Submission to The Royal Commission into The Casino Operator and Licence

By Prof Penny Crofts (University of Technology Sydney) and Dr Honni van Rijswijk (University of Technology, Sydney)

Introduction

We welcome the opportunity to submit to this Royal Commission. We specialise in interrogating jurisprudential analysis of responsibility and the corporate form. We are presently involved in a large project analysing the intersection of corporate law, criminality and gambling. Our recent research into the question of gambling controls at Australian Casinos has followed the NSW Bergin Inquiry (Inquiry under Section 143 of the Casino Control Act 1992) and the question of links between casinos and government that result in what could be termed 'state-corporate crime'.

Presently, we have two papers in pre-publication stage with international journals:

- Crown Resorts, corporate governance and criminality
- A case study of State-Corporate Crime: Crown Resorts

This submission summarises our findings.

This submission responds to the final term of reference of the Victorian Royal Commission into the Casino Operator and Licence:

"K. Whether there are any other matters necessary to satisfactorily resolve the matters set out in paragraphs A to J, above."

In summary, the matters we address include:

- The failure of corporate governance at Crown which failed to notice and control extensive money laundering;
- The failure to have systems in place to receive information about problems;
- The corporate focus on profit, to the apparent exclusion of other considerations;
- The failure of directors to act in the **long term** interests of the company;
- The failure to construct the board with members capable, interested, willing or independent enough to ensure compliance with regulations;
- The fact that such failings have the potential to shield directors and the company from criminal prosecution;

- The question whether corporations law is adequate in describing directors' responsibilities;
- The increasingly 'light touch' of regulations and regulators overseeing casinos; and
- The enabling, by government, of the questionable business practices at Crown, through successive watering down of regulation and control and reductions in enforcement.

DETAILED COMMENTS

Corporate governance 'failures'

In the first study we detail a series of problems in corporate governance that the Bergin Inquiry characterised as a series of failures – the failure to review and react to media allegations, the failure to have systems in place to receive information about problems and risks, the failure to challenge and ask questions, the failure to know and understand the fundamentals of the business, and the failure to set the risk appetite.

One of the core principles of corporate governance is that directors act in the best interests of the company. This raises key questions as to what those best interests might be and whether corporate governance at Crown Resorts should be regarded as failures or in fact as successes within the terms of the corporate form. The maximisation of profit is the functional and legal purpose of a corporation.[1]

At Crown Resorts, the end result of corporate governance 'failures' was increased profit, in the relative short term.

The Bergin Inquiry found that the 'organisation fixated on doing whatever it could to rake in millions of high-roller dollars, sometimes at the risk to its own staff, while leaving the door open to criminal syndicates'.[2] The business model of Crown was explicitly dependent on Chinese high rollers and there was a reluctance to shut this model down despite recognition of increased risks because this would undermine the profitability of Crown Resorts.

---

[1] Janine S Hiller, 'The Benefit Corporation and Corporate Social Responsibility' (2013) 118(2) *Journal of Business Ethics* 287.

[2] https://www.abc.net.au/news/2020-10-25/inquiry-evidence-that-brought-crown-resorts-to-its-knees/12806694

Likewise, Crown only reluctantly and belatedly responded to problems of money laundering because every dollar going through the Casino went towards its net worth and profits, regardless of whether the money was for gambling and/or money laundering. For this reason, the Inquiry found that:

> Its push for profit skewed its consideration of the necessity to comply with the object of the *Casino Control Act* of protecting the casino from criminal exploitation.[3]

Given the hitherto incredibly light touch of regulators in Australia, motivated by government dependence on gambling revenue,[4] and that the core purpose of Crown Resorts is profit, the corporate governance 'failings' could be instead characterised as a legitimate business approach to achieve maximum profits.

