Submissions of the CPH Parties

Submissions of Consolidated Press Holdings Pty Limited and CPH Crown Pty Limited to the Royal Commission into the Casino Operator and Licence

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A INTRODUCTION

1. Consolidated Press Holdings Pty Limited and CPH Crown Holdings Pty Limited (together, **CPH Parties**, or **CPH**) submit that:

   (a) it is both unnecessary and undesirable to impose a shareholding limit for shares in the holding company (Crown Resorts);

   (b) alternatively, any shareholding limit in Crown Resorts should be no lower than 20% and, consistently with the objects of the *Casino Control Act* 1991 (Vic) ***(Casino Control Act)*****,** the requirement for regulatory approval to exceed it should only be necessary in circumstances where the dealing would in fact result in the acquirer obtaining significant influence over the management or operation of the casino business. There should be a tight timeframe for the VCGLR's approval of such applications, and a right of appeal;

   (c) the Board of Crown Melbourne should have a majority of independent directors (being independent of Crown Resorts, as well as independent of major shareholders and the senior executive teams of each company); and

   (d) it is unnecessary and undesirable to repeal the compensation provisions in the Casino Management Agreement.

2. These submissions address the above issues, in turn.

B SHAREHOLDING CAPS IN CROWN RESORTS ARE UNNECESSARY[1]

B.1 Summary

3. The CPH Parties submit that shareholding caps in Crown Resorts are unnecessary both as a general matter, and as any form of 'response' to CPH's previous influence in relation to Crown. That is because:

   (a) as discussed further in Part C of these submissions, the focus of the relevant objects of the *Casino Control Act* is influence over the management or operations of the casino business, not mere shareholding. Influence does not necessarily follow from mere shareholding, as the present circumstances illustrate. Currently, three shareholders in aggregate hold approximately 60% of the shares in Crown Resorts. None of them influences the management or operations of Crown Melbourne or its casino business;

   (b) whatever influence CPH once had upon Crown Resorts, it was through its Board representation, the services provided under the Services Agreement and information sharing. None of those arrangements remain. It follows that the extent of CPH's responsibility for Crown Resorts' failings and cultural problems is largely irrelevant for the purposes of this Commission;

   (c) in any event, it is not possible for this Commission to identify the extent of CPH's historic responsibility for Crown's Resorts' cultural problems due to the complexity of conducting any such rigorous analysis of culture. Nor has the Commission investigated the extent of any such responsibility;

   (d) the CPH Parties' undertakings to the ILGA, which the CPH Parties have also proposed to the VCGLR, are appropriate and sufficient; and

   (e) the position may be further buttressed by a requirement that there is a majority of directors of Crown Melbourne who are independent of Crown Resorts, major shareholders and Crown executives.

B.2 Any historic influence of CPH was not via its shareholding

4. At the outset, the CPH Parties acknowledge and accept that:

[1] The Commissioner asked the CPH Parties for submissions on this issue: see question 1 in the letter from Solicitors Assisting dated 23 July 2021. See also Submissions of Counsel Assisting, page 211 [3.14], and the letter from Solicitors Assisting dated 1 June 2021.

(a) there have been failings at Crown Resorts, as revealed in the NSW Inquiry Report and in the course of this Royal Commission; and

(b) the topics identified by Counsel Assisting (including Crown's relationship with the VCGLR, the bonus jackpot tax issue, the CUP practice and AML compliance issues)[2] indicate that there have been cultural problems within Crown.

5. The extent of CPH's responsibility for Crown Resorts' failings and cultural problems is largely irrelevant for the purposes of this Commission. Whatever influence CPH (or persons associated with them, such as Messrs Packer, Jalland or Johnston) may have had on Crown Resorts' culture in the past, and whatever view may be taken about that influence, the evidence before this Commission is that it has ended. CPH no longer has any representatives on the Crown Resorts Board (nor are there representative directors on the Boards of any of its subsidiaries including Crown Melbourne).I Its executives do not provide services to Crown Resorts, and there is no longer any information sharing arrangement in place. CPH is now merely a passive shareholder, which has relevantly undertaken not to seek Board representation until October 2026, not to seek to enter into information sharing agreements with Crown Resorts and not to communicate with Crown directors and executives outside of public forums (such as at Crown Resorts general meetings or investor briefings), other than in certain limited ways acceptable to the relevant regulator. In this regard:

(a) there is no evidence to suggest that CPH's mere shareholding has influenced Crown Resorts' culture, or that it prevents Crown Resorts from embedding cultural change. It does not.

(b) by October 2026, Crown Resorts would have had sufficient time to '*embed*' a corporate culture which addresses the concerns that have been identified.

6. While the CPH Parties have, in the past, nominated directors for appointment to the Crown Resorts Board (all of whom were subject to regulatory approval in the three States in which Crown holds a licence to operates casinos), there was no evidence before the NSW Inquiry, and there is no evidence before this Commission, that the CPH Parties have otherwise ever used or intended to use the voting power associated with their Crown Resorts shareholdings to exert influence over or with respect to the decision-making of the casino businesses of Crown (or indeed, in respect of any relevant decision related to the matters that are the subject of formal inquiry).

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[2] Submissions of Counsel Assisting, page 249 [4.1]

7. The asserted '*influence*' of CPH and Mr Packer considered in the NSW Inquiry did not arise from the shareholding of CPH in Crown. That inquiry did not consider CPH's use of voting power in general meeting. There was no evidence in that inquiry (or for that matter in this Commission) that CPH's voting power was ever deployed in a way adverse to Crown. Rather, the asserted influence was said to involve influence over or with respect to the management or operation of Crown's casino business, and in particular influence on Crown's corporate governance and risk management processes through:

   (a) the asserted actions and involvement of CPH nominee directors on the Crown Resorts Board;

   (b) Mr Packer's relationship with and asserted influence over particular members of the Board and Crown executives; and

   (c) the operation of the Services Agreement and the Controlling Shareholder Protocol.[3]

8. As noted by Counsel Assisting,[4] each of the Services Agreement and the Controlling Shareholder Protocol has been terminated. That occurred on 21 October 2020, prior to the conclusion of the NSW Inquiry.[5] As a result of the termination of these arrangements, no further services are being or will be provided by CPH executives to Crown Resorts, and there is no longer any basis for the CPH Parties to receive information from Crown Resorts, other than that which they are entitled to receive as shareholders of that company.

9. Mr Johnston and Mr Jalland, two of the three CPH nominees on the Crown Resorts Board, resigned from the Board immediately following publication of the NSW Inquiry Report.[6] CPH terminated its consultancy agreement with its third nominee, Mr Poynton, the same day. Mr Poynton resigned as a director of Crown Resorts (and of Burswood Limited, a subsidiary of Crown Resorts), on 28 February 2021.[7] Accordingly, CPH now has no nominee on the Crown Resorts Board. None of Messrs

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3 Ex RC0970: COM.0005.0001.0334 at .0587 [21]

4 Submissions of Counsel Assisting, page 323 [2.9]

5 Ex RC0970: COM.0005.0001.0334 at .0587 [21]; Ex RC0437b: CRL.742.001.0180; Ex RC0149b: CRW.0000.0003.0062 at .0067; Ex RC0417: CRW.512.196.0003 at .0010; Ex RC0437q: CRW.518.004.7714; Coonan, 27.04.21 at [11] [Ex RC0437: CRW.998.001.0526 at .0531]

6 Coonan, 27.04.21 at [30(g)] [Ex RC0437: CRW.998.001.0526 at .0536]; Korsanos, 27.04.21 at [8] [Ex RC0434: CRW.998.001.0104 at .0105]; Ex RC0417: CRW.512.196.0003 at .0003; Submissions of Counsel Assisting, page 323 [2.9]. As noted above, the statement in Counsel Assisting's submissions that they 'were removed' by Crown Resorts (page 210 [3.7]) is inaccurate.

7 Coonan, 27.04.21 at [30(g)] [Ex RC0437: CRW.998.001.0526 at .0536]; Ex RC0417: CRW.512.196.0003 at .0003

Johnston, Jalland or Poynton ever sat on the Crown Melbourne Board. Mr Packer ceased to serve on the Crown Melbourne Board over five years ago.

10. At the time that Mr Johnston and Mr Jalland resigned, CPH issued a media release stating, among other things, that:

> *[t]he issue of CPH's representation on the Crown board, and future communications between those representatives and CPH, were potentially complex matters for ILGA and Crown to resolve. The steps announced today take them off the table, giving Crown's board clear air to work with ILGA in the execution of its announced reform agenda, and become a model casino operator. CPH supports these efforts*.[8]

11. None of the directors or executives who it was asserted in the NSW Inquiry Report had '*loyalty*' to Mr Packer, being Messrs Felstead, Alexander, Demetriou, Mitchell, Barton or Kunaratnam,[9] remains with Crown.

12. **Annexure A** to these submissions responds specifically to the propositions which Counsel Assisting have sought to draw both from evidence in this Commission and the NSW Inquiry Report regarding the historic influence of the CPH Parties and Mr Packer in relation to Crown.

B.3 Complexity of culture

13. It is not possible for the Commission to identify the extent of CPH's historic responsibility for Crown Resorts' cultural problems, given the complexity of any sound and rigorous assessment of organisational culture, and the absence of any root cause analysis having been undertaken of those problems.

14. The NSW Inquiry Report identified many factors contributing to the failures it identified at Crown Resorts. Those factors included failures of the Board as a whole,[10] senior executives,[11] and various employees;[12] Crown Resorts' approach to the inquiry through its lawyers Minter Ellison;[13] and inadequate external advice received in relation to Chinese law.[14]

15. The evidence of Ms Arzadon, who is an expert in corporate culture and its influence on conduct, is that:[15]

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8 CPH.136.001.0069
9 Ex RC0445: COM.0005.0001.0001 at .0160 [18]-[22]
10 Ex RC0445: COM.0005.0001.0001 at .0567 [46], .0569 [54], .0573 [7], .0574 [84], .0583 [136]
11 Ex RC0445: COM.0005.0001.0001 at .0573 [82], .0574 [86]
12 Ex RC0445: COM.0005.0001.0001 at .0566 [42]
13 Ex RC0445: COM.0005.0001.0001 at .0570 [63]
14 Ex RC0445: COM.0005.0001.0001 at .0572 [74]
15 Ex RC0477: COM.0007.0001.0178 at .0181

(a) An essential first step to ascertaining the cause of Crown's cultural problems is undertaking a detailed *'root cause analysis'*, which is *'a detailed and nuanced analysis of the facts on the grounds.'*[16] That would involve interviewing hundreds of people at different levels within Crown. It would also necessarily involve a process of '*triangulation*' of the variety of views sought (which has not yet been done) and the application of *'healthy, professional scepticism'*. Such an analysis has yet to be completed by Crown or anyone else.

