INDEPENDENT LIQUOR AND GAMING AUTHORITY OF NSW

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

THE HONOURABLE P A BERGIN SC
COMMISSIONER

REASONS IN RESPECT OF APPLICATION MADE BY CROWN RESORTS LIMITED

DATE OF REASONS: 6 AUGUST 2020

DATE OF HEARING: 3 AUGUST 2020

REASONS

1 These reasons relate to the application made by Crown Resorts Limited (Crown) by written submission dated 29 July 2020 augmented by oral submissions made on its behalf by Mr N Young QC in a private hearing held on 3 August 2020. Mr A Bell SC leading Mr S Aspinall appeared as Counsel Assisting in the Inquiry.

Background

2 On 30 May 2019 a sale of Crown shares (the Share Sale Agreement) triggered a series of events that, combined with publication in the media during July and August 2019 of allegations of illegal and/or improper conduct by Crown (the Media allegations), caused the Authority to establish an Inquiry under section 143 of the *Casino Control Act* 1992 (NSW) (the *Casino Control Act*).

3 This Inquiry was established by the Instrument of Appointment dated 14 August 2019. That Instrument of Appointment contained the Terms of Reference of the Inquiry.

4 The Public Hearings of the Inquiry commenced on 21 January 2020 when Counsel Assisting outlined matters to be the subject of investigation and hearings of the Inquiry. Public Hearings continued in the week of 24 February 2020. After the COVID-19 Pandemic Health Orders were issued by both the NSW Government and Commonwealth Government, the Independent Liquor and Gaming Authority (the Authority) deferred the work of the Inquiry until further notice on 3 April 2020.

5 On 23 June 2020 the work of the Inquiry resumed and Public Hearings re-commenced on 27 July 2020.

6 One matter that was the subject of investigation for the Inquiry was the question of the suitability of Melco Resorts and Entertainment Limited (Melco) to be a close associate of the Licensee of the Restricted Gaming Facility (the Barangaroo Casino), Crown Sydney Gaming Pty Ltd. That aspect of the Inquiry's investigations arose by reason of the abovementioned share sale transaction between CPH Crown Holdings Pty Limited (CPH Crown Holdings) and Melco on 30 May 2019 pursuant to which Melco agreed to purchase 19.99% of CPH Crown Holdings' shares in Crown. It is for these purposes unnecessary to descend into the detail of the transaction other than to note that ultimately Melco abandoned its pursuit of the shareholding in Crown and on 29 April 2020 sold all of its shares in Crown that had been transferred to it pursuant to the share sale agreement.

7 Although the question of the suitability of Melco as a "close associate"[1] of the Licensee is now no longer part of the Terms of Reference, the circumstances surrounding the share sale transaction and subsequent events remain relevant to the work of the Inquiry in respect of the questions of suitability of the Licensee, Crown and its business associates.

8 In recognition of these changes, the Authority issued an amended Instrument of Appointment dated 23 June 2020 (Amended Terms of Reference).

9 Aspects of the Amended Terms of Reference relevant to this application include the following:

> **Part A Suitability Review**
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> 14. On and from 27 July 2019, the Nine Network, the Sydney Morning Herald, The Age and other media outlets have broadcast or published material which raised various allegations into the conduct of Crown Resorts and its alleged associates and business partners and raised questions as to whether the Licensee remains a suitable person to hold a restricted gaming license for the purposes of the *Casino Control Act* (**Allegations**).

[1] As defined in section 5 of the *Gaming and Liquor Administration Act* 2007 (NSW).

15. The Allegations include, but are not limited to, allegations that Crown Resorts or its agents, affiliates or subsidiaries:
    (a) engaged in money-laundering;
    (b) breached gambling laws; and
    (c) partnered with junket operators with links to drug traffickers, money launderers, human traffickers, and organised crime groups.

16. In response to the Allegations, the Commissioner is to inquire into and report upon (**Suitability Review**):
    (a) whether the Licensee is a suitable person to continue to give effect to the Barangaroo restricted gaming licence;
    (b) whether Crown Resorts is a suitable person to be a close associate of the Licensee;
    (c) in the event that the answer to either (a) or (b) above is no, what, if any, changes would be required to render those persons suitable; …

10 Part B of the Amended Terms of Reference – *Regulatory Framework and Settings* is also of relevance as it requires the investigation into aspects of the operation of casinos "in an environment of growing complexity of both extant and emerging risks for gaming and casinos" and to report to the Authority with recommendations to enhance the Authority's future capability for the regulation of casinos.[2]

China Arrests

11 The Media Allegations were published in the print media and in a Channel 9 *60 Minutes* program entitled *Crown Unmasked.* They included very serious allegations in respect of Crown's operations in mainland China between 2011 and October 2016 when 19 of the employees of its subsidiary were arrested and detained for allegedly breaching gambling laws in China (the China Arrests). The program included an interview with one of the former employees who had worked in the administration section of the business in China and, although arrested and detained for a short period, was exempted from criminal sanction at the time of sentencing.

[2] Paragraph 10 of the Amended Terms of Reference.