These corporate governance 'failings' can likewise be viewed as a success in terms of shielding the company and the majority of individual directors from criminal prosecutions. The common law principle of nominalism reveals that Board ignorance is indeed bliss. Nominalism dates from the 19th century and privileges the classic criminal legal subject – the flesh and blood individual.[5] On this account, corporations are artificial entities made up of nothing more than a collective of individuals and, as such, can only act through living persons.[6] The dominant approach for ascribing corporate liability in Australia is through identification theory, which requires proof that the 'directing mind' of the corporation has acted with the requisite fault, as set out in *Tesco v Nattrass* [1972] AC 153.[7] This approach is based on an anthropomorphic conception of the company, where only those persons

---

[3] Bergin (n5). 562.

[4] Linda Hancock, Tony Schellinck and Tracy Schrans, 'Gambling and Corporate Social Responsibility: Re-Defining Industry and State Roles on Duty of Care, Host Responsibility and Risk Management' (2008) 27 *Policy and Society* 55.

[5] Max Radin, 'The Endless Problem of Corporate Personality' (1932) 32 *Columbia Law Review* 643-667.

[6] Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6(1) *Criminal Law Forum* 1-44; Meir Dan-Cohen, *Rights, Persons, and Organizations* (Oxford University Press, 1986). Fatal robots are arguably a way in which corporations can act without humans. See,eg, S Solaiman, 'Corporate Manslaughter by Industrial Robots at Work: Who Should Go on Trial under the Principle of Common Law in Australia' (2016) 35(1) *Journal of Law and Commerce* 21-53.

[7] *Hamilton v Whitehead 166 CLR 121, 127.* The UK has largely reaffirmed the directing mind approach in *AG's Reference (No 2 of 1999)* [2000] EWCA Crn 90. The test was tempered somewhat by the PC expanding the people whose actions and state of mind are attributed to the company in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918.

invested by proper authority with managerial powers and responsibility are regarded as the head or brains of the company.

The language of both casino-related legislation and the Inquiry reflect and reinforce the anthropomorphic conception, especially the Bergin Inquiry's focus on whether Crown Resorts was a 'suitable person'.[8] The Bergin Inquiry focused on the 'state of mind' of the Board and upper management in its determination as to whether Crown Resorts was a suitable person. The 'state of mind' of this 'directing mind' is treated by law as the state of mind of the organisation which enables criminal liability to be imposed on a corporation for offences that require *mens rea*. The principle requires that the prosecution prove that the directing mind of a corporation knew of the criminal actions and possessed the necessary *mens rea*.[9]

Critics have pointed out that identification theory has not met with much practical success and might better be characterised as an 'obstacle' to corporate conviction.[10] It is highly restrictive, artificial and fails to grapple with the reality of contemporary corporations.[11] The identification principle specifies that only staff and officers who are very high up in the corporate hierarchy can represent the directing mind of the corporation.

Such a person or people must be responsible for the supervision of corporate activities and the design of corporate policies at the highest level.[12] However, in complex organisations

---

[8] James G Wright, 'A Step Too Far: Recent Trends in Corporate Personhood and the Overexpansion of Corporate Rights' (2015) 49(3) *John Marshall Law Review* [i]-924 ('A Step Too Far'); Cody J Jacobs, 'If Corporations Are People, Why Can't They Play Tag' (2016) 46(1) *New Mexico Law Review* 1.

[9] The directing mind can be more than one person acting collectively, such as a Board of directors. See James Chalmers, 'Corporate Culpable Homicide: Transco Plc v HM Advocate' (2004) 8(2) *Edinburgh Law Review* 262-266. For an analysis of the common law position see Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' in Justin O'Brien and George Gilligan (eds), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Hart Publishing, 2013).

[10] S Solaiman, 'Corporate Manslaughter by Industrial Robots at Work: Who Should Go on Trial under the Principle of Common Law in Australia' (2016) 35 *Journal of Law and Commerce* 21. 51.

[11] Judicial criticisms include *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 3 All ER 918 (Lord Hoffman); *Canadian Dredge & Dock Co v R* [1985] 1 SCR 662, 693 (Justice Estey); *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, 67. See also, Stefan HC Lo, 'Context and Purpose in Corporate Attribution: Can the 'directing Mind' Be Laid to Rest?' (2017) 4(2) *Journal of International and Comparative Law* 349-376.