(b) The culture of a large organisation, such as Crown, will be complex, involving people in different subgroups by reference to level, division or geography,[17] which may have their own culture. It will be influenced by '*formal*' and '*informal*' leaders,[18] internal and external factors,[19] staff skills and training,[20] and formal policies, including financial and non-financial incentives.[21] Given this complexity, it is inherently unlikely that there is a sole or dominant cause for Crown's culture (or even that there is one, monolithic '*culture*' of the organisation). As Ms Arzadon explained *'I think culture is a very complex issue and it shouldn't be boiled down to one thing, like leaders only, it is actually much more systemic than that'*.[22]

(c) The views of senior management tend to *'simplify the problems to divert attention from their own participation in those problems'*, being a *'common reaction'* when a company is in *'crisis mode'*.[23] Rather, one must be *'particularly astute to avoid the adoption of simplistic causes as being the driving force of a problem which a company has arrived at'* (a proposition which Ms Arzadon indicated she *'definitely agree[d] with'*).[24]

(d) It is essential to consider '*direct information from multiple organisational members … to avoid "projecting" assumptions from an outside analyst about the root causes of observable behaviour*'[25] because *'without going and speaking to people in the organisation, you can get a certain distance in terms of forming*

16 Arzadon T3985.2-T3985.6
17 Ex RC0477: COM.0007.0001.0178 at .0194. See also Halton T3640.27-T3640.29, Coonan T3855.1-T3855.14
18 Ex RC0477: COM.0007.0001.0178 at .0193 - 0195
19 Ex RC0477: COM.0007.0001.0178 at .0189
20 Ex RC0477: COM.0007.0001.0178 at .0195
21 Ex RC0477: COM.0007.0001.0178 at .0195. See also Halton T3640.27-T3640.29
22 Arzadon T3995.2-T3995.4
23 Arzadon T3984.29-T3984.40
24 Arzadon T3984.42-T3984.47
25 Ex RC0477: COM.0007.0001.0178 at .0191

conclusions based on the materials and facts and observing behaviour, but until you actually speak to people, you don't have the full picture.'[26]

(e) The *'full picture'* is yet to be ascertained,[27] and the NSW Inquiry Report did not have the benefit of it (which Ms Arzadon assumed to be the case from the face of the NSW Inquiry Report).[28]

(f) Ms Arzadon agreed that *'investigating fundamental cultural norms through all the pressure and perspective of individuals of a formal inquiry involving people having to give evidence under oath is not ideal from [Ms Arzadon's] point of view in analysing fundamental root causes'*.[29]

16. Accordingly, as submitted by Counsel Assisting, the root cause analysis being undertaken by Ms Victoria Whitaker of Deloitte will need to be *'very carefully carried out and conducted with…a high degree of professional scepticism'*,[30] before reaching conclusions about attribution of causes of Crown's cultural failings.

17. It is accepted that some problems identified during the NSW Inquiry are indicative of cultural problems. However, the NSW Inquiry was not conducted with the benefit of the necessary root cause analysis of those problems. It therefore did not involve a close examination of Crown Resorts' culture, and pronouncements made in the NSW Inquiry Report as to Crown Resorts' culture must accordingly be approached with considerable caution.[31]

18. Similarly, for the reasons set out above, by reference to Ms Arzadon's evidence, care must be taken in accepting the evidence of Crown Resorts' directors as to the contribution of culture to particular failures and the reason for that culture existing.[32] That evidence needs to be approached with professional scepticism, as it may suffer from (a) the human tendency to *'simplify the problems to divert attention from their own participation in those problems'* which is particularly acute given Crown is in *'crisis mode*' and (b) the problems associated with evidence of culture being provided on oath in a Royal Commission setting.

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26 Arzadon T3986.39-T3986.43
27 Arzadon T3986.45 – T3987.11
28 Arzadon T3987.5
29 Arzadon T3987.13-T3987.20
30 Submissions of Counsel Assisting, page 261 [8.20]
31 Cf Submissions of Counsel Assisting, page 240 [1.12]
32 Those views are set out in Submissions of Counsel Assisting, pages 242-243 [1.20]-[1.27].

B.4 CPH Parties' undertakings to the ILGA (also proposed to the VCGLR)

19. Following the publication of the NSW Inquiry Report, the Chair of the ILGA made statements to the media requesting that CPH put forward proposals to address the ILGA's concern as to '*the degree of influence that Mr Packer would have over Crown going forward rather than the exact amount of his shareholding in the company … influence is the key word. They need to address that*.' Media reports quote the Chair further stating that *'[he did] not want to be uncommercial and interfere in the market* …[if Mr Packer] *could sell his shares, I don't want to put constraints on him. On the other hand, I don't want to limit his voting rights because that gives disproportional control to minority shareholders*.'[33]

20. CPH responded to the request so communicated by the Chair of the ILGA by proposing a series of undertakings, which were subsequently agreed by the ILGA. On 16 April 2021, the ILGA made a public statement about that agreement.[34] The CPH Parties have subsequently agreed to extend until October 2026, the time period in which nominees to the Crown Resorts Board will not be sought.[35] They understand that the ILGA proposes to formalise those undertakings once various other matters being addressed by Crown are completed. In the meantime, the CPH Parties have conducted and are continuing to conduct themselves consistent with those undertakings.[36]

21. The CPH Parties are aware that, via the issue of broad Notices to Produce both to CPH and to Crown, Counsel Assisting sought to test the existence of any ongoing influence on Crown's governance or operations by the CPH Parties. Counsel Assisting stated that there is no evidence of such ongoing influence.[37] That is also the position of the current Crown Resorts Board. In the letter on behalf of the Crown Resorts Board dated 2 July 2021 addressed to the Minister for Gaming, Crown's board stated that '*CPH does not control Crown*.'[38]

22. Counsel Assisting expressed a number of concerns about the undertakings CPH had given to the ILGA. Those concerns were expressed in the absence of having reviewed the undertakings because Counsel Assisting mistakenly indicated that the

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33 "Mitchell digs in among calls for more Crown bloodletting", The Australian, 16 February 2021 CPH.171.001.0005

34 CPH.167.006.0001; Crown Resorts announcement to ASX on 16 April 2021 – *NSW ILGA announcement in relation to agreement with CPH* [CPH.173.001.0155]

35 Emails between Guy Jalland and Murray Smith dated 26 to 28 July 2021 [CPH.173.003.0001]

36 Ex RC1411: CPH.122.002.0001; CPH.167.006.0002; CPH.167.006.0003

37 T4038.23-T4038.24. It is notable, and consistent with this position, that Mr Packer is not listed among those named in Counsel Assisting's 'list of key people': Submissions of Counsel Assisting, pages 27-35

38 Ex RC0415: CRW.512.212.0001_R. at .0004. See also Ex RC0418: CRW.512.196.0053 at .0060.

undertakings had not been produced to or seen by the Commission.[39] In fact, following a reference made by Counsel Assisting on 17 May 2021 that the Commission did not have a copy of these undertakings,[40] the CPH Parties produced a copy of those undertakings to the Solicitors Assisting on 18 May 2021.[41] They did so after seeking the ILGA's permission to do so, and on a voluntary basis (not having received any Notice to Produce from the Commission seeking their production). The CPH Parties are aware that the VCGLR has also communicated with the ILGA about these undertakings.[42] The CPH Parties have also provided a copy of the undertakings to the VCGLR and offered equivalent undertakings directly to the VCGLR.[43]

23. Without the benefit of seeing the undertakings to the ILGA, Counsel Assisting expressed the following concerns:[44]

    (a) that they were voluntary and may only be temporary;

    (b) that it is unclear whether the undertakings are specific to the Sydney casino or whether they apply to the Melbourne casino;

    (c) that CPH had not given the undertaking to the VCGLR;

    (d) that the undertaking not to appoint directors is limited in time to 2024; and

    (e) that the undertaking not to initiate discussions with Crown about its business would not preclude Crown from initiating discussions with CPH.

24. Each of these concerns may be addressed in turn.

25. First, none of the undertakings, other than the undertaking relating to nominees on the Board of Crown Resorts, is time bound. They are expressed to endure in perpetuity, so most of them are not temporary in nature. That is significant. It means that CPH is limited to voting its shares in general meeting and (from October 2026) seeking to have directors appointed, who will need to be approved by shareholders and the regulators.

26. Secondly, the undertakings are not confined to *'the Sydney casino'*, but apply to all of Crown's business and operations (undertaking 2).

27. Thirdly, as the undertakings apply in respect of all of Crown's business, they will operate in the context of the regulation of Crown Melbourne. Nevertheless, CPH has offered to repeat those undertakings to the VCGLR. A copy of its correspondence to

39 Submissions of Counsel Assisting, page 275 [3.3]
40 T10.10-T10.15
41 CPH.167.006.0002; CPH.167.006.0003; Ex RC1411: CPH.122.002.0001
42 Ex RC0463i: VCG.9999.0002.0001 at VCG.9999.0002.0001_0165
43 Ex RC1409: CPH.0000.0003.0195; Ex RC1412: CPH.172.001.0001
44 Submissions of Counsel Assisting, page 275 [3.3]

the VCGLR to that effect has been provided to the Solicitors Assisting the Commission.[45]

28. Fourthly, as to the undertaking regarding nominee directors (undertaking 3), which was originally expressed to endure until the 2024 annual general meeting of Crown Resorts, and which the CPH Parties have now offered to extend until the 2026 annual general meeting (which offer the ILGA has accepted), even after that undertaking ceases to operate, the appointment of any director in support of whose election to the Crown Resorts Board the CPH Parties might vote their shares is still subject to approval by the VCGLR as a precondition to that person assuming office (as provided for by the '*associate*' regime under the *Casino Control Act*). It would also require the approval of state gaming regulators in NSW and WA.[46] Additionally, the CPH Parties' current combined shareholdings in Crown Resorts equate to approximately 36.81%. Thus, any nominee put forward by the CPH Parties would need to attract the support of other shareholders to gain a majority.

29. Fifthly, Counsel Assisting observe that the undertaking for CPH not to initiate contact with Crown (undertaking 2) does not prohibit the reverse. However, that undertaking is directed towards matters within CPH's control. Importantly, CPH has proposed to the VCGLR a confirmation that it will *'comply with the spirit of the undertaking and look beyond form to the substance of the undertaking'*. Given all that has passed as a result of the NSW Inquiry and this Royal Commission, it would be surprising if Crown Resorts did seek to initiate discussions with CPH, but if it did so, in honouring the spirit of the undertaking, CPH would terminate any contact of substance so initiated by Crown Resorts unless sanctioned by the relevant regulators. Further, it is plain from communications by Crown Resorts' Board that Crown has no intention of acting inconsistently with the undertakings given by CPH.[47]

30. The NSW Inquiry Report, notwithstanding the statements contained in that report as to the influence of the CPH Parties and Mr Packer, envisaged that CPH would continue to have two nominees on the Crown Resorts Board (namely Mr Jalland and Mr Poynton). That is, that report did not conclude that CPH should have no involvement with Crown Resorts' Board. The undertakings offered by CPH and agreed to by the ILGA as to board representation thus go beyond what was contemplated by the NSW Inquiry Report.

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45 CPH.171.001.0017

46 *Casino Control Act 1991* (Vic) ss 28(3), (5); *Casino Control Act 1992* (NSW) ss 35(3), (5); *Casino Control Act 1984* (WA) s 19B(1)

47 Ex RC0415: CRW.512.212.0001_R. at .0004-.0005. See also Coonan, 27.04.21 at [27(b))] [Ex RC0437: CRW.998.001.0526 at.0215]

31. The matters described above demonstrate that CPH and Mr Packer have addressed the issue of ongoing influence over the management and operation of Crown's casino business. Whatever influence CPH may have had in that regard, it no longer exists.

B.5 A requirement that Crown Melbourne's Board include independent directors

32. Although there is no requirement for non-listed companies in Australia to appoint independent directors, under the ASX Corporate Governance Principles all listed companies are subject to recommendations as to board and board committee composition.[48] This includes, relevantly, a recommendation that a majority of the directors on a board of a listed entity should be independent, and that the board of a listed entity should have an audit committee which has at least three members, all of whom are non-executive directors and a majority of whom are independent directors.