12 It appears that it is not in issue that 19 of the Crown employees pleaded guilty to a charge of assembling a crowd to engage in gambling in breach of Article 303 of the *Criminal Law of the Peoples Republic of China*.

13 On 27 June 2017, 16 of the 19 employees were sentenced to fixed terms of imprisonment and fined; 5 of whom were sentenced to 10 months; 11 of whom were sentenced to 9 months. The other 3 (administrative staff), including the interviewee on the *60 Minutes* program were exempted from criminal penalty. The employees who were sentenced to imprisonment were senior management staff and members of the sales team.

The Class Action

14 On 4 December 2017, representative proceedings were commenced against Crown in the Victorian Registry of the Federal Court of Australia by Zantran Pty Limited on its own behalf and on behalf of all persons who had acquired an interest in fully paid ordinary shares in Crown between 6 February 2015 and 16 October 2016 and had allegedly suffered loss or damage by reason of Crown's conduct (the Class Action).[3]

15 It is not in issue in the Class Action that Crown derived a substantial portion of its revenue from VIP gambling by high rollers from mainland China visiting its Australian casinos. Much of the background information to the China Arrests is also not in issue in the Class Action. That includes the fact that on 6 February 2015 the Chinese Government announced a major crackdown on casinos from overseas countries setting up representative offices in China to attract and recruit Chinese citizens. It is also not in issue that in June 2015 some employees of the South Korean casino operators Paradise and Grand Korea Leisure were arrested in China, and that Crown was aware of those arrests.

[3] Statement of Claim in proceedings VID1317/2017.

16 Notwithstanding the admissions of guilt by the employees and their consequent imprisonment, there is a serious issue to be tried in the Class Action as to whether "Crown's China operations" were in breach of Chinese law or which possessed characteristics which were a target of the Chinese gambling crackdown. There are also serious issues to be tried as to whether there existed a "risk" (and if so the extent of Crown's knowledge of the risk) that: (a) the employees would be detained; (b) Crown would be forced to terminate its China operations; and (c) if so terminated Crown would suffer a significant reduction in its Chinese VIP revenue and/or its total revenue. [4]

17 It is alleged in the Class Action that Crown failed to make disclosures to the Australian Stock Exchange (ASX) in accordance with its Continuous Disclosure Obligations in respect of these risks.

18 The Applicant in the Class Action relies upon various public statements made by Crown in its 2014, 2015 and 2016 Annual Reports, including in respect of the risk management governance structures within its operations and the nature of the Chinese Market. .[5] The Applicant relies upon these statements, referred to as the Risk Management Representation and the Chinese Market Growth Representation (the Representations) to make claims of misleading or deceptive conduct and claims of contravention of s 1041H of the *Corporations Act* 2001 (Cth); section 12DA(1) of the *Australian Securities and Investments Commission Act* 2001 (Cth); and section 18 of the *Australian Consumer Law* (ACL).[6]

19 The Applicant also claims that Crown did not have in place effective policy, systems and structures to properly monitor and manage the alleged risks and

[4] Statement of Claim and Amended Statement of Claim, par 30 to 36.
[5] Statement of Claim, par 62 to 70.
[6] Set out in Schedule 2 of the *Competition and Consumer Act* 2010 (previously known as the *Trade Practices Act* (1974).

claims that Crown's knowledge of the risks meant that it did not have reasonable grounds for making the Representations.

20 The Applicant alleges that the risks and the surrounding information constituted material information which a reasonable person would expect, had they been disclosed, would have had a material adverse effect on the price or value of Crown shares.[7] It claims that Crown's failure to disclose these risks and the surrounding information, caused or contributed to the traded price for the Crown shares being materially higher than their true value or the traded price that would have existed had there been such disclosures.

21 It is alleged that following the Crown announcement on 17 October 2016 that 18 of its staff had been detained by Chinese authorities, Crown's share price declined by approximately 13.9% from $12.95 to $11.15.[8]

22 The Applicant alleges that the decline in the share price was caused by the market's reaction to the information communicated to the market after the arrests in October 2016.[9]

Media Exposure

23 The print media and the *60 Minutes* program *Crown Unmasked* dealt with numerous allegations including aspects of the China Arrests.

24 The print media referred to Crown's response to some of the allegations that had been put to it prior to the broadcast of the *60 Minutes* program. That included Crown's claim that it could not comment on "specific allegations", although it denied any breach of Chinese law and made the point that it "had

[7] Statement of Claim, par 86.
[8] Statement of Claim, par 28-29.
[9] Statement of Claim, par 88-89.

not been charged with an offence in China" and refuted any suggestion "that it knowingly exposed its staff to the risk of detention in China".[10]

25 The allegations in the print media included that Crown disregarded Chinese law and the welfare of its employees as they were offered "huge bonuses to lure Chinese high-rollers to gamble at Crown's Australian casinos". It also included the claim that "even as it became likely Chinese police were closing in, Crown directed its Chinese sales staff to keep promoting gambling, but to do so 'under the radar' and to refuse to assist police in the event they were raided". It also included a claim that Crown instructed its staff to "falsely claim to Chinese authorities they were not working for Crown in China but were working in other locations".[11]

