johnston and Felstead. On the 21st of May, Mr Johnston emailed Mr Barton, Mr Felstead, Mr Alexander and Mr Packer setting out some discussion points in relation to the financial year business plan "for our call this evening". Importantly, the only suggested change made by Mr Johnston which was accepted was the following, and you will see that at point 3.

As you will also see, the disclosure which was made to Melco Resorts only covered financial year '20 and did not cover financial years '21 and '22 to which Mr Johnston's comment related. Indeed, none of Mr Johnston's suggested changes concerned financial year '20. Mr Johnston in his transcript at 3010, line 30 said, "This was part of our normal budget process" and he was providing that assistance under the services agreement. He said that:

> *Following the discussions of the points raised in the email to Mr Barton there was a modification of the financial plans that related to the third point.*

That's at transcript 3020, 18 to 45 and it related to table games in Melbourne. Mr Barton described these at transcript 2887, lines 37 to 48, as:

> *...interim financial plans until they were presented to the Crown Resorts board which normally happened at a board meeting around June.*

Between 18 and 23 May, Mr Jalland and Mr Winkler agreed to a sale of 19.99 per cent for $13 in two tranches subject to Mr Packer and Mr Lawrence Ho's approval. That's transcript 3253, lines 12 to 18 and Mr Johnston's statement at paragraph 50, that's WIT.CPH.001.0001. On the 23rd of May, Mr Packer told Mr Jalland and Mr Ho that he was supportive of proceeding for the sale of that tranche of shares for a price of $13. Now, that's in Mr Johnston's statement of the 23rd of December which is WIT.CPH.001.0001 at 010, and arrangements were made to document the agreement. On the 29th of May, Mr Johnston and Mr Jalland signed a letter on behalf of CPH to Melco Resorts requiring confidentiality undertakings so CPH could provide confidential information to Melco. That's – can I go to exhibit AB41, CPH.001.021.0006. And you see ..... start:

> *Accept that you acknowledge and agree in accordance –*

etcetera, and then there's an annexure, confidential information.

COMMISSIONER: Yes.

MR HUTLEY: Hang on. I'm sorry. I'm sorry, you have to go to the 29th, the second document which is exhibit A41, thank you. The proposal. You will see the confidential information. Thank you.

COMMISSIONER: Yes.

MR HUTLEY: And you see the agreement with respect to the confidential information.

COMMISSIONER: Yes.

MR HUTLEY: Etcetera. "The above will apply until". And then there's the benefit of the document, you acknowledge holds the benefit of this on its own behalf and on

trust for Crown. Crown in each, etcetera, and (c) "any breach or threatened breach outlined ..... may cause ....." this is on pinpoint 0007. Now, on 29 May, following the receipt, if you go – there's exhibit AB40 which is CPH.001.021.0051 at – relevantly at 052 is the confidential information, and there's a reference to the 2020 performance which is – in effect refers to a range in relation to announced – published. It's significant to note the information is negative although – albeit that it was not material. Now, the alleged conflict that's put, it's alleged that Mr Johnston had a conflict of interest which he failed to declare in providing comments in respect of the draft financial plan in circumstances where CPH was contemplating selling some of Crown Resorts shares.

To deal with that allegation it's necessary to consider the services agreement. That's exhibit Y13, CRL.525.001.0001, and at 0015 there's clause 11.1, you would note, and at – just go to that – etcetera, that's the perception, and then 14.4 it goes to – at 0017 over to 0018, and if you note particularly B and C, and it acknowledges that CPH is a major shareholder and may use the information for its own benefit.

COMMISSIONER: That's clause 14. - - -

MR HUTLEY: 14.4(c).

COMMISSIONER: Yes.

MR HUTLEY: And you see (i).

COMMISSIONER: Yes.

MR HUTLEY: Now - - -

COMMISSIONER: So where you're looking at leads on from 14.4(a)(ii), I think, Mr Hutley.

MR HUTLEY: For the purpose of – for the purpose of – to provide services or while CPH is a director – executive director, is a director the Crown or a committee member, you see. Or there's a disjunct.

COMMISSIONER: I'm just wanting to nail this point down, if I may. You're putting to me that this services agreement allowed CPH to use the information for its own purposes?

MR HUTLEY: Yes.

COMMISSIONER: Where do I see that one again? It's - - -

MR HUTLEY: (c).