33. These recommendations are responsive to Principle 2 of the ASX Corporate Governance Principles, that the board of a listed entity should be of an appropriate size and collectively have the skills, commitment and knowledge of the entity and the industry in which it operates, to enable it to discharge its duties effectively and to add value. They are also premised upon the notion that:

> *The board needs to have an appropriate number of independent non-executive directors who can challenge management and hold them to account, and also represent the best interests of the listed entity and its security holders as a whole rather than those of individual security holders or interest groups.*

34. This statement is reflective of the widely held position in corporate governance literature and agency theory that '*agency costs, information asymmetry, and potential for managerial opportunism in high growth firms are greater than in low growth firms*', and that the boards of high growth firms that are complex in nature accordingly require a higher percentage of independent directors to act as more effective monitors.[49] Put another way, '*independent directors are seen as accountability mechanisms as their role is to help ensure that companies are pursuing the interests not only of their shareholders but also of their stakeholders*'.[50]

35. Nottage and Aoun of the University of Sydney Law School reported in a 2016 article that generally speaking, the empirical evidence then available in an Australian context

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48 ASX Corporate Governance Principles and Recommendations, 4th Edition (2019), available at <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>.

49 Dulige, J. et al, 'Independent Directors: Exploring the heterogeneous nature of multiple directorships' (2020) 17:4 *Corporate Ownership & Control* 18, 20-21.

50 Garcia-Sanchez, I., and Martinez-Ferrero, J., 'Independent Directors and CSR Disclosures: The moderating effects of proprietary costs' (2017) 24 *Corporate Social Responsibility and Environmental Management* 28, 29.

to support the proposition that independent directors are in fact responsible for improvements in overall corporate performance or value was not strong (although the authors noted methodological limitations of the studies cited).[51] Nonetheless, to the extent that the question of independent directors was raised in evidence before the Commission, the witnesses spoke positively about the influence of independent directors, both in relation to their role on the Board of the listed entity (Crown Resorts) and their potential role on the Board of the casino licensee (Crown Melbourne). For instance, Ms Korsanos gave evidence that she considered that there was value in having a director on the Board of Crown Melbourne who was independent of Crown Resorts, and suggested that it may help more diverse thinking.[52]

36. Mr Nigel Morrison (a director of Crown Melbourne and an independent director of Crown Resorts) expressed the view that independent directors were fundamental to proper governance of any company, based on their ability to exercise their best judgment, unconstrained by any loyalties or other matters that may influence their judgment and not be in the interests of all stakeholders and shareholders.[53] He also noted the difficulty in studies seeking to measure the impact of independent directors on the '*performance*' of a company, given that performance could be measured by a variety of factors including profit but also the long-term sustainability of a company's social licence to operate.[54] Mr Morrison also suggested that the broader perspectives of a diverse group of non-executive (independent) directors was likely to provide a fuller evaluation of risk and return issues, which may well lead to a better return over time.[55]

37. On the question of the potential interaction between the influence of a dominant shareholder on the one hand and the influence of independent directors on the other, Mr Morrison gave evidence that shareholder dominance may be a result of size or dominant personality, but that this could be either a good thing or a bad thing,[56] noting the potential for a dominant shareholder to drive the business and '*attract a certain quality of management that are so driven*'.[57] Mr Morrison expressed the view that having independent directors could temper the potential risk that a dominant shareholder may be a 'bad' thing, provided that they were '*people of backbone and*

51 Nottage, L. and Aoun, F., 'The Rise of Independent Directors in Australia: Adoption, Reform, and Uncertainty' (2016) 23 *U. Miani Int'l & Comp. L. Rev.* 571, 651.
52 Korsanos, T3689.21-T3689.30.
53 Morrison, T2268.14-T2268.25.
54 Morrison, T2269.4-T2269.9.
55 Morrison, T2269.21-T2269.28.
56 Morrison, T2287.5-T2287.14.
57 Morrison, T2268.18-T2268.21.

character and integrity and prepared to walk away, if they disagree with the way things are being done'.[58]

38. Mr Morrison did not disagree with the Commissioner's suggestion that a majority of the Board of Crown Melbourne should be independent of Crown Resorts, but noted that it was necessary to ensure that there was not an inefficient duplication and repetition of issues through the group structure. He distinguished between overarching issues at group level such as culture and values, and company level operational matters.[59]

39. In the HIH Insurance Royal Commission Report,[60] Justice Owen stated:

> *The weight of current opinion is that it is desirable to have a majority of independent directors on a public company board. The board of HIH had several 'independent' directors but this provided little protection against the folly of management. I am not convinced that a mandatory requirement for boards to have a majority of non-executive directors is either necessary or desirable. In most cases it will be desirable (assuming the non-executive directors are truly independent) but flexibility ought to be maintained to enable corporations to be structured in a way that best suits their circumstances. Nonetheless, the trend in the prescription of codes of conduct seems to assume the premise. My recommendations have been developed accordingly.*

40. Importantly, in that report,[61] Justice Owen also stated:

> *…it is not immediately clear to me why a substantial shareholding in the company should be regarded as compromising independence. Such a shareholding may provide greater incentive to bring the interests of the company to bear. On the other hand, the fact that a director has a close personal association with the chief executive may be destructive of independence, but is very difficult to assess objectively or on a 'check-list' basis. The critical question, it seems to me, is not so much whether, on objective criteria, the individual is 'independent' but rather whether he or she is subjectively capable of exercising independent judgment.*

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58 Morrison, T2289.1-T2289.11.
59 Morrison, T2275.29-T2276.4.
60 Justice Neville Owen, 'Report of the HIH Royal Commission', (2003), Vol I, [6.2.6]. (https://web.archive.org/web/20150417231809/http://www.hihroyalcom.gov.au/finalreport/index.htm).
61 Ibid.

C SHAREHOLDING CAPS IN CROWN RESORTS ARE UNDESIRABLE[62]

C.1 Summary

41. The CPH Parties submit that shareholding caps in Crown Resorts are undesirable, as:

(a) shareholding caps in a holding company of Crown Melbourne would not advance the purposes of the *Casino Control Act*, and would ignore the distinction between separate corporate organs;

(b) shareholding caps are not supported as a matter of Victorian legislative history; and

(c) shareholding caps would have adverse impacts on Crown Resorts and its many shareholders. The Commissioner is not in a position to properly assess that impact based on the evidence before the Commission.

C.2 Shareholding caps would not advance the purposes of the legislation and would ignore distinction between separate corporate organs

42. A key purpose of the *Casino Control Act* is to ensure that the management and operation of casinos remains free from criminal influence or exploitation.[63] The primary way this is achieved is by regulating '*associates*' at various points, including in the context of licensing,[64] cancellation of a licence,[65] change of situation of the casino operator,[66] and ongoing monitoring.[67]

43. An '*associate*' is relevantly defined[68] as a person who:

(a) holds or will hold any relevant financial interest, or is or will be entitled to exercise any relevant power (whether in right of the person or on behalf of any other person) in the casino business of the operator or applicant, and by virtue of that interest or power, is able or will be able to exercise a significant influence over or with respect to the management or operation of that casino business; or

(b) holds or will hold any relevant position, whether in right of the person or on behalf of any other person, in the casino business of the operator or applicant.

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62 The Commissioner asked the CPH Parties for submissions on this issue: see question 1 in the letter from Solicitors Assisting dated 23 July 2021. See also the submissions of Counsel Assisting, page 211 [3.14], and the letter from Solicitors Assisting dated 1 June 2021.

63 Section 1(a)(i) of the *Casino Control Act 1991* (Vic).

64 Section 9.

65 Section 20.

66 Section 28.

67 Section 28A.

68 Section 4.

44. The three touchstone concepts underpinning the definition of '*associate*' – namely, '*relevant financial interest'*, *'relevant position'* and '*relevant power'* – are all expressly tethered to the relevant '*casino business*' (here, the business of Crown Melbourne). It can be seen that a person is not an associate merely by virtue of holding a financial interest; rather the legislation focuses on a financial interest which enables the exercise of '*significant influence'* over or with respect to the management or operation of the casino business. The legislature's focus is not on the extent of shareholding, but the ability to exercise a significant influence over and with respect to the management or operation of the casino business.

45. The mere holding of shares, even a large parcel of shares, in a holding company, does not of itself give a person influence over and with respect to the management or operation of the casino business. Influence does not arise merely by reason of such a shareholding.

46. One result of this regime is that a shareholder of a holding company of a casino operator or licence applicant who wants to have a significant level of influence over the control or management of a casino business has no choice but to seek to be approved as an '*associate*' by the regulator. Similarly, any directors such a shareholder seeks to nominate for appointment to the board of a casino operator or licence applicant will need to be approved as '*associates*' by the regulator.

47. The CPH Parties, Mr Packer and CPH's officers are not currently '*associates*' of Crown Melbourne, as has been accepted by Counsel Assisting.[69]

48. The VCGLR in recent correspondence has contended that Consolidated Press Holdings Pty Limited is an '*associate*' because it has a *'relevant financial interest'* by virtue of which it is or will be able to exercise significant influence over or with respect to the management or operation of Crown Melbourne.

49. That position is misconceived.

50. First, for the reasons already discussed at Parts B2 and B4 above, CPH is not exercising any influence, let alone significant influence, over or with respect to the management or operation of Crown Melbourne.

51. Second, CPH does not have a *'relevant financial interest'* in Crown Melbourne in any event. That term is defined in section 4(2) of the *Casino Control Act* as follows:

> *"relevant financial interest", in relation to a business, means—*
> *(a) any share in the capital of the business; or*

[69] Submissions of Counsel Assisting, page 275 [3.2]

(b) any entitlement to receive any income derived from the business;

52. The '*business*' referred to in this context is *'the casino business of the operator or applicant*' referred to in s 4(1) (being Crown Melbourne).

53. CPH does not hold any shares in the capital of Crown Melbourne, as required by s 4(2)(a). Crown Melbourne is wholly-owned by Crown Resorts (through an intermediary company). Insofar as CPH presently holds shares of Crown Resorts, this is not a *'share in the capital of the business*' (being Crown Melbourne) as required by s 4(2). Had the legislation intended to encompass shareholdings in holding companies of casino operators or applicants, it may be expected to have included an express statement to this effect.

54. Nor does CPH have an '*entitlement to receive any income derived from the business*' of Crown Melbourne, as required by s 4(2)(b). The phrase *'entitlement to receive any income*' is not defined in the Act. It is submitted that the proper construction of this phrase must be a legally enforceable entitlement of some kind (namely, in law or in equity). Otherwise, the classes of persons potentially captured by this criterion would be too broad, and the connections between those persons and the casino operator in question would arguably be too remote to properly serve all of the purposes of the Act (which relevantly include, per s 1(a) of the *Casino Control Act*, the establishment of a system for the licensing, supervision and control of casinos, to further aims including the promotion of tourism, employment and economic development generally in the State).

55. In any event, CPH does not have an *'entitlement to receive any income*' from Crown Melbourne, either as a matter of law or fact. To this end, as a mere shareholder in Crown Resorts, CPH has no such entitlement in respect of Crown Melbourne. Whatever rights CPH may have as a shareholder of Crown Resorts, those rights do not rise as high as an entitlement to any income (or, for that matter, any financial advantage or benefit) from the business of Crown Melbourne, being a separate and distinct corporate entity.

56. This conclusion is buttressed by the fact that even insofar as Crown Resorts itself is concerned (in which CPH does have a direct shareholding), CPH does not have any relevant *'entitlement*' to receive income. At its highest, CPH has, from time to time, previously received dividends from Crown Resorts. However, the mere receipt of dividends is not to be equated with having a legally enforceable *'entitlement'* to them. To this end, the constitution of Crown Resorts relevantly provides, at article 8.1(a), that

'[*t*]*he directors may pay any interim, special or final dividends as, in their judgment, the financial position of the Company justifies*'. The decision regarding payment of dividends is, therefore, a matter wholly within the responsibility – and discretion – of the Crown Resorts directors. Such an arrangement cannot constitute an '*entitlement*' to income on the part of CPH. It follows that CPH can have no such relevant entitlement in respect of income from a business in which it owns no shares (Crown Melbourne).