26 The print media also referred to a statement obtained from a lawyer for Mr James Packer who had been the Chairman of Crown up to August 2015 and a director of Crown until 21 December 2015. Mr Packer was not a director of Crown at the time of the China Arrests. The print media published a statement from the lawyer that Mr Packer "adamantly" insisted that he had no knowledge of Crown's conduct in China that led to the prosecution of its employees; that he had not been an executive of Crown since 2012; and that he had resigned as Chairman of Crown Resorts in August 2015 and as a board member in December 2015. That statement included a claim that Mr Packer had a "passive role" at Crown.[12]

27 The *60 Minutes* program, "*Crown unmasked*", dealt with numerous allegations, but touched upon the China Arrests in part through interviews with one of Crown's former employees. The program included claims that Crown advised

[10] *Woman jailed was doing her job*, The Age, July 27, 2019, Nick McKenzie, Grace Tobin and Nick Toscano.
[11] *Woman jailed was doing her job*, The Age, July 27, 2019, Nick McKenzie, Grace Tobin and Nick Toscano.
[12] *Woman jailed was doing her job*, The Age, July 27, 2019, Nick McKenzie, Grace Tobin and Nick Toscano; *Casinos extensive connections to Asian organised crime gang known as "the Company",* July 27, 2019, The Sydney Morning Herald, Nick McKenzie, Nick Toscano and Grace Tobin; *Gangsters, gamblers and Crown casino: How it all went wrong*, July 27, 2019, Nick McKenzie, Nick Toscano and Grace Tobin.

its Chinese staff to obtain foreign work visas to make it appear as it they were not working in China and to "meet gamblers in smaller groups so as to fly under the radar". It also included the statement made by the then Crown Chairman, Mr Robert Rankin, to Crown's shareholders in Perth in late 2016 that "we are proud over many years of this company's compliance track record" and that in respect of the China Arrests, it was "not the time and the place to comment on the specifics of this particular incident" but that there "will be a day when we should and will".

28 On 31 July 2019 the print media reported a statement by "a Crown spokeswoman" that the company would assist with any investigation into the allegations, but "absolutely rejects allegations of illegality" describing them as an "attempt to smear the company".[13] It was also reported that since the China Arrests Crown had "overhauled its presence in Asia" and had adopted a more "conservative" approach winding back direct marketing efforts and more heavily relying on high rollers coming via third-party tour operators.[14]

29 On 3 August 2019 The Age published an article entitled "*Crown board's role in scandal questioned*[15] dealing with the question of whether the nature of Crown's corporate governance prevented it from properly managing its risks in China in respect of the China arrests. A Crown "spokeswoman" was recorded as having indicated that Crown would not respond to questions because of the "unbalanced and disgraceful reporting by Nine/Fairfax and the unjustified attack on the integrity of Crown and, by association, its directors, officers and staff".

[13] *China's alleged influence agent Huang Xiangmo was Crown high roller*, July 31, 2019, Nick McKenzie, Nick Toscano and Grace Tobin.
[14] *Gangsters, gamblers and Crown casino: How it all went wrong*, July 27, 2019, Nick McKenzie, Nick Toscano and Grace Tobin – *Crown unmasked.*
[15] *Crown Board's role in scandal questioned*, August 3, 2019, Patrick Hatch.

The Crown Board responds

30 On 31 July 2019 the Crown board issued an ASX/Media Release as "*A Message from the Crown Resorts Board of Directors*"[16]. That document lists each director as an author of the Message under the heading "*Setting the record straight in the face of a deceitful campaign against Crown*".

31 The directors made the claim that there was "unbalanced and sensationalised reporting" that was based on "unsubstantiated allegations, exaggerations, unsupported connections and outright falsehoods". It dealt with numerous matters and in respect of the China Arrests the following was recorded:

> **Detentions in China in 2016**
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> The programme also rehashed some of the content of an earlier 'Four Corners' programme in relation to the detention of Crown group staff in China in 2016.
>
> The foundation of the criticism of Crown in the programme is that Crown knew that the conduct of its staff constituted an offence in China and that it deliberately flouted the law.
>
> This is wrong. Crown was not charged with or convicted of any offence in China.
>
> The relevant prohibition under Chinese law is contained in Article 303 which concerns arranging 'gambling parties'. At all times Crown understood that its staff were operating in a manner which did not breach that provision.
>
> Also, at all relevant times, Crown obtained legal and government relations advice from reputable, independent specialists. The fact that staff were nevertheless detained and convicted is not an indication that the advice was wrong or disregarded, but an illustration of the challenges involved in anticipating how foreign laws can be interpreted and enforced.
>
> The '60 Minutes' programme featured a former junior employee and several purported experts. Whether they were paid for the '60 Minutes' appearance was not disclosed. Also, the objectivity of the former employee is open to question on the basis that she made an unsuccessful demand for compensation from Crown of over 50 times her final annual salary.

[16] INQ.100.010.0896.