COMMISSIONER: (b), isn't it?

MR HUTLEY: Sorry, (b). Yes, quite.

COMMISSIONER: It's (b). Yes, yes.

MR HUTLEY: And then that's allowed subject to (c).

COMMISSIONER: Yes. Now, can I just ask you to address me on this because I will have to construe it, I believe. But when this services agreement says you can use it for your own purposes, there's one view you would take in looking at the whole of the agreement that the "own purposes" are for the purposes of putting the directors or the executives in a position to be able to provide the services to Crown. So a construction which may present as reasonable is that "own purposes" is look, we need to get some information so that we can provide our services to Crown in a particular way as opposed to wow, we've got the information, we can use it for whatever we like.

MR HUTLEY: The difficulty with that is (a)(ii), with respect, Commissioner.

COMMISSIONER: Yes.

MR HUTLEY: (a)(ii) deals with exactly that.

COMMISSIONER: Yes, but that's for allowing them to provide, you see. That's - - -

MR HUTLEY: For the purpose of – that will continue to – no, if the parties agree that - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - CPH have been provided and will continue to receive information of for the purposes of CH – or for the purpose of allowing CPH to provide the services to Crown.

COMMISSIONER: Yes.

MR HUTLEY: It's a disjunct.

COMMISSIONER: Yes, and so for their own purposes – to find "your own purposes" in a contract such as this when you read the whole of it is something with which I would need some assistance because it does look to me that "for your own purposes" would be to ensure that you are able to provide me, the other party to the contract, with the services that you promise to provide as opposed to you going off and using it for any purpose you like at any stage at any time in your life, and I have some difficulty with that proposition.

MR HUTLEY: The difficulty one runs into is all that would be done by the second clause of 14.4(a)(ii).

COMMISSIONER: Yes, I heard you make that submission. Thank you.

MR HUTLEY: And also I will just give it – there's a provision preventing using insider trading, or insider trading.

COMMISSIONER: Yes, there's also that.

MR HUTLEY: I will just get that clause. Which must mean – see, one of the difficulties – and there's nothing untoward about this, if one thinks about it – if one supplies material to us of a confidential – CPH, of a confidential nature, in certain circumstances that will arm CPH with material which, to comply with its obligations quoad third persons in which it's dealing for its own purposes, it might have to disclose that information, otherwise, it would be engaging in perhaps illegal conduct. Thus, for example - - -

COMMISSIONER: But it's – sorry. You go ahead.

MR HUTLEY: Thus, for example – and it's quite clear that the whole purpose of disclosing the information to Melco was to avoid any position whereby Melco would be able to be able to say you were seized of information which we consider material and you withheld it from us and, therefore, the transaction is impugnable.

COMMISSIONER: Yes. No, Mr Bell's made that very clear, but coming back to your point of construction – coming back to your point of construction, that insider trading prohibition – we will call it that generally – is not inconsistent with the construction that I've suggested to you, because you can receive information for the purposes of providing your services, you can use it for your own purpose to get you into the position to provide me with the services, but it's not at large: you can use it for any purpose you like in history or in the environment. So I'm troubled by that latter construction because - - -

MR HUTLEY: But if it was only to put yourself in the position of CPH to provide its services, the – you're allowed to pass it on to third parties as long as they provided an undertaking not to disclose it to anyone else.

COMMISSIONER: That's right. So in getting yourself ready to help me and getting yourself ready to serve me, you may need to disclose this information, say, to Mr Packer, because he wasn't covered by this. So you may need to disclose it to someone else, but if you have to do so to get your position in a position to serve me, you've got to get from them an undertaking that they won't misbehave. So that's the more commercial construction on which I would possibly be assisted.

MR HUTLEY: But that's not for the purposes – its own purposes, it's for the purposes of providing – that allow the CPH executives to provide the services. The

example that you give me would be necessarily for the purposes of allowing CPH executives to provide the services.

COMMISSIONER: It would be for the purposes of putting it into a position rather than simply allowing; it would be enabling it. I'm sorry to use that word.

MR HUTLEY: Well, for the purposes of allowing, "allowing" means to enable.