57. Third, and although the VCGLR does not assert in its recent correspondence that CPH holds a *'relevant power*' through which it exercise significant influence over the management or operation of Crown Melbourne, it is useful as a matter of completeness to analyse the relevant statutory language concerning that phrase. *'Relevant power'* is defined in s 4(2) of the *Casino Control Act* as follows:

> "*relevant power" means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others—*
>
> *(a) to participate in any directorial, managerial, or executive decision; or*
>
> *(b) to elect or appoint any person to any relevant position*.

58. Section 4(1) of the *Casino Control Act* expressly provides that *'relevant power'* is power *'in the casino business of the operator or applicant'* referred to in that section (in this case, Crown Melbourne).

59. As with the requirement of an '*entitlement to receive income,'* it is submitted that the proper construction of the phrase '*entitled to exercise any relevant power*' in this context must involve a legally enforceable entitlement of some kind. CPH does not have any such entitlement to exercise power either (per subparagraph (a)) *'to participate in any directorial, managerial or executive decision'* in respect of, or (per subparagraph (b)) *'to elect or appoint any person to any relevant position'* in, Crown Melbourne, for the following reasons.

    a. CPH is not a director of Crown Melbourne. Nor are there any representatives of CPH (or of the broader CPH corporate group) on the Board of Crown Melbourne. It is submitted that these facts alone are sufficient to conclude that CPH has no *'relevant power'* as defined in s 4(2) of the Act. This conclusion is reinforced by the fact that CPH is also not a director of, and nor does it (or the broader CPH corporate group) have representatives on the Board of, Crown Resorts. Further, pursuant to the undertakings provided to the ILGA, CPH has agreed not to seek any appointment to the Board of Crown Resorts before October 2026.

b. An examination of CPH's shareholding supports this conclusion. A mere shareholding in Crown Resorts does not entitle CPH to participate in directorial, managerial or executive decisions of Crown Melbourne (being a separate and distinct legal entity from Crown Resorts, for which the power of management vests in its Board: art 19.1, Crown Melbourne constitution). Similarly, in respect of s 4(2)(b), CPH's shareholding does not constitute an entitlement to *'elect or appoint any person to any relevant position*' in Crown Melbourne. At its highest, CPH might theoretically be able to vote its shareholding in favour of particular candidates to be appointed to (or retained on) the Crown Resorts (not the Crown Melbourne) Board – but an ability to vote a non-majority shareholding in Crown Resorts in a particular way (just as the other shareholders of that company are entitled to vote their shareholdings) does not rise as high as comprising a *'relevant power'* in Crown Melbourne's casino business for the purpose of s 4(1) of the Act. This position is reinforced by the undertakings provided to the ILGA.

60. There are no other relevant forms of power capable of exercise by CPH that might otherwise satisfy the statutory definition in this context.

61. Fourth, in order to satisfy the requirements of s 4(1)(a), the relevant financial interest or relevant power must **also** confer the ability to '*exercise a significant influence over or with respect to the management or operation*' of the casino business of Crown Melbourne. In this regard, the requirements of relevant financial interest or relevant power on the one hand, and significant influence on the other hand, are expressed by the Act to be conjunctive, not disjunctive.

62. *'Significant influence'* is not defined in the Act. It is submitted that in circumstances where the interest of the CPH Parties rises no higher than CPH's shareholding in Crown Resorts (which combined with CPH Crown's shareholding is 36.81%), CPH is not able to exercise *'significant influence'* over, or with respect to, the management or operation of Crown Melbourne. Further, as a matter of fact, CPH does not exercise such influence, as discussed at Parts B2 and B4 above.

63. In any case, the management and operation of the casino business is vested in the directors, not the shareholders. Relevantly, cl 5.6(a) of the Crown Resorts Constitution provides that the Crown Resorts directors are responsible for managing the business of Crown Resorts. An equivalent provision is contained in article 19.1(a) of the Crown Melbourne Articles of Association (**Crown Melbourne Articles**) in respect of the management of the business of that company. This follows the typical constitutional

balance of powers between the members in general meeting and the board of directors of a company, which '*sees management power vested exclusively in the directors, with specific powers conferred on the members*' .[70] To this end, all other things being equal, shareholders of a holding company have no right (or ability) to usurp the powers of directors of a subsidiary.

64. As a corporate organ:

> *… a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholder as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.*[71]

65. Similarly, in *John Shaw & Sons (Salford) Ltd v Shaw* ,[72] Greer LJ said:

> *… If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.*

66. While ordinarily the members at general meeting may exercise power to appoint and replace directors, the shareholders cannot directly or indirectly exercise significant influence over or with respect to the management or operation of the casino business, as that is the domain of the board and the management (as delegates of the board). Here the power of members at general meeting to appoint and replace directors is curtailed further by the requirement for directors to obtain regulatory approval for their appointment.

C.3 Shareholding caps are not supported as a matter of Victorian legislative history

67. In their submissions,[73] Counsel Assisting quoted the recommendation of the Honourable Xavier Connor AO QC in his '*Report of Board of Inquiry into Casinos in*

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70 *Aveo Group Ltd v State Street Australia Ltd (in its capacity as custodian for Retail Employees Superannuation Trust)* [2016] FCAFC 81 at [47].

71 *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89.[72] [1935] 2 KB 113, 134.

72 [1935] 2 KB 113, 134.

73 Submissions of Counsel Assisting, page 210 [3.11].

the State of Victoria',[74] that relevantly *any person or corporation with a 5% shareholding should automatically be subject to an investigation by the licensing body'*.

68. This recommendation was not adopted by the Victorian legislature when enacting the *Casino Control Act,* which made a deliberate decision to regulate persons with significant influence over the management or operation of casino businesses, rather than to regulate shareholdings as such. At around that time Sir Laurence Street AC KCMG, who carried out a similar inquiry in respect of NSW casinos, declined to recommend the imposition of any shareholding restriction in that State:[75]

> *One of the criteria which has assumed an importance in other jurisdictions is the requirement of a satisfactory corporate structure […] This could require prescribing the nature of equity holdings, levels of maximum (or minimum) shareholdings for any one entity and limitations on the extent of foreign ownership. Various approaches were recommended to the Inquiry.*
>
> *No information was obtained by the Inquiry which suggested that prescribing any of these matters in advance would assist in ensuring the selection of a suitable operator.*

69. Against that background, the CPH Parties submit that it is instructive, when considering the extended shareholding restrictions under contemplation by the Commissioner, to have regard to the legislative history of regulation of shareholding limits under the *Gambling Regulation Act* 2003 (Vic) (***Gambling Regulation Act***) and its predecessor legislation.

70. When the *Gaming and Betting Act* 1994 (Vic) (***Gaming and Betting Act***) was introduced in 1994, s 53 made it unlawful to have a '*prohibited shareholding interest'* in the licensee (the gaming operator), which was comprised more than 5% of the total voting shares (or 2.5% in the absence of a probity review certificate under s 54). The rationale was that:[76]

> *Part 4 [in which s 53 was found] regulates shareholdings in the licensee to ensure that there is a diverse ownership structure, with no single, dominant shareholder. The part places a limit on the total number of voting shares which may be held by non-residents of Australia, representing 40 per cent of the voting shares on issue. Each individual investor who is an Australian resident is limited to 5 per cent of the voting shares, and each individual investor who is a non-resident of Australia is limited to 2.5 per cent of the voting shares. Each investor holding more than 2.5 per cent of the voting shares will be subject to a probity review.*

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74 The Hon Xavier Connor AO QC, 'Report of Board of Inquiry into Casinos in the State of Victoria' (1983), at [16.24].

75 Sir Laurence Street AC KCMG, 'Inquiry into the Establishment and Operation of Legal Casinos in NSW Report', (27 November 1991), at 129-130

76 Second Reading Speech, *Gaming and Betting Bill* 1994 (Vic), page 865 (Hansard, 25 May 1994, the Honourable Haddon Storey, Minister for Gaming)

71. Over time, the shareholding restrictions were loosened, as the legislature came to realise that they had been too onerous. In 1997, s 53 of the *Gaming and Betting Act* was amended to increase the percentage of voting shares in a licensee comprising a '*prohibited shareholding interest'* from 2.5% to 5%, and in 2002 the percentage was increased to 10% and the 40% non-resident ownership restriction as abolished. The 10% limit was retained when the *Gaming and Betting Act* was replaced by the *Gambling Regulation Act*.[77] The 10% limit remained in operation until 2010, when s 61(3) the *Gambling Regulation Amendment (Licensing) Act* 2010 (Vic) repealed the prohibited shareholding requirement altogether. The reasons given for the repeal were:[78]

> *In addition to the changes to the regulation and monitoring of associates, the bill removes the 10 per cent shareholder restrictions that are in place for the current gaming operators. These restrictions were originally put in place at the time of the public float of the TAB and again when Tattersall's was listed as a public company. The original reason for the imposition of the shareholding restrictions was to allow small investors to own part of the company. Given the passage of time since the public float, the shareholding restrictions appear to have served their purpose.*
>
> *One of the other reasons for the imposition of shareholding restrictions was for probity reasons to ensure that unsuitable persons could not hold more than 10 per cent of a licensee's shares. In order to ensure the ongoing suitability of shareholders the consolidated provisions for the investigation and regulation of associates will apply to the shareholders of these licensees.*

72. This demonstrates the legislature's focus on the regulation of persons with the ability to exercise a significant influence over or with respect to the management or operation of that casino business, rather than to regulate the mere holding of shares.

73. It is submitted that it is appropriate for the regulatory focus to remain on the ability to exercise significant influence over or with respect to the management or operation of the casino business. This is the issue that is sought to be addressed by the legislation, rather than the mere holding of shares. The mode of regulation that has been selected by the legislature is appropriate to address the issue. A shareholding cap would not be justified because it would not lead to an overall improvement in social welfare.[79]

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77 Section 4.3.20, *Gambling Regulation Act* 2003 (Vic)

78 Second Reading Speech, *Gambling Regulation Amendment (Licensing) Bill* 2010 (Vic), page 3 (Hansard, 24 June 2010, Mr Lenders, Treasurer)

79 R Finkelstein (assisted by M Ricketson), 'Report of the independent inquiry into the media and media regulation' (2012) at 268-269 [10.7]-[10.8] (available at https://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf).

C.4 Holding company shareholding restrictions would have adverse impacts for Crown Resorts and all its shareholders

74. An extension of shareholding restrictions to Crown Resorts as holding company of Crown Melbourne, whether it be set at 5% or 10%, would adversely impact Crown Resorts and all its existing shareholders in a number of ways. The Commissioner is not in a position to assess the full impact of such restrictions based on the evidence before the Commission. Nor is the Commissioner able to conclude that any benefits of any such restrictions would outweigh the costs so as to lead to an overall improvement in social welfare.[80]

75. First, Crown Resorts' shares are listed on the ASX. Its shareholders have conducted themselves to date on the basis that their lawfully acquired shareholdings in Crown Resorts would continue to be capable of being lawfully owned and traded without limitation. The shareholders include the CPH Parties (which collectively hold a total of 36.81%[81]), Perpetual Limited and Midnight Acacia Holdings Pte Limited (Blackstone) (which, according to their most recently lodged substantial shareholder notices, hold 8.19% and 9.99%, respectively).