32 However the Sydney Morning Herald refused to publish the "Advertisement" and instead published an article in which it responded to the directors' claims including in respect of the China Arrests as follows:[17]

> **Crown's claim**: Detentions in China in 2016: The foundation of the criticism of Crown in the program is that Crown knew that the conduct of its staff constituted an offence in China and that it deliberately flouted the law. This is wrong. Crown was not charged with or convicted of any offence in China.
>
> R**esponse**: 18 Crown staff were convicted of gambling offences in China.
>
> **Crown's claim**: The relevant prohibition under Chinese law is contained in Article 303 which concerns arranging "gambling parties". At all times Crown understood that its staff were operating in a manner which did not breach that provision. Also, at all relevant times, Crown obtained legal and government relations advice from reputable, independent specialists. The fact that staff were nevertheless detained and convicted is not an indication that the advice was wrong or disregarded, but an illustration of the challenges involved in anticipating how foreign laws can be interpreted and enforced.
>
> **Response**: 18 Crown staff were convicted of gambling offences in China and multiple experts, including the former chief of intelligence for the Royal Hong Kong Police, have said publicly that Crown's dealings in China were foolhardy, high-risk and in potential breach of the laws the Crown staff were ultimately found to have broken. Crown's own internal files reveal they suggested to Chinese staff they obtain foreign work permits so it would appear they were not working in China when, in fact, they were.
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> **Crown's claim:** The [reports] featured a former employee and her views of what occurred in China in 2016. It did not disclose her very junior position, or that she had unsuccessfully demanded that Crown pay her a sum exceeding 50 times her annual salary as compensation. Whether she was paid for the '60 Minutes' interview and Fairfax articles was also not disclosed.
>
> **Response:** Jenny Jiang was not paid for her interview. Nor did she seek payment. Her staff certificates and internal company appraisals describe her employment in glowing terms. Crown sought to pay her $60,000 after her arrest in return for Ms Jiang not criticising the company. She refused this offer. The program accurately reflected her position and job title.

33 On 1 August 2019 a further "Advertisement" was published in The Age and The Australian newspapers entitled "*Setting the record straight in the face of a deceitful campaign against Crown"* with a heading "Crown is a highly reputable Australian operator". The Advertisement referred to the 18,000 employees and the fact that Crown operated in one of the "most highly regulated industries in

[17] 31 July 2019, The Age, The Sydney Morning Herald and 60 Minutes all respond to Crown Resorts.

Australia" with the claim that it takes its responsibility of compliance very seriously. However, the advertisement, once again, focused on what it referred to as "deceitful reporting". There was no reference in this Advertisement to the China Arrests.

Public Hearings of the Inquiry

34 On 21 January 2020 in opening the Public Hearings of the Inquiry, Counsel Assisting referred to some of the key Media Allegations that would be the subject of investigation in hearings in the Inquiry. Counsel Assisting referred to the relevant parts of the Terms of Reference requiring consideration of the Media Allegations. Reference was made to the necessity for the Inquiry to "test the veracity of the Media allegations".[18]

35 Counsel Assisting also made reference to the Chinese Government crackdown, and indicated that, the "activities of the arrested employees and the directions they received from Crown Resorts will be a subject of this Inquiry ".[19] Counsel Assisting referred to the Media Allegations that Crown Resorts had: (a) offered large financial and other incentives to its China-based staff to recruit Chinese high roller gamblers to Crown Resorts casinos in Melbourne, Perth and Macau; and (b) instructed its staff to claim to Chinese authorities that they were not working in China, but were working in other locations; and (c) advised their staff to obtain foreign work visas to corroborate such claims. It was submitted that the investigations of the circumstances of the China Arrests have a clear bearing on the issues of whether: (i) the Licensee is a suitable person to hold or give effect to the Licence to operate the Barangaroo Casino; and (ii) Crown is a suitable person to be a close associate of the Licensee. [20]

[18] Tr 25.
[19] Tr 43.
[20] Tr 39.

36 Counsel Assisting then referred to the Chinese law relevant at the time of the China Arrests and to the orders that were made in respect of the imprisonment of and fines imposed on the Crown employees. There was also reference to the fact that Crown had withdrawn from and ceased all operations of its VIP international team on the ground in mainland China. Reference was then made to the Class Action and that it had been listed for final hearing in November 2020.[21]

37 Later in the Opening on 21 January 2020 Counsel Assisting gave a summary of the then anticipated sets of hearings which included the following:

> The third set of hearings will principally relate to the media allegations which were made concerning the conduct of Crown Resorts and the continuing suitability of the Licensee and Crown Resorts as a close associate of the Licensee having regard to those allegations.

38 The first round of hearings relating to the regulatory framework and compliance with anti-money laundering legislation commenced on 24 February 2020. International experts with relevant experience in casino regulation gave evidence during the period 24 to 27 February 2020.

39 The parties who have been granted leave to appear in the Inquiry (the interested parties) were subsequently advised that the work of the Inquiry had been deferred consequent upon the impact of the COVID-19 pandemic. Those interested parties were advised that one month's notice would be given of any resumption of the Inquiry.

40 On 24 June 2020 the interested parties were advised that the Authority had directed that the work of the Inquiry was to resume from 23 June 2020.