COMMISSIONER: On one view of it, but to have a - - -

MR HUTLEY: But there's no other meaning - - -

COMMISSIONER: To have a - - -

MR HUTLEY: It doesn't – it can't be for the purpose of allowing, then, it must be permitting because - - -

COMMISSIONER: Well - - -

MR HUTLEY: - - - it's not for the purpose of allowing them, because allowing would be to authorise, and the agreement authorises.

COMMISSIONER: But the agreement is - - -

MR HUTLEY: It must be allowing – I'm sorry.

COMMISSIONER: But the agreement is to provide services to Crown.

MR HUTLEY: Quite.

COMMISSIONER: And to find a subparagraph like this to give carte blanche to use all the confidential information that's provided, not for the purpose of servicing Crown, but to do anything you like, is a difficult construction. I'm having difficulty with that.

MR HUTLEY: Well, in our respectful submission, "for its own purposes" means its own purposes and, I mean - - -

COMMISSIONER: In the context of this agreement?

MR HUTLEY: Well, the difficulty is that it's an utterly unnecessary clause. It has no added meaning to (a)(i) and (ii).

COMMISSIONER: I understand that submission.

MR HUTLEY: (b) becomes totally otiose.

COMMISSIONER: Yes. I understand that submission.

MR HUTLEY: Totally otiose. And no submission has been made as to why that would not follow. And the obligation is – and, in any event, let it be assumed that there is a fine question of construction there, and it's certainly an available construction and a construction which Crown – CPH operated on, which it obviously operated on with legal advice.

COMMISSIONER: Correct.

MR HUTLEY: And with that legal advice, it also obtained the undertaking from Melco. And I should say in this regard, some – something was said in relation to the undertaking with respect to irreparable harm. Now, that's a classic lawyer's device which, Madam Commissioner, you would have seen a thousand times in contracts which are put in by lawyers to ensure that, against the possibility of a threatened breach, you can get an injunction. I mean, that is classic boilerplate of a lawyer to put in a contract dealing with confidential information. It's in every contract which is drafted for the last 50 years, and you must have seen hundreds of them. So what we say is lawyers, quite properly, took a view of this agreement, which we say is the correct view, but we understand the contrary view, or the concern you, Madam Commissioner, expressing. But if one's talking here about suitability - - -

COMMISSIONER: Correct.

MR HUTLEY: - - - this is suitability about acting properly.

COMMISSIONER: Yes.

MR HUTLEY: And acting properly here was taking an approach to an agreement, taking appropriate advice from experienced lawyers, expecting – and legitimately expecting – in respect of these questions should there be an issue to arise, they followed it on the construction which we advanced punctiliously. In fact, the lawyers were so punctilious as to seek an extra benefit or protection quoad Crown Resorts. They sought a declaration. They acknowledged that they was holding the promise on trust, something which was not required under C.

COMMISSIONER: Quite.

MR HUTLEY: And hardly a disadvantage to Crown Resorts, and hardly something which need to be informed to Crown Resorts before it was obtained. It could not but be a benefit for them to be – they didn't have to give it. It could not but be a benefit to them and, therefore, it is, in our respectful submission, curious that that, as it were, extra benefit going beyond that which is demanded, is itself the subject of criticism.

COMMISSIONER: Well, it's criticism on the basis that they purported to exercise their position as directors of CPH on behalf of Crown without telling Crown, and that's irrespective of whether there's a benefit or a detriment - - -

MR HUTLEY: With respect, no.

COMMISSIONER: - - - the question was raised as to - - -

MR HUTLEY: The declaration - - -

COMMISSIONER: The question was raised as to whether they should have told Crown.

MR HUTLEY: Quite. But whether they told Crown – the question is when. They did – Crown became aware of this agreement shortly after it was entered into. They didn't exercise a power to make a declaration in trust in favour of Crown qua Crown, they may it qua CPH. They were the legal – they were the beneficiary of the promise and Crown – CPH created the trust - - -

COMMISSIONER: Yes.

MR HUTLEY: - - - obviously, not Crown. So the directors, to the extent that they approved of this agreement – and they obviously did – were acting solely in their capacity as director or officers of CPH.

COMMISSIONER: Holding, purportedly, a benefit to Crown.

MR HUTLEY: Quite. But if I declare a trust in favour of your Honour – I'm sorry, Madam Commissioner, I'm able to do that if that's my property. It is solely beneficial to you. I don't require your consent to make the declaration. When you become aware of it, you may decline it and renounce it, and then the trust will not be perfected, of course. So the – but the declaration is a matter solely for the property owner, which is relevantly CPH. If, for example, on notice of it, Crown Resorts did not want the benefit of the trust, of the chose in action, of course, they could decline it and the trust would fail.