76. Other (smaller) shareholders have presumably also conducted themselves on the basis that they have invested in a company in which major shareholdings exist and are likely to continue (with all of the benefits that major shareholders bring, such as access to capital funding). It would be unjust for the position of these shareholders to be changed, in circumstances where, for the reasons set out above:

    a. the relevant touchstone is influence, not shareholding. Influence does not automatically follow from shareholding at any particular level, as the present circumstances illustrate. There is already a regulatory mechanism which addresses influence; and

    b. insofar as the asserted previous influence of CPH and Mr Packer in particular is concerned, that did not arise from the shareholding of CPH in Crown Resorts. The removal of any influence with respect to the management or operation of the casino business has been achieved through actions already taken by CPH and Crown Resorts without the need to introduce shareholding restrictions to Crown Resorts that may well, for the reasons given below, operate to the detriment of many third party shareholders.

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80 Ibid.

81 Details of the CPH Parties' shareholding over time are set out in **Annexure B** to these submissions.

77. Secondly, a restriction on the ability to acquire more than 5% or 10% of Crown Resorts shares without regulatory approval is likely to depress the market price for Crown Resorts' shares compared with the current position. The restriction may also make it more difficult, as a practical matter, for shareholders to sell shareholdings in excess of such a size, which may also materially impact the value of the shareholdings. For example, a shareholder who sought to dispose of a 15% stake in Crown Resorts may need to split the stake and sell to separate purchasers so as to achieve a sale in an acceptable commercial timeframe. It is likely that the value thus realised would be less than the sale of a single parcel given the strategic value inherent in acquisition of such a parcel..

78. Thirdly, a restriction on the ability to acquire more than 5% or 10% of Crown Resorts shares without regulatory approval would likely create a major disincentive to trading in its shares, thus diminishing market depth. Limiting institutional shareholders or others to 5% or 10% will impact the aggregate demand for Crown shares which would be expected to have a flow on impact on price. Regulatory probity for large institutions is very complex, and the process of obtaining regulatory approval can take months. If such approval is required to be obtained before a shareholding of a particular size can be sold to a new owner, this may delay (in some cases, significantly) such a share sale process, or at least create an unacceptable level of commercial uncertainty in respect of such transactions so as to inhibit their being contemplated in the first place. These factors are likely to have implications for (1) the share price capable of being realised by Crown Resorts shareholders for their holdings, and (2) market demand for such shares more generally – the restrictions may act as a significant disincentive to invest in Crown Resorts.

79. Fourthly, given the above consequences, a restriction on the ability to acquire more than 5% or 10% of Crown Resorts shares without regulatory approval could place Crown Resorts and its current shareholders at a competitive disadvantage compared to other listed companies who are not subject to such restrictions.

D IF A SHAREHOLDING LIMIT IS IMPOSED IN CROWN RESORTS, AT WHAT LEVEL SHOULD IT BE SET?

80. If a shareholding limit is imposed on a holding company of Crown Melbourne, there are powerful reasons for setting the level at 20% (and additionally having regard to the considerations discussed at Part F of these submissions). That level is consistent with the threshold in the *Corporations Act* 2001 (Cth) (***Corporations Act***) for takeovers and the acquisition of relevant interests.[82] It is also consistent with the threshold in the *Foreign Acquisitions and Takeovers Act* 1975 (Cth) (**FATA**). The Commissioner ought to approach with caution any proposal that involves the imposition of requirements for approval of shareholders in a listed company at levels that are inconsistent with the current market regulatory regime for those companies (being the 20% takeovers and relevant interest threshold prescribed by the *Corporations Act*), for fear that it may have a chilling effect on the commercial viability of that entity.

81. Permitting a 20% shareholding limit would place Crown Resorts and its shareholders on equal footing with other listed entities when seeking to raise capital. It would enable the retention of the availability of substantial capital investment (through private placements, etc at times of corporate financial stress), which lower thresholds (for example, 5% or 10%) may not. The importance of having appropriate bases to raise capital are particularly important at present given the economic uncertainty caused by the pandemic. So much is illustrated by the temporary increase of placement capacity to 25% under ASX Listing Rule 7.1 % between 31 March 2020 and 30 November 2020.[83] Victoria may choose to permit a 20% shareholding limit in Crown as a way of balancing the competitive advantage to the State with concerns about any one shareholder having too much power or influence. As submitted above, shareholdings of themselves do not create the influence to which the *Casino Control Act* regime is directed.

82. A 20% shareholding limit would also be consistent with limits in other industries where shareholding restrictions have been implemented.

83. The *Financial Sector (Shareholdings) Act* 1998 (Cth) was introduced in order to increase *'diversity of ownership'* of prudentially regulated financial institutions, to *'ensure that the risks associated with a concentration of ownership are minimised'*.[84] It originally fixed a shareholding cap of shareholdings of 15% for any one person (and

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82 Section 606

83 ASX Class waiver decision- temporary extra placement capacity, 31 March 2020; ASX media alert dated 9 July 2020, "ASX is extending temporary emergency capital raising relief to 30 November 2020"

84 Explanatory Memorandum, *Financial Sector (Shareholdings) Bill* 1998 (Cth), [1.4]

their associates), and that cap was increased in 2019 to 20%, in order *'to encourage more participation and greater competition in the financial sector*'.[85] It was perceived that a 20% limit, rather than a 15% limit, *'balances the desire for increased competition in the financial sector market with the need to maintain appropriate checks and best ensuring financial system stability*'.[86]

84. Similarly, the FATA is expressed to deal with *'certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities (being corporations and unit trusts) and businesses, that have a connection to Australia'*.[87] As part of its operation, it regulates the holding of '*substantial interests'* in securities, assets and other things by particular persons. The FATA originally imposed a '*substantial interest'* threshold in this regard of 15%, but in about late 2015, this threshold was increased to 20% '*to better align the foreign investment rules with the takeover rules in the Corporations Act 2001*'.[88]

85. A simple way of achieving a 20% shareholding limit insofar as shareholdings in Crown Resorts are concerned would be to remove the cl 22B.1 exception in the Casino Agreement in relation to the requirements in cl 22.1(f) of the Casino Agreement and cl 2.7 of the Crown Melbourne Articles. Relevantly:

(a) Clause 22.1(f) of the Casino Agreement provides that Crown Melbourne:

> *will not knowingly permit a person or, upon becoming aware of a person being entitled, allow a person to continue to be entitled to a number of Shares which exceeds 5% of the total number of Shares on issue at any time, without the prior written approval of the Authority;*

(b) In this context, '*entitled to shares*' has the same meaning as in the takeover provisions of the *Corporations Act*;[89]

(c) Article 2.7 of the Crown Melbourne Articles provides:

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85 Explanatory Memorandum, *Treasury Laws Amendment (Financial Sector Regulation) Bill* 2018 (Cth), [1.8]

86 Explanatory Memorandum, *Treasury Laws Amendment (Financial Sector Regulation) Bill* 2018 (Cth), [1.11]

87 Section 3, *Foreign Acquisitions and Takeovers Act* 1975 (Cth)

88 Explanatory Memorandum, *Foreign Acquisitions and Takeovers Legislation Amendment Bill* 2015 (Cth) page 17; Second Reading Speech, *Foreign Acquisitions and Takeovers Legislation Amendment Bill* 2015 (Cth), page 19 (Hansard, 20 August 2015, House of Representatives, Mr J Hockey, Treasurer). The takeover rules are found in Chapter 6 of the *Corporations Act* (relevantly, s 606 imposes a 20% threshold for the acquisition of relevant interests in voting shares in particular types of company).

89 Clause 22.3 of the Casino Agreement states that '*For the purposes of clause 22.1, a reference to a person being entitled to Shares has the same meaning as a reference in Part 6C.1 of the Corporations Act to a person being entitled to voting shares in a company and that person's entitlement will be calculated in the manner prescribed for calculation of substantial holdings in Part 6C.1 of the Corporations Act as if that Part applied'.* It seems that the first reference to Part 6C.1 should have been to Part 6.1 instead.

The number of Shares to which a person (other than a Sponsor) is entitled must not exceed five percent (5%) of the total number of Shares in the Company on issue at any time without the prior consent of the Authority.

(d) Section 608(3) of the *Corporations Act* ordinarily operates such that a person is deemed to have a relevant interest in the securities of a body corporate (first entity), if that person has voting power above 20% in another body corporate which has securities in the first entity.

(e) However, in the case of Crown Melbourne, the impact of section 608(3) of the *Corporations Act* is affected by clause 22B.1 of the Casino Agreement, which provides:

The Authority agrees that it will not regard the Company as breaching clause 22.1(f) of this document or article 2.7 of the Company's constitution if a person becomes entitled to more than 5% of the total number of Shares in the Company solely through that person's shareholding in Crown Resorts.

86. The effect of removing cl 22B.1 would be to subject Crown Resorts shareholders and their shareholdings to the deeming provisions of the *Corporations Act*, such that holding voting power in Crown Resorts of 20% or more would trigger the need for regulatory approval to be obtained from the VCGLR under cl 22.1(f) of the Casino Agreement and article 2.7 of the Crown Melbourne Articles. Those provisions cap shareholdings in Crown Melbourne at 5% without regulatory approval, and without the benefit of cl 22B.1 and in the absence of grandfathering (discussed further in Section E of these submissions), the CPH Parties would be required to obtain regulatory approval as they are deemed (by s 608(3) of the *Corporations Act*) to hold more than 5% of shares in Crown Melbourne by virtue of their combined 36.81% shareholding in Crown Resorts. This would align the regulatory regime for Crown Melbourne in Victoria to that which exists in Western Australia under the Burswood Limited constitution.

E IF A SHAREHOLDING LIMIT IN CROWN RESORTS IS IMPOSED, WHEN SHOULD IT BEGIN?[90]

87. The adverse effects of any shareholding restrictions (as described above) will be magnified by retrospective application.

88. Counsel Assisting acknowledge in their submissions that implementation of a shareholding restriction in respect of Crown Resorts '*would necessitate a sell-down of a majority shareholder's interests*'.[91] Should that be the case, it is trite to observe that such an event would be all but certain to cause financial loss to the CPH Parties (given that true value is seldom if ever realised in the context of a forced sale). Such an outcome could also be expected to adversely impact the value of all shareholdings in Crown Resorts.

89. In the circumstances, the CPH Parties submit that any recommendation to impose shareholding limits must be expressed to operate prospectively, and not in respect of current shareholders of Crown Resorts.

90. There is, at law, a general presumption against retrospectivity of legislation. As Barwick CJ stated in *Watson v Lee*,[92] *'to bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny'* and '*would be so fundamentally unjust*'. In *Boral Windows v Industry Research and Development Board*[93] Hill J stated: '*Retrospective legislation is somewhat distasteful. Retrospective legislation which takes away accrued rights is even more so'.*

91. If the Commissioner decides to recommend the imposition of some form of shareholding restriction in respect of Crown Resorts, then such restriction should be imposed only prospectively, and after a reasonable time that enables current shareholders to take any action they deem necessary to minimise the impact on them of that restriction.

92. The letter from the Solicitors Assisting dated 23 July 2021 sought submissions as to whether any shareholding restriction should '*apply to the CPH group as from September 2024 when their undertaking to ILGA not to exercise the power to appoint directors expires*'. The existing ILGA undertakings set out above now operate until

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90 The Commissioner asked the CPH Parties for submissions on this issue: see question 2 in the letter from Solicitors Assisting dated 23 July 2021.