[21] Tr 41.

41 On 6 July 2020 the interested parties were advised that the adjourned first round of hearings that had commenced in February 2020 would resume and continue in the weeks commencing 27 July 2020 and 3 August 2020.

42 On 14 July 2020 the interested parties were advised that a further set of Public Hearings of the Inquiry focusing on various circumstances leading to the China Arrests were tentatively scheduled to occur between 17 and 26 August 2020.

43 Also on 14 July 2020 Crown's solicitors were asked whether there was consent to the Witness Statements that had been filed in the Class Action proceedings being deployed in the Inquiry. It was also indicated that certain individuals would be the subject of a Summons to appear in those hearings, including Mr Barry Felstead and Mr Rowen Craigie.

44 On 16 July 2020 Crown's solicitors were asked to indicate whether there was any issue with the English translation of the relevant Chinese law being Articles 303 and 25 of the *Criminal Law of the Peoples Republic of China*, and Article 1 of the *Interpretation of the Supreme People's Court and Supreme People's Procuratorate about some issues concerning the application of law in gambling criminal cases*.

45 On 20 July 2020 Summonses were issued to the subsidiary of Crown Resorts in respect of the documents relating to the operation of the business in China. A further Summons was served (although now no longer pressed) on Crown Resorts in respect of its discovery in the Class Action.

46 On 24 July 2020 Crown's lawyers requested "the opportunity to be heard in relation to procedural fairness considerations" in respect of the Inquiry's hearings regarding the China Arrests with a request that such opportunity be given prior to any public announcement being made regarding "the fact or timing" of those hearings.

47 On 27 July 2020 Crown's lawyers filed written submissions in relation to its applications regarding the hearings and, as indicated above, these submissions were augmented by oral submission in a private hearing on 3 August 2020.

Written submissions

48 There were three main points made in the written submissions in respect of the proposed China Arrests hearings. The first relates to the burden on witnesses. The second relates to a proposal that the China Arrests hearings be deferred and the third relates to the desirability of hearing the evidence in private rather than in public.

49 In respect of the first point, Crown submitted that there are substantial demands imposed on any witness called to give evidence before any court or commission of inquiry. It submitted that given that the Class Action is scheduled for hearing in November, after the anticipated hearings of this Inquiry, the preparation will "impose a significant personal burden on each of the witnesses" that "may be oppressive" on its former employees if called as witnesses in this Inquiry. [22]

50 In respect of the second point, Crown submitted that it would be "appropriate" to defer the Inquiry's hearings "until after the completion of the witnesses being examined" in the Class Action because there is an obvious risk that the present sequencing of the Inquiry's hearings and the Class Action hearings "could cause substantial prejudice to Crown and its shareholders" [23] It was submitted that Crown did not understand that there would be any prejudice to the Inquiry if its hearings on this topic were to be deferred "for a period of a few months" and that efficiencies would result from such deferral.

[22] Par 18 and 9.
[23] Par 21.

51 In respect of the third point, Crown contended that if the decision was made not to defer the hearings, then the proposed hearings should be conducted "in private sessions" to avoid causing "serious prejudice to Crown and the proposed witnesses".

Oral submissions

52 In oral submissions on 3 August 2020 Mr Young QC indicated that Crown abandoned the contention in its written submissions that the Inquiry hearings in respect of the China Arrests be deferred "for a period of a few months". This was clearly in recognition that the reporting date in the Amended Terms of Reference of 1 February 2021 would render such a proposal impractical and unacceptable.[24]

53 Mr Young QC expanded on the points raised in the written submissions in respect of: (i) the proposal that the evidence in respect of the China Arrests be given in private; and (ii) the burden on witnesses giving evidence twice in a short period in two separate proceedings. He also raised two points not covered in the written submissions. The first relates to legal professional privilege claims in the Class Action and the impact of the Inquiry processes on those claims; and (ii) a contention that the China Arrest hearings may interfere with the administration of justice.

Private hearings

54 In expanding on Crown's written submissions in relation to its application for the hearings in respect of the China Arrests to be held in private, it was submitted that the evidence taken privately should not be released or published: (a) ideally until after the trial judge has determined the Class Action proceedings, which would mean after delivery of judgment; or (b) at least until

[24] Tr 7, Private Hearing.

after "the hearing of the class action has concluded", presumably after completion of the hearing of the evidence and submissions.

55 As this submission continued, the point was developed into the contention that "nothing should be released before the handing in of the final report of the Commission" and that it "could be released then" with a "query" as to whether, "even then" a full transcript and video of the evidence would need to be released prior to the decision in the Class Action being handed down. It was suggested that this submission was made out of concern to avoid an application to re-open the evidence in the Class Action consequent upon such release.