COMMISSIONER: These are fascinating arguments and fascinating submissions, but you're so right; this is about suitability and the fact that the directors who were both directors of CPH Crown holdings, CPH and of Crown, then created this trust or declared this trust or recorded that there was a trust, was criticised on the basis of their failure to tell Crown about it in circumstances where they were directors of Crown at the same time, and that is the extent of that criticism as I understand it.

MR HUTLEY: Well, if the criticism, and it's important, of failing to tell them before it was created or after it was created, they became aware of it after it was created.

COMMISSIONER: Correct.

MR HUTLEY: And there is, in my respectful submission, no need to tell about – tell them of it before it's created, because it was solely a benefit that CPH chose to

confer. If they had done nothing they would have acted, as they did in compliance with the agreement, and there would be nothing in it. Anyway, you understand our submission. We say that is a point which goes nowhere. Now, we say that the financial plan was completely separate from the negotiations. The evidence is – I've taken you through them, that the choosing of the amount and the negotiation of the amount was in Mr Jalland's hand.

It was completely separate from the financial plan, save and to the extent that there was reference in the ultimate letter of confidential information to an apparent margin of difference between announced market and – market announced plans for the year 2020 and internal reporting. That's it. And we say that that is – involves no real or apparent conflict. Now – and it's not sufficient to speak in terms of a potential conflict here, and we will give you a reference. We've given you a reference to what Lord Justice Millet, as his lordship was, in Bristol and West Building Society v Mothew [1998] Ch 1 at pages 18 to 19, and therefore those paragraphs – the relevant passages have been referred to with approval in the New South Wales Court of Appeal in Rigg v Sheridan.

Clause 14 of the service agreement knowledges that CPH is a major shareholder that may use information for its own benefit, and I won't make any further submission in relation to that. In those circumstances mere potential for conflict is simply not enough. There has to be an actual conflict in accordance with the law, and there is absolutely no conflict and no conflict has been identified. Now, the final matter is that Mr Johnston and Mr Jalland were criticised for the terms upon which they provided confidential information. That's in the submissions at paragraph 96 and it "exposed Crown Resorts to the risk of harm". And the harm is said to be by reference of a trust in its favour. That's paragraph 97. In our respectful submission, there can be no harm by reason of the creation of a trust. By definition - - -

COMMISSIONER: I don't think it's by reason of the creation of the trust. It was by a recognition that there was exposure to the risk of harm within the wording of the document to which you're referring.

MR HUTLEY: Quite. And if that is the reference to irreparable harm, that is, in my respectful submission, no risk of harm has been proved in fact and those clauses are what in our respectful – my respectful submission is boilerplate. It's there - - -

COMMISSIONER: They may be boilerplate, Mr Hutley, but if there is a serious documentation between the parties where there is reference to irreparable harm and they're wanting to protect it from irreparable harm, even though you say what you've said about lawyers and boilerplates, it is relied upon as a prospect and that's how it was put, I think.

MR HUTLEY: Well, I can't say anything more than we've submitted.

COMMISSIONER: Yes, I understand.

MR HUTLEY: There's really been no identification of what harm could be suffered by the company should Melco take the extraordinary step of disclosing the matters, and you've seen the number of matters. It is, in our respectful submission, a legal agreement which in reality does not reflect in any way upon the suitability of either Mr Johnston or Mr Jalland. They were doing all that they need and there's simply no evidence of any irreparable harm which may be suffered in relation to that information, and I think that deals with that issue.

COMMISSIONER: The financial plan. Thank you.

MR HUTLEY: Yes.

COMMISSIONER: All right.

MR HUTLEY: Thank you for sitting on, Madam Commissioner.

COMMISSIONER: Yes, yes.

MR HUTLEY: Tomorrow we will turn to the China arrests.

COMMISSIONER: Yes. I will resume then at 10 o'clock tomorrow morning in public hearings. Thank you, Mr Hutley, and thank you, counsel assisting. I will adjourn until then.

MATTER ADJOURNED at 4.32 pm UNTIL
THURSDAY, 12 NOVEMBER 2020