91 Submissions of Counsel Assisting, page 211 [3.13]. Counsel Assisting state, without explanation, that for the purpose of their submissions, '*a majority shareholder means a person holding (beneficially or otherwise) 10% or more of the shares*': submissions of Counsel Assisting, page 211, FN 1585. This definition finds no support either in company law, or in the circumstances of the Crown Resorts shareholding. The CPH Parties submit that, properly construed, a shareholding of 36.81% (which may be the largest single shareholding in Crown Resorts) is not a 'majority' shareholding.

92 (1979) 144 CLR 374, 379

93 (1998) 83 FCR 215, 221

October 2026 (not September 2024). For the reasons set out in Parts B and C of this submission, the CPH Parties submit that they should not be required to sell down their shares by any time, and that after October 2026, the VCGLR will be one of the regulators who can withhold consent to a nominee of CPH being appointed to the Crown Board, or impose conditions on that nominee, including requirements that give further effect to the enduring undertakings that remain binding on CPH after 2026.

93. To the extent that the suggested timing coincides with the timing of the CPH Parties once more possibly seeking to nominate directors for appointment to the Board of Crown Resorts, it is submitted that there is no risk associated with the possible resumption of this process from October 2026. As stated above, any such persons nominated for appointment to the Board of Crown Resorts would, if they constitute an '*associate*' of Crown Melbourne under the *Casino Control Act* (namely, if they were capable of exercising significant influence over the management and operation of Crown Melbourne's casino business), need to obtain regulatory approval from the VCGLR in any event.

F IF A LIMIT IS IMPOSED ON SHAREHOLDING IN CROWN RESORTS WITHOUT VCGLR'S APPROVAL, HOW SHOULD VCGLR ASSESS APPLICATIONS FOR APPROVAL?

94. If the VCGLR's approval is required in order to deal in shares (above a particular limit), that approval should only be necessary in circumstances where the dealing would in fact result in significant influence over the management or operation of the casino business (for example, because the acquirer of shares seeks to appoint nominees to the Board of the licensee or its holding company, or substantively participate in the management of the casino; or if the transaction is intended as a precursor to a change of control transaction). Appropriate undertakings could be sought from the proposed acquirer in that regard. That approach would be consistent with the existing objects of the *Casino Control Act*, and consistent with the position discussed earlier in these submissions – namely that mere shareholding, of itself, does not necessarily result in significant influence over the management or operation of the casino business. .

95. It is also important that the process of application and approval be subject to strict confidentiality requirements, including so that there is not public disclosure of either the application or its determination. That is the position that applies in relation to the seeking of approvals under FATA, and is significant for preserving commercial confidence and avoiding detrimental market impacts, particularly where transactions may be precursors to control transactions.

96. In addition, in order to ameliorate the likely delays associated with regulatory approval, time limits should be imposed on the VCGLR's assessment of the applications.

97. Finally, there should be a statutory right of appeal de novo to an independent tribunal against a decision by the VCGLR not to approve a dealing in shares above a particular limit.

G SHOULD THE CASINO CONTROL ACT BE AMENDED TO REQUIRE THAT SOME DIRECTORS OF A CASINO LICENSEE BE INDEPENDENT OF ANY HOLDING COMPANY?[94]

G.1 Desirability of having licensee directors who are independent of holding company

98. The CPH Parties support the imposition of a requirement that at least some directors of a casino licensee be independent of any holding company, substantial shareholders, and the executive management team. The CPH Parties express no view as to the mode of imposition of the requirement, whether by amendment of the *Casino Control Act*, the Casino Agreement, or both.

99. As stated above, there are benefits associated with independent directors on a company board, as recognised by the ASX Corporate Governance Principles.

100. The issue arises in the context where, although not raised by Counsel Assisting in their submissions, in the course of the hearings the Commissioner has expressed concerns about a conflict of interest arising if Crown operations are centralised.[95] The Commissioner has queried how, if at all, conflicts can be resolved where the interests of Victoria are sacrificed for the interests of Crown Perth or Crown Sydney.[96] As a result of this concern, the Commissioner also indicated that he was contemplating making a recommendation that Crown Melbourne not be permitted to delegate any functions or decision-making of Crown Melbourne to Crown Resorts[97] as the '*subsidiary board should, as the agreements contemplate and as the legislation contemplates, it should run Victoria. No parent company, no holding company should run Victoria'.*[98]

101. A separate but related concern raised in Counsel Assisting's submissions is in relation to Crown Resorts' consideration of a restructure of its internal corporate governance structure from a decentralised model to a centralised model.[99] While the details of that model are yet to be developed, Counsel Assisting submit that a centralised structure may be in breach of Crown Melbourne's obligations in cl 22 of the Casino Agreement that stipulate conditions relating to Melbourne's company structures including that 75% of meetings of Crown Melbourne's Board of directors and senior executive managers

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94 The Commissioner asked the CPH Parties for submissions on this issue: see question 4 in the letter from Solicitors Assisting dated 23 July 2021.

95 T2271.27-T2276.26; T3490.31-T3494.39; T3495.24-T3496.96; T3619.23-T3619.35; T3620.26-T3623.10; T3678.16-T3679.17; T3680.35-T3684.22; T3841.30-T3842.39

96 T2273.6-T2273.14

97 T3493.21–T3493.25

98 T3494.12-T3494.15

99 Submissions of Counsel Assisting, page 212 [4.6]

are held in Melbourne each year and Crown Melbourne's senior executive managers and company secretary reside in Victoria.[100]

102. While the CPH Parties are not privy to the details of the potential restructure to a centralised model, they submit that any situations of conflict could be addressed by ensuring that the directors are aware of the existence of, or potential for conflict, and communicate the existence of conflicts at the appropriate time, and potentially further alleviated by the inclusion of independent directors on the Board of Crown Melbourne. Further, there is no reason in principle why Crown Melbourne could not continue to abide by its obligations relating to Crown Melbourne's company structure under cl 22 of the Casino Agreement, noting that the Casino Agreement expressly contemplates Crown Melbourne is a wholly owned subsidiary of Crown Resorts and that the Crown group encompasses casinos operated in other States of Australia.

103. Consideration of whether some directors of the casino licensee should be independent of any holding company is also informed by Counsel Assisting's submission that by promoting the development of Crown Sydney, Crown Resorts may have breached the requirements of the Casino Agreement that Crown Melbourne act in a way which favours the interests of the State of Victoria. Counsel Assisting contend in their written submissions that Crown Resorts has potentially breached cl 22.1 of the Casino Agreement in the following respects:

(a) First, Crown Resorts' conduct in developing facilities elsewhere, particularly NSW, are inconsistent with the best endeavours obligation to ensure that its business is conducted for the benefit of Crown Melbourne and the interest of the State of Victoria as set out in cl 22.1(r)(i);[101]

(b) Secondly, Crown Resorts' proposal for the development of Crown Sydney is detrimental to Crown Melbourne's interests[102] (in breach of the obligation in cl 22.1(r)(ii)); and

(c) Thirdly, the terms of the Crown Sydney proposal suggest that inadequate consideration was given by Crown Resorts to the requirements in cl 22.1(ra).[103]

100 Submissions of Counsel Assisting, page 214-215 [4.26]
101 Submissions of Counsel Assisting, page 332 [3.22]
102 Submissions of Counsel Assisting, page 332 [3.23]
103 Submissions of Counsel Assisting, page 333 [3.30]

104. During the course of the hearing, the Commissioner expressed similar concerns regarding whether Crown Resorts had complied with its obligations under the Casino Agreement to act in the best interests of the State of Victoria.[104]

105. The CPH Parties submit that on the evidence, there is no legal or commercial basis to conclude that Crown Resorts has acted to the detriment of Crown Melbourne or failed to ensure that it has given Crown Melbourne and the State of Victoria primacy in its decision making. The interests of Crown Melbourne (the shareholding in which is Crown Resorts' most substantial asset) and Crown Resorts have always been aligned. The evidence before the Commission does not establish that Crown Resorts' future endeavours, including the proposed Crown Sydney casino, will cause these interests to diverge.[105] Indeed, unchallenged evidence to the contrary has been given to the Commission, including that the Crown Sydney development will be value accretive for the entire Crown Group, including Crown Melbourne.[106] In addition, the VCGLR has expressly indicated as part of its review process that it considers the relevant obligations in cl 22 have been complied with.[107]

106. For these reasons (addressed in more detail below), the CPH Parties submit that although it is potentially desirable that the casino licensee have independent directors (in the sense that they are independent of any holding company, as well as of the organisation), it is not the case that the Casino Agreement requires completely decentralised independent governance of the casino licensee, or that Crown Resorts has breached that Agreement by developing properties outside of Victoria. Indeed, there are important benefits to Crown Melbourne (and indirectly to the State of Victoria) from a governance model which is at least partly centralised, which would be foregone by a requirement, for instance, that ***all*** of the casino licensee's directors be entirely independent of any holding company.

G.2 Key clauses in Casino Agreement

107. Clauses 22.1(r) and 22.1(ra) of the Casino Agreement provide the following:

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104 T2271.27-T2276.26; T3490.31-T3494.39; T3495.24-T3496.96; T3619.23-T3619.35; T3620.26-T3623.10; T3678.16-T3679.17; T3680.35-T3684.22; T3841.30-T3842.39

105 The evidence from the NSW Inquiry cited by Counsel Assisting at page 332 [3.28], contrary to those submissions, says nothing at all about *'tax take for NSW at the expense of the Melbourne casino*.' That evidence did make clear that international VIP was *'only about a third of the [projected] EBITDA of Crown Sydney*', a matter not referred to by Counsel Assisting.

106 Halton T3621.27- T3621.35

107 Ex RC0435: COM.0005.0001.0776 at .0859 and .0862

(r) the Holding Company Group, if it pursues anywhere in Australia a business similar to that of the Company, will use its best endeavours to ensure that such business is conducted in a manner:

(i) which is beneficial both to that business and to the Company and which promotes tourism, employment and economic development generally in the State of Victoria; and

(ii) which is not detrimental to the Company's interests;

(ra) the Company:

(i) must ensure that the Holding Company Group locates the headquarters of its gaming business in Melbourne;

(ii) will endeavour to maintain the Melbourne Casino as the dominant Commission Based Player casino in Australia; and

(iii) will ensure that the Holding Company Group maintains the Melbourne Casino as the flagship casino of the Holding Company Group's gaming business in Australia,

provided however that the obligations of the Company under this Clause 22.1(ra) may be terminated by the Company by giving at least one (1) months' notice in writing to the Commission whereupon the obligations of the Company under this Clause 22.1(ra) shall cease:

(iv) on the fifth (5th) anniversary of the Ninth Variation Date; or

(v) if no such election is made prior to one (1) month prior to the fifth (5th) anniversary date of the Ninth Variation Date then, on the expiration of any four (4) year period thereafter.

(For the avoidance of doubt, the Company may elect to terminate its obligations under this Clause 22.1(ra) effective on the following anniversaries of the Ninth Variation Date:

5th anniversary, 9th anniversary, 13th anniversary, 17th anniversary, etc.).[108]

108. Clause 22.1(r) was amended by the Eight Variation Agreement to the Casino Agreement effective 30 June 1999.[109] Clause 22.1(ra) was inserted by the Ninth Variation Agreement to the Casino Agreement dated 8 July 2005.[110]

109. Clause 22.1(r) imposes specific obligations on the Holding Company Group, which is defined as the Holding Company and the Holding Company's Subsidiaries. The clause therefore imposes obligations on Crown Resorts, Crown Sydney and Crown Perth to give primacy to Crown Melbourne in the operation of their casinos. Critically, this provision of the Casino Agreement expressly contemplates that the Crown Group can run multiple casino businesses. This is addressed further below.