Burden on witnesses

56 In expanding upon Crown's written submissions in respect of the burden on witnesses it was submitted that Crown's concern is to "avoid the prejudice that would flow" from what was described as the "dual cross-examination, the repeat cross-examination within a short period of time and what may flow out of it" in two separate proceedings with overlapping issues.[25]

57 It was submitted that the burden on witnesses who are required to give evidence twice in a short space of time, "may be quite dangerous for their wellbeing". In this regard, a reference was made to Mr O'Connor's written statement of evidence in the Class Action which, it was said, "the Inquiry now holds". This reference was in support of the submission that Mr O'Connor's experience whilst imprisoned was particularly harrowing. It was also submitted that one issue to be dealt with in the Class Action is what "credence can be given to Chinese legal processes", a matter that Crown submitted it would wish to agitate in the Inquiry.

[25] Tr 8, Private Hearing.

Legal professional privilege

58 A point raised for the first time that was not referred to in written submissions relates to Crown's claims in respect of legal professional privilege. In this regard, Crown relied upon the decision of O'Callaghan J in *Zantran Pty Ltd v Crown Resorts Limited (No 2)* [2020] FCA 1024 which sets out much of the background and the nature of the claims in the Class Action. It also includes extracts from statements of evidence of three witnesses Crown presently intends to call in the Class Action, Mr Jason O'Connor, Mr Michael Chen and Ms Jane Pan.[26] This background was relevant to the Court's determination of Crown's claims opposing access to some of its documents falling within the categories of discovered documents on the basis of legal professional privilege.

59 In recognition of the abrogation of privilege in s 17(1) of the *Royal Commissions Act* 1923 (NSW) it was submitted that if Crown or its witnesses are compelled to answer questions or provide documents, the contents of which are the subject of privilege claims in the Class Action, then those claims would be compromised and/or rendered nugatory.

Interference with the administration of justice

60 A further new point raised only in oral submissions was that it is also "quite possible that the public conduct of the Inquiry into these matters [China Arrests] would amount to an interference with the administration of justice in the Federal Court."[27]

61 Although not expanding upon this submission in detail, Mr Young QC added, "I'm not saying it will. It all depends on what course is taken in those hearings, but there's a risk running in the other direction as well, and of the two, the

[26] Par 12 to 24.
[27] Tr 10.

predominant public interest is the administration of justice in the civil proceedings."[28]

62 In reply to Crown's submissions Senior Counsel Assisting, Mr Bell SC emphasised the public function of the Inquiry in assessing the suitability of the Licensee and Crown and the public interest in the hearings in respect of the China Arrests being open to the public.[29]

63 Reference was made to the opening submissions in the public hearing of the Inquiry on 21 January 2020, referred to earlier in these Reasons, when the proposed public hearings regime was announced including in relation the Media Allegations in respect of the China Arrests.[30] Senior Counsel Assisting also referred to the capacity for the Inquiry to accommodate the protection of documents from publication and to receive evidence privately in appropriate circumstances. This was put in contradistinction to the "blanket" approach that Crown had adopted to all hearings in respect of the China Arrests.[31]

64 As a matter of courtesy Mr Bell SC also addressed Mr Young QC's submission in relation to the prospect of an interference with the administration of justice submitting that there was no likelihood of such a risk. [32]

65 In response, Mr Young QC submitted that there could be "untold damage" to Crown if the hearings of the Inquiry in respect of the China Arrests were held in public.[33]

[28] Tr 10.
[29] Tr 15.
[30] Tr 15.
[31] Tr 15.
[32] Tr 15.
[33] Tr 16.

Consideration

66 The nature of this Inquiry established under s 143 of the *Casino Control Act* 1992 (NSW) is relevant in the consideration of Crown's submissions.

67 The questions of the suitability of the Licensee to continue to hold or give effect to the Licence to operate the Barangaroo Casino and of Crown as a close associate of the Licensee are matters of very significant public interest. This significance is recognised in the Instrument of Appointment which refers to the requirement to have regard to the primary objects of the *Casino Control Act* to: (a) ensure that the management and operation of a casino remain free from criminal influence or exploitation; (b) ensure that gaming in a casino is conducted honestly; and (c) contain and control the potential of a casino to cause harm to the public interest and to individuals and families.[34]

68 The fact that the broadest powers under the *Royal Commissions Act 1923* (NSW) have been accorded to the Inquiry is also a recognition of the significant public interest in the work of the Inquiry and the determination of these questions by the Authority. This significance has been recognised recently by the New South Wales Court of Appeal in *Attorney General for New South Wales v Melco Resorts and Entertainment Limited* [2020] NSWCA 40 at [93].

69 The Commissioner has all the powers, rights and privileges that are vested in the Supreme Court or in any judge thereof in any action or trial in relation to compelling the attendance of witnesses, the answering of questions and the production of documents.[35]

[34] Section 4A(1).
[35] Section 18, *Royal Commissions Act* 1923 (NSW).

70 The questions of the suitability of the Licensee and Crown in this Inquiry are to be determined in the context of temporally pressing circumstances having regard not only to the reporting date to the Authority of 1 February 2021[36] but also to the reported public statements in respect of Crown's intention to "open" the Barangaroo Casino "ahead of schedule" and "before Christmas 2020".[37]

71 Notwithstanding the direction by the Authority that hearings of the Inquiry are to be held in public, the terms of the Instrument of Appointment and the applicable legislative provisions permit investigative steps to be taken, and hearings to occur in private. The legislative prerequisites to such private hearings to be read with the Instrument of Appointment are those contained in s 12B of the *Royal Commissions Act* 1923 (NSW) and s 143B of the *Casino Control Act* 1992 (NSW).