[12] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

like Crown Resorts, the higher up a person is, the less likely that they will have the necessary *mens rea.*[13]

Our analysis of Crown Resorts' problems demonstrates and confirms how the construction of the Board as the 'directing mind' of the corporation is problematic. The principle of nominalism does not encourage directors to gain knowledge, ask questions, or challenge. To this point, all the directors are shielded from any responsibility and attribution of culpability except for Rankin who Counsel recommended be referred to the Australian Securities and Investment Commission (ASIC) for failing in his corporate duties.[14]

Theorists might take comfort from the fact that the avid pursuit of short-term profit has generated longer-term problems for the company and raised questions about its sustainability.[15] This is in accordance with the belief that there are built-in limits on short-term pursuit of profit.[16] Crown Resorts has been denied a license to operate in New South Wales and there are now inquiries into Crown Resorts operations in Victoria and Western Australia.

State-corporate crime

Our second study shows that, in our view, the Bergin Inquiry exposed Crown Resorts, and the Australian gambling industry more generally, as a site of state-corporate crime.

---

[13] Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12 *Law and Financial Markets Review* 57. 58.

[14] Bergin (n 5) 202.

[15] James Packer had already demonstrated his intention to divest himself of shares in Crown Resorts. Thus his influence on corporate governance reflected his concern for short-term profits and then leaving the company before problems in China and AML became urgent. See Shelley and Marshall (n 23).

[16] This was argued by Commissioner Hayne in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. As a consequence of money laundering admissions by Crown, a class action was commenced by Maurice Blackburn in the Supreme Court of Vic in December 2020. The action is against Crown Resort, asserting its governance and risk management failings caused a massive share price plunge in October. The suit alleges that Crown had engaged in misleading or deceptive conduct from December 2014 to October 2020 that it had 'robust or effective systems' for ensuring compliance with its AML obligations, including as they applied to its VIP international business and engagement with overseas junket tour operators, and had not disclosed relevant information to the market. Also that Crown had conducted its affairs in a manner that was contrary to the interests of shareholders. The class action seeks an order from the court that the company buy back shares from affected investors. The suit claims that shareholders would expect Crown to have best-practice governance and to have complied with laws designed to combat money laundering. This was also because of repeated public assurances by Crown that it took AML responsibilities seriously.

By this we mean that it is clear that both the company and the state share an interest in maximising profit – the company because it enhances return to shareholders and share value and the state because it enhances gaming related revenues.

The Bergin Inquiry has been described as harnessing a 'new era of accountability' in the gaming sector (Bavas, 2020). The Bergin Inquiry has led to the Victorian Government calling this Royal Commission and likewise the Western Australian government has called an inquiry into Crown Resorts.

We contend that the business practices at Crown have been enabled by the government through a process of deregulation, supported by an ideology of neo-liberalism. Despite recognition of the criminogenic nature of gambling, the state has shown a willingness to suspend rules, deregulate, reduce the powers and undermine the independence of regulators.

Recent history has shown a preference for formal rules and self-regulation, rather than investigation and enforcement. Although the Bergin Inquiry provided ample detail of the ongoing history of deregulation of the gambling industry in Australia, it slated much of the responsibility for crimes and malfeasance at Crown to corporate governance failings. However, these 'failings' can only be understood within the wider context of state facilitation of Crown's harmful, even criminal, acts.

In fact, the corporate governance at Crown was rational, given the regulatory and legal environment. Far from a failure, it should be regarded as a success in its avid pursuit of profit to the limits of the law, and in accordance with its corporate form. Given state complicity in the pursuit of profit, it is unsurprising that Crown committed offences and pursued a business model that depended upon crimes and harms, which it rationally and correctly calculated were unlikely to be enforced by the state. In the absence of regulation and enforcement, the state effectively authorised and legitimated Crown's activities. What is surprising is that after years of rubber stamping of casino licences across Australia, the

Bergin Inquiry refused Crown its licence and undertook such a substantive and far-reaching inquiry.

We would be happy to discuss our submission with the Commission.