108 Ex RC0435: COM.0005.0001.0985 at .1016
109 Ex RC0496: VIC.0001.0001.0274
110 Ex RC0497: VIC.0001.0001.0498

110. As far as the CPH Parties are aware, Crown Melbourne has not made any election to terminate its obligations under cl 22.1(ra).

111. The Casino Agreement also imposes obligations on Crown Melbourne to ensure 75% of meetings of the Board of directors and senior executive managers are to be held in Melbourne and that its senior executive managers (including at least one company secretary) reside in Victoria.

112. Specifically, the relevant clauses provide the following:

(a) Clause 22.1(b) provides that '*the Company must be ensure that at least 75% of the meetings of the Company's board of directors are to be held in Melbourne each calendar year';*

(b) Clause 22.1(b) provides that *'the Company must ensure that at least 75% of the meetings of the Company's Senior Executive Managers are to be held in Melbourne each calendar year';*

(c) Clause 22.1(bb) provides that *'the Company must ensure that its Senior Executive Managers reside in Victoria';* and

(d) Clause 22.1(bc) provides that *'the Company must ensure that at least one Company Secretary resides in Victoria'.*[111]

113. Clauses 22.1(b), (ba), (bb) and (bc) (described in these submissions as the **company structure obligations**) were inserted by the Ninth Variation Agreement to the Casino Agreement dated 8 July 2005.[112] These obligations are imposed on Crown Melbourne only, not Crown Resorts, or any of other Crown Resorts' subsidiaries such as Crown Sydney.

G.3 Potential for conflicts of interest

114. During the public hearings, the Commissioner raised an issue about whether centralising functions is consistent with the Casino Agreement, and whether it should be made impermissible in any event.[113] The Commissioner questioned a number of witnesses about whether each operating subsidiary should have separate and

111 Ex RC0435: COM.0005.0001.0985 at .1014
112 Ex RC0497: VIC.0001.0001.0498 at .0501
113 T3494.18-T3494.21

independent boards, particularly in circumstances where there is an obligation on Crown Melbourne to act in the best interests of Victoria.[114]

115. The CPH Parties make the following submissions in relation to the issue raised by the Commissioner.

116. First, as submitted above, Crown Resorts is not precluded under the Casino Agreement from centralising its operations provided the requirements in cls 22.2(b), (ba), (bb) and (bc) are met by Crown Melbourne and the obligations giving primacy to Crown Melbourne in cls 22.2(r) and (ra) continue to be complied with even after operations are centralised.

117. Secondly, it is entirely possible, and in fact common, for directors to sit on the boards of multiple companies within a corporate group and properly discharge their duties to each of the companies. The approach taken by Courts in relation to how directors are to discharge their duties in making decisions within a group of companies has diverged over the years.

118. In *Charterbridge Corp Ltd v Lloyds Bank Ltd*,[115] it was recognised by the Court that commercial decisions within a group of companies are likely to be taken having regard to group interests, rather than the interests of the separate entities which are involved. Justice Pennycuick preferred an objective formulation that the directors' decision would not be in breach of duty provided '*an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the [separate] company*'.

119. *Charterbridge* has been applied by Australian courts, however different approaches have been taken including by the High Court in *Walker v Wimborne*[116] where Mason J emphasised the fundamental principle that *'each of the companies was a separate and independent legal entity, and that it was the duty of the directors of Asiatic to consult its interests and its interests alone in deciding whether payments should be made to other companies.'*

120. The High Court also considered conflicting fiduciary duties in *R v Byrnes & Hopwood,*[117] and emphasised the importance of the director's disclosure of any conflicting or potentially conflicting interests and obtaining the company's consent.

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114 McCann T2273.6-T2273.14; Halton T3619.23-T3619.35
115 [1970] Ch 62, 74
116 (1976) 137 CLR 1, 7
117 (1995) 183 CLR 501

121. The position in relation to wholly-owned subsidiaries is clearer. Section 187 of the *Corporations Act* provides that a director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith and in the best interests of the subsidiary if:

(a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and

(b) the director acts in good faith and in the best interests of the holding company; and

(c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

122. It appears from the authorities and legislative provisions that having common directors of holding companies and subsidiaries does not preclude those directors from acting in the best interest of the subsidiary. It is an issue that needs to be carefully managed, but as Ms Halton acknowledged in her evidence, and referring to her experience as a director of another Melbourne-based board which has a subsidiary in another jurisdiction with a separate board,[118] it is an issue she sees managed on a very regular basis (and managed effectively).[119] Ms Halton also noted that it was the duty of director to *'serve the purpose of the particular company, so unless the parent has in some way indebted you, which I'm not aware that we have in any way, shape or form, those directors actually have that obligation.'*[120]

123. The management of conflicts by officeholders can be observed in other contexts. For example, in the context of a responsible entity of managed investment schemes, the officers of the responsible entity need to consider the interests of shareholders of the responsible entity, and members of each scheme – which interests may diverge on occasion. The way these conflicting interests are resolved is by the legislature giving primacy to the duties owed to members of the scheme: ss 601FC(1)(c), 601FC(3) of the *Corporations Act*.[121] Sections 601FD(1)(c) and 601FD(2) of the *Corporations Act* impose a similar statutory obligation on the officers of the responsible entity. The obligations imposed on the casino licensee to promote the interests of the State of Victoria could be managed in a similar way.

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118 Halton T3620.46-T3620.47
119 Halton T3623.4-T3623.5
120 Halton T3621.1-T3621.8
121 See also *Timbercorp Securities Limited (in liq) v WA Chip & Pulp Co Pty Ltd* [2009] FCA 901, [9]-[11] per Finkestein J.

124. Thirdly, the entire Crown Group, including Crown Melbourne, benefit from the synergies and efficiencies created by a centralised structure. Mr Morrison gave evidence that a centralised structure was not only more efficient but would achieve a better overall quality outcome. He stated:[122]

> *You have to have a management structure in place that deals with the nuances and the differences from one State to another or one company to another, but I think you want to run your group, your whole company based on certain values, behaviours, principles, et cetera, and those things need to apply across the group. There will be certain elements that are different, you know, if I take your example and try and apply it to this situation, there will be different things in the way Crown Sydney operates to Crown Melbourne, in the way to Crown Perth … A lot of things are state-based legislation, which would cause those things to be different, but a lot of them are federal-based legislation which would cause them to be the same. I am a supporter of consolidating it. It is efficient. It reduces duplication, but it also gives a better quality of answer. It allows you to invest in better quality people to oversee the totality of that and make sure it is correctly structured for those state and regional differences.*

125. Ms Korsanos gave essentially the same evidence, that in her view, pooling resources could enable the Crown business generally to achieve a better quality of outcome, more consistent outcomes, and a higher benchmark in areas such as compliance, financial crimes, and responsible gaming.[123] In any event, Ms Korsanos gave evidence that no definitive decision had been made on the corporate model and structure and there was '*absolutely insufficient discussion to date to even put something forward.*'[124] Mr McCann made clear that any structure would need to comply with Crown Melbourne's obligations under the Casino Agreement, the commercial reality of decision-making, and the issue of conflicts that may or may not arise and how they will be dealt with.[125]

126. Finally, the CPH Parties note that conflicts of interest may potentially arise, not in the formal sense of conflicting duties of directors, but between the interests of senior executives of Crown Melbourne and/or Crown Resorts in their role as senior executives, and their duties if appointed to the Board of the casino licensee. For this reason, it may also be desirable that any amendment require that the casino licensee have one or more directors who are not only independent of the board of any holding company, but who are also independent in the sense that they do not participate in the senior management of either the licensee or any holding company.

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122 Morrison T2272.10-T2272.29
123 Korsanos T3672.20-T3672.41
124 Korsanos T3691.37-T3691.38
125 McCann T3492.36-T3492.37

G.4 No breach of obligation to give Crown Melbourne primacy

127. While Crown Resorts is not a party to the Casino Agreement, cl 22.1(r) imposes an obligation on it to give primacy to Crown Melbourne in its pursuit of other casino businesses in Australia.

128. Counsel Assisting contend that Crown's conduct in developing facilities elsewhere, particularly in NSW, would seem inconsistent with its best endeavours obligation to ensure business is conducted for the benefit of Crown Melbourne and the interests of the State of Victoria and that no evidence has been provided to show how Crown Resorts' non-Victorian business activities have benefited Crown Melbourne or State of Victoria.[126]

129. In the CPH Parties' submission, this contention is deficient in three critical respects.

130. First, the most significant aspect of cl 22.1(r) is that it recognises by its clear terms that Crown Resorts may operate similar businesses to Crown Melbourne's business elsewhere in Australia. Where it does so, Crown Resorts is required by the clause to ensure that the business is conducted in a particular manner that is in effect not detrimental to Crown Melbourne and is supportive of the interests of the State of Victoria.

131. The CPH Parties submit that the clause clearly recognises the co-existence of potentially competitive casinos operated by the Crown Group. Crown Resorts operates casinos in Melbourne and Perth pursuant to licences that have been issued under applicable State legislation. In addition, Crown Resorts is seeking to operate the Crown Sydney casino pursuant to a licence issued in NSW and is in the process of taking steps to satisfy the ILGA that it is suitable to operate such a licence.

132. Significant information is publicly available concerning these businesses conducted by Crown Group. In addition, the Crown Group has regularly shared information regarding Crown Perth and Crown Sydney with the VCGLR. It is relevant in CPH's submission that the VCGLR has, on at least two occasions, considered whether the Casino Agreement has been complied with and on each occasion has determined that compliance has been achieved. The VCGLR specifically considered and commented on Crown Sydney and compliance with these clauses in both its Fifth and Sixth Reviews of the Casino Operator and Licence:

    (a) Page 136 of the Fifth Review states that '*The VCGLR considers that Crown Melbourne Limited has met all of its obligations in relation to clause 22.1(r) and*

126 Submissions of Counsel Assisting, page 332 [3.22]

22.1(ra) of the Casino Agreement.' The report then goes on to say '… *it is unclear at this stage what the final scope of the casino will be, as approval for the Barangaroo project has not been given. Given the success and profitability of the Melbourne Casino and the scale, nature and timing of the proposed Barangaroo project,* ***it is considered unlikely that during the next review period, there will be any significant downgrading of the importance of the Melbourne Casino to Crown Limited****'* (emphasis added).[127]

(b) The Sixth Review also notes that Crown Melbourne has complied with the obligations under these clauses.[128]

133. It should be assumed, in the absence of evidence to the contrary, that at all times the Crown Board satisfied itself that the conduct of Crown Perth and the proposed business in Sydney, once commenced, would be such that there is clear compliance with the letter and spirit of the obligation in cl 22.1(r). To CPH's knowledge there has been no evidence put forward that indicates the contrary.

134. Secondly, at least in relation to Crown Sydney, which is yet to commence operations, the obligation in cl 22.(r) will not be enlivened until Crown Sydney opens and commences its casino business.