Private hearings - Burden on witnesses – Privilege claims

72 Crown's submission that the proximity of the two proceedings will impose a significant burden on the proposed witnesses is made separately but also in support of the application that the hearings in respect of the China Arrests should be held in private. The issue in respect of the claims of legal professional privilege are also relied upon in support of that application. It is therefore convenient to deal with these submissions together.

73 As indicated above, the submissions made by Crown included the claim that there could be "untold damage" to it if the hearings of the Inquiry in respect of the China Arrests were to be held in public. Mr Young QC was unable to particularise the nature of this suggested damage and candidly conceded that there may have been a touch of advocate's flourish within it.[38] However it is

[36] Terms of Reference, par 22.
[37] Webpage of Crown Sydney published at www.crownsydney.com.au "Opening December 2020"; Peter Amsel, *Crown Resorts says Sydney casino to open by Christmas 2020*, Calvin Ayre.com, 8 January 2020; Sydney Morning Herald *You're an Amazing friend* Andrew Hornery 15 May 2020.
[38] Tr 16.

clear that Crown is being pursued in the Class Action for very significant damages, said to be in the hundreds of millions, for alleged failures to disclose material information and for allegedly misleading or deceptive statements.

74 Although constituted for different purposes (one regulatory and one a civil claim for damages) there will be some crossover between the issues in the Inquiry and those in the Class Action.

75 In this regard, issues in the Inquiry include whether the Media Allegations in respect of Crown's employees having been convicted and imprisoned for breaches of the law and the alleged surrounding circumstances referred to earlier were accurate. The public debate in relation to the China Arrests in 2019 when the directors issued their Message/Advertisement, include Crown's claim that it was not found by any Court in China to have breached the laws of China. It is a fact that Crown was not separately pursued for any breaches of the law in China. It was only the employees of its subsidiary who were convicted on pleas of guilty and imprisoned.

76 Issues relevant to Crown's suitability as a close associate and that of the Licensee include whether the requirements imposed on Crown's employees in its business operations, through its subsidiaries, in international jurisdictions, in this instance China, did or did not expose its employees to the real risk of imprisonment in that jurisdiction. An important aspect of this issue is whether Crown's directors were advised of and/or appreciated the nature of the environment in which its employees were operating up to the time of the arrests in 2016. It is also important to review what changes were made consequent upon the convictions and imprisonment of its employees and in the light of the director's publicly expressed views in the Message/Advertisement, to explore the Board's identification and/or acceptance of the seriousness of any deficiencies that may be exposed in this regard.

77 It is not uncommon for Commissions of Inquiry and/or Royal Commissions and civil or criminal or regulatory proceedings to be heard concurrently or in close proximity and for witnesses in one to be called as witnesses in the other.

78 In *Victoria v Australian Building Construction Employees' & Builders' Labourers Federation* [1982] HCA 31; (1982) 152 CLR 25 (the Builders' Labourers case), the High Court considered such concurrency and questions relevant to the matters that have been raised by Crown in its submissions.

79 In the Builders' Labourers case an Inquiry had been commissioned by both the Federal and Victorian Governments into the conduct of officers of the Federation. After the commencement of the Inquiry, the Commonwealth applied to the Federal Court to deregister the Federation. After those proceedings were commenced, the Federation sought an injunction restraining the Inquiry from proceedings to hear evidence or make findings until after the finalisation of those deregistration proceedings.

80 The Federal Court dismissed the application for the injunction. That application was the subject of successful appeal to the Full Federal Court which held that the continuation of public proceedings of the Inquiry would prejudice the administration of justice in the Federal Court proceedings.[39] This was the subject of the appeal in the High Court.

81 Pertinent to the submission made by Crown regarding the burden on witnesses giving evidence twice, Mason J (in the majority) said:[40]

> In argument it was suggested that the Federation would be prejudiced by having witnesses which it might call in the deregistration proceedings initially examined and cross-examined in the inquiry. No doubt there is some disadvantage to the Federation in having its prospective witnesses first called to give evidence in the inquiry but that disadvantage does not amount to pressure or prejudice in the relevant sense. Although it is an inconvenience and it results in advance knowledge of what witnesses will say in court, this in itself does not amount to an interference with the administration of

[39] (1981) 53 FLR 396
[40] Page 103.

> justice. What is more, it is an inconvenience to the Federation whether proceedings before the Royal Commissioner are held in public or in camera.