135. Thirdly, contrary to Counsel Assisting's submissions, evidence was given during the hearing as to how Crown Sydney would benefit Crown Melbourne. Ms Halton squarely addressed this issue in her evidence, stating the following:

> *One of the things I do want to give you some assurance about is --- I arrived after Sydney was agreed as an entity. It was a project on foot, it was happening. But all the advice I've always had about that was it would accretive to the entire business. In other words, everyone gets a better financial outcome out of that particular investment. There is nothing I've seen, or ever been told, that actually suggests otherwise. In fact, the very consistent advice, and it is to do with particularly international visitors and how they tend to move across the properties and actually getting more of the people who are in Sydney to come actually to our property in Melbourne.*[129]

136. Mr McCann also gave evidence that:

> *Really, one of the big drivers for Victoria is tourism revenue, and part of the vision around having Crown Sydney is to become more appealing to international tourism spend, which would go to both Sydney and Melbourne.*[130]

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127 Ex RC00013: CRW.510.025.5690 at .5826
128 Ex RC0002: COM.0005.0001.0776
129 Halton T3621.24-T3621.35
130 McCann T3495.12-T3495.15

137. Ms Halton and Mr McCann's observations are unsurprising given there is a reasonable expectation that if Crown Sydney draws in increased visitors from overseas who may not otherwise have travelled to Australia at all, those visitors are likely to also travel to Melbourne, thereby affording Crown Melbourne an opportunity (that it would not have otherwise had) to attract patrons to its property. That benefits not only Crown Melbourne but the State of Victoria, through the increase of tourism to its state and the attendant economic benefits.[131]

138. There is inherent in Counsel Assisting's submissions a presumption that the establishment of Crown Sydney will not be beneficial to Crown Melbourne and may ultimately be detrimental to Crown Melbourne's interests, although the precise reasons for these concerns remain unclear. There is no cogent economic analysis before the Commission that would be necessary for such a contention to be accepted. It is clear from the evidence that there is every intention for the operation of Crown Sydney to be value accretive for the entire Crown Group, including Crown Melbourne.

139. In relation to Crown Resorts' compliance with cl 22.1(ra), Counsel Assisting submits there is a potential breach because the Crown Sydney Proposal is '*replete with statements which tend to suggest that this particular obligation was not given adequate consideration by Crown Resorts*'[132] and points to various parts of the Crown Sydney Proposal that refer to generating high-end tourism for Sydney, attracting more high net worth international gaming customers and generating potential benefits for NSW.[133]

140. The Crown Sydney Proposal is a letter from Mr Packer to Mr Chris Eccles of the NSW Government in June 2013[134] setting out the key features of the Crown Sydney Proposal. It was a proposal document which had the primary purpose of persuading the NSW government to accept the Crown proposal to build a casino in Sydney. In this regard, the Stage 2 Assessment Report dated July 2013 prepared by the NSW Government[135] set out the following criteria against which it assessed unsolicited proposals:

- *Unique benefits of the proposal – such as property ownership or intellectual property;*

131 In an interview with the VCGLR in 2018, Professor Horvath also made reference to Crown Melbourne remaining Crown's principal focus, and that Crown's modelling indicated that Crown Sydney would serve to increase the flow of business to Crown Melbourne. See Ex RC0124: VCG.0001.0003.1632 at _0028, _0029, _0036.

132 Submissions of Counsel Assisting, page 333 [3.30]

133 Submissions of Counsel Assisting, page 333 [3.31]–[3.37]

134 Ex RC 1293: CRW.INQ.010.004.0001

135 The Stage 2 Assessment Report July 2013 was prepared by the NSW Government in accordance with the NSW Government Unsolicited Proposals Guidelines 2012: https://www.nsw.gov.au/sites/default/files/2020-05/Unsolicited_proposals_Crown_Sydney_Resort_Project_Stage_2_Assessment_Report.pdf

- *Value to Government – including economic benefit, improved service deliver, whole-of-life costs, risk transfer, timely achievement of objectives and qualitative outcomes;*
- *Whole-of-Government impact, including opportunity cost;*
- *Appropriateness of return on investment obtained by the Proponent given project risks;*
- *Capability and capacity of Proponent to deliver the proposal;*
- *Affordability; and*
- *Appropriate risk allocation.*

141. The matters which Counsel Assisting have pointed to are the matters that one would expect to be included in an unsolicited proposal in order to address this criteria. It cannot be reasonably suggested that Crown Resorts should have, in a proposal document that was intended to convince the NSW Government of the benefits of Crown Sydney casino to NSW, also included statements as to how Crown Sydney would benefit Crown Melbourne and the State of Victoria. It was simply not a matter relevant to the NSW Government's consideration as to whether to approve the proposal.

142. In the CPH Parties' submission, it is misguided for Counsel Assisting to infer from the absence of these considerations in the Crown Sydney Proposal that Crown Resorts did not adequately consider its obligations under the Casino Agreement. Evidence was given throughout the hearing that indicates the intention is to continue to maintain the Crown Melbourne as the flagship casino of the Crown Group:

(a) Mr McCann, the recently appointed CEO of Crown Resorts, acknowledged in his evidence that Crown Melbourne was *'clearly the outstanding resort in the country'* and that it need to be '*maintained as such to meet our obligations'*.[136]

(b) Mr Morrison said in his evidence that he didn't think Crown Sydney would overtake Melbourne and that the purpose of Crown Sydney was to take business away from The Star.[137]

(c) Ms Halton agreed that Melbourne was the *'heart of the operation'*.[138]

None of these statements was challenged in questioning of these witnesses.

136 McCann T3494.37-T3494.39
137 Morrison T2273.44–T2274.7
138 Halton T3622.9

143. In an interview with the VCGLR in 2018, Professor Horvath referred to Crown Resorts having given specific consideration to its obligations under cl 22.1(ra) in connection with the development of Crown Sydney.[139]

144. The topic was also specifically considered by the VCGLR in the Fifth Review in 2013. Crown Resorts informed VCGLR that it did not believe that Crown Sydney would '*threaten either the obligations regarding Crown Melbourne Limited being the flagship casino of the Crown Group in Australia or the dominant commission based casino in Australia.'*[140] The VCGLR accepted that if the Crown Sydney project proceeded, '*competitive pressures within the Sydney commission based player market mitigate some of the risk of Crown Melbourne Limited losing primacy in the commission based player market in Australia. However, as the Melbourne Casino is currently the pre-eminent commission based player casino in Australia, the new casino at Barangaroo will be directly competing with it for the most significant players.'* [141]

145. Crown Melbourne also submitted to the VCGLR that it considered the operation of three Crown-branded Australian casinos would increase its ability to cater to the demands of commission based players, and as a result, its ability to attract more commission based players at each property. The VCGLR noted that the success of Macau, Singapore and Las Vegas which each have high densities of casinos lent support to Crown Melbourne's submissions and ultimately considered that the nature, size and timing of the Crown Sydney proposal meaning that it was unlikely to threaten Crown Melbourne's position as the dominant commission based player casino in Australia. However, it noted it was too early to make a judgment of the Crown Sydney Project beyond the 2013 review period.[142]

146. Nevertheless, it is evident from reviewing the Fifth Review report that Crown Melbourne provided significant information to the VCGLR relevant to its consideration of the issue and the VCGLR appropriately considered the issue of compliance before issuing its reports.

147. Indeed, the broader question as to whether Crown Melbourne ought to be permitted to acquire other casino-related business was explored with the regulator (then the VCGA) as early as 1999, in the context of the proposed insertion of cl 22.1(r) of the Act. In a letter sent by Mr Packer to the then Chairman of the VCGA, Ms Sue Winneke, Mr Packer noted that it may be better for Victoria that Crown Resorts be permitted to hold

139 See Ex RC0124: VCG.0001.0003.1632 at __0036
140 Ex RC00013: CRW.510.025.5690 at .5827
141 Ex RC00013: CRW.510.025.5690 at .5827
142 Ex RC00013: CRW.510.025.5690 at .5827

interests in other casino-related business, which might otherwise be acquired by third parties who do not have the same commitment to advancing the interests of Victoria as the Crown licensee.[143]

148. In light of the evidence referred to above regarding the co-benefits to Crown Melbourne of other Australian casino properties also being operated by Crown, and in the context of a highly competitive national and international casino market, Mr Packer's observation remains apposite.

G.5 Company structure obligations

149. As noted above, the company structure obligations impose obligations on Crown Melbourne to ensure that at least 75% of meetings of the company's Board and senior executive managers are held in Melbourne and its Senior Executive Managers (including at least one Company Secretary) reside in Victoria. Counsel Assisting's submissions posit that the proposed centralised structure might be in breach of these obligations as the intention behind the Casino Agreement *'is to ensure operational control and oversight of the casino business is not moved away from the casino.'*[144]

150. While the CPH Parties do not have visibility of the details of any potential centralisation, they submit that that the *'intention behind the Casino Agreement'* is not relevant in circumstances where the terms of the company structure obligations are clear and unambiguous. That is, provided Crown Melbourne ensures that the obligations in those clauses are met (i.e. Crown Melbourne senior executive managers reside in Victoria and meetings are held in Victoria), there is nothing from a contractual perspective that precludes the Crown Group from centralising functions or decision making in Crown Resorts.

151. The CPH Parties also note that evidence was given which indicated Crown Melbourne would have regard to its legal obligations in any proposed centralised governance structure:

    (a) Ms Korsanos, the Chair of Crown Melbourne, indicated that while she had not been directly involved in conversations regarding this issue, when it came to Crown Melbourne, she did not see there being any changes required to the requirements under the Casino Agreement arising from the centralised

143 Letter dated 14 April 1999 from Mr Packer to VCGA [CPH.173.001.0153]
144 Submissions of Counsel Assisting, page 215 [4.27]

structure.[145] Ms Korsanas further added that *'every property would have its localised management leadership and clarity of decision-making'.*[146]

(b) Mr McCann also gave evidence that Crown Melbourne would make sure it complied with its legal requirements in *'how the Melbourne business is run and the Melbourne asset has to be run to be premium resort in the country.'*[147] Mr McCann also demonstrated a willingness to relocate to Victoria for the purposes of complying with the Casino Agreement.[148]

Again, none of this evidence was challenged.

152. There is no reason to doubt the evidence from Mr McCann and Ms Korsanos that Crown Melbourne will continue to abide by its company structure obligations even if key functions and decision-making are delegated to Crown Resorts. The incorporation of independent directors to the Board of Crown Melbourne could operate in tandem with such a structure, as an appropriate mechanism for ensuring both that the residency requirements are met, and that centralisation of decision-making does not lead Crown Resorts to subvert the interests of Crown Melbourne.

145 Korsanos T3681.3-T3681.35
146 Kosanos T3684.5-T3684.7
147 McCann T3492.37-T3492.39
148 McCann T3492.24

H SHOULD THE OBLIGATION IMPOSED ON THE STATE TO PAY COMPENSATION IN THE EVENTS DESCRIBED IN CLAUSES 24A.2(I), 24A.3 AND 24A.4 OF THE CASINO MANAGEMENT AGREEMENT BE REPEALED?[149]

153. The CPH Parties submit that the obligation imposed on the State to pay compensation to Crown Melbourne in the circumstances described in cls 24A.2(i), 24A.3 and 24A.4 of the Casino Management Agreement should not be repealed. Doing so would undermine confidence in contracting with the government and increase the sovereign risk of investing in Victoria and Australia.

H.1 Compensation provisions have statutory force

154. The relevant clauses are described in the Submissions of Counsel Assisting, pages 272-273 [2.1]-[2.7].

155. The submissions of Counsel Assisting refer to the apparent tension between s 156 of *Casino Control Act* which provides that no right to compensation against the State of Victoria arises in relation to the cancellation, suspension or variation of the terms of the licence, or an amendment of the conditions of a licence and cls 24A.2(i), 24A.3 and 24A.4 of the Casino Management Agreement. Their submissions further state that *'section 7 of the Casino (Management Agreement) Act 1993* ***may*** *have the effect of displacing s 156 of the CCA…'* (emphasis added).[150]

156. Section 6J of *Casino (Management Agreement) Act 1993* provides that the Tenth Deed of Variation (which is the Deed that relevantly inserted cl 24A into the Casino Management Agreement) *'is ratified and takes effect as if it had been enacted in this Act'*. The effect