82 In dealing with the topic of evidence being given in public or in private, Mason J said:[41]

> I have earlier mentioned in another connextion the importance to the executive government of the procedure by way of commission of inquiry. It is a valuable method of comprehensive and authoritative fact finding on which to base wide-ranging proposals for legislative and administrative reform. It is a means of ascertaining whether abuses exist and what steps might be taken to eliminate them. By virtue of the publicity which usually attends the proceedings and ultimately the report when it is made public, the commission of inquiry serves the beneficial purpose of enlightening the public, just as it enlightens government. To restrain the proceedings of a Royal Commission pending the final outcome of litigation, especially civil litigation concerning the deregistration of a trade union which is inevitably protracted, would be a very grave prejudice to the government and to the public interest. The restraint, if imposed, might need to endure for years.
>
> It was no doubt a recognition of this aspect of the public interest that persuaded the Federal Court to impose, not an absolute restraint on the proceedings, but a restraint on proceedings in public. However, this restraint, limited though it is, seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character to which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. Especially is this so when the inquiry has power to compel attendance and testimony.

83 The questions raised by Crown in respect of the burden on witnesses is really not in issue. The environment of a witness box is not a place of comfort. It is an environment in which the person giving evidence must be acutely aware of the need to be truthful in a pressurised forensic setting in public. On the assumption that there is "some disadvantage" in Crown's prospective witnesses being called to give evidence in the Inquiry before giving evidence in the Class Action, I am not satisfied that it amounts to pressure or prejudice in the relevant sense, such as to justify conducting all the China Arrests hearings in private.

84 The procedures and processes of the Inquiry can be adjusted to ensure that any witness who may have a particular vulnerability is accommodated, if such

[41] Page 97.

circumstances warrant it. Although it is clear from the statement of evidence to which Mr Young QC referred that the experience in the Chinese prison for at least one of the proposed witnesses was harrowing, there is no evidence of particular vulnerability of any witness at this stage. However if there is such evidence, the processes of the Inquiry will adjust to ensure such vulnerability is not exacerbated.

85 The point raised in respect of the extant claims of legal professional privilege in the Class Action is important. Those claims in the Federal Court should not be compromised or rendered nugatory by public exposure in this Inquiry. That does not mean that the totality of the hearings in respect of the China Arrests should be excluded from public gaze. However, it does mean that the Inquiry will adopt processes in respect of those claims to ensure that such claims are not compromised. Although Mr Young QC submitted that this would cause inefficiencies in any public hearings and thus suggested private hearings would be more efficient, such inefficiencies that might occur are not a proper basis for a decision to conduct all of the hearings in respect of the China Arrests in private.

86 In recognition of Crown's entitlement to maintain its legal professional privilege claims in the Class Action, the Inquiry can adopt the processes available to it to ensure that those claims are not compromised or rendered nugatory.

87 It is appropriate at this juncture to make some observations about the Class Action and the vagaries of litigation. This is a reference to an array of possibilities, including: (a) a prospect of forensic decisions being made not to call any witnesses, or some particular witnesses, having regard to the way in which the evidence is developed during the trial of the Class Action; and (b) the settlement of the litigation, either in whole, or in respect of a particular issue. These decisions are of course the domain of the relevant parties to the civil litigation before the Federal Court. This Inquiry, rightly, has no control

over any of those decisions and it is important that it proceeds within the confines of its Amended Terms of Reference in the Instrument of Appointment and the legislative structure to which reference has been made above.

Interference with the administration of justice

88 It is appropriate to refer to the submission made by Crown, although certainly not forcefully, that public hearings of the Inquiry in relation to the China Arrests could "quite possibly" amount to an interference with the administration of justice.

89 Mason J's following observations are pertinent to that submission:[42]

> Obviously judges are more capable than jurors at putting aside prejudicial matter, including public prejudice. Objectivity and independence are the qualities which judges are expected to bring to judicial determination. I should have thought, along with Northrop J at first instance, that to say that there is a risk the judges of the Federal Court may succumb, even subconsciously, to pressures arising from public prejudice flowing from the proceedings of the Commission is somewhat fanciful. But it is submitted that three judges of the Federal Court have acknowledged that there is a risk of this occurring. In my view that is not what the Full Court of the Federal Court decided. All that Deane J said was that there would be a tendency "to create an adverse environment for the future and proper conduct of the proceedings" and that they would be liable to bring, "subconsciously", pressures on the judges. This, it seems to me, falls short of finding that there is a "likelihood" or "substantial risk" of serious prejudice to the federation in a relevant sense.
>
> It is only natural that judges should prefer to decide cases in an atmosphere which is clinically free from prejudice. No-one enjoys making a decision to which government or the public is hostile or antagonistic. But the natural desire to avoid embarrassment of this kind is not enough to justify a restraint which deprives the public of knowledge of important matters which it has a legitimate interest in knowing. Nor is such a restraint to be justified on the footing that justice must not only be done, it must also appear to be done. It has never been suggested, and could not be rationally suggested, that judges are disqualified from hearing a case because there exists a bare possibility that they may share a generally held public prejudice.

90 The present circumstances referred to above do not in my view pose any risk of the interference with the administration of justice.

[42] At page 102.

Conclusion

91 The application that the Inquiry not publish the fact or the time of the hearings in the China Arrests is dismissed. The application that all of the hearings in respect of the China Arrests be heard in private is dismissed. The Inquiry hearings in respect of the China Arrests will be held in public subject to any relevant applications from time to time during those hearings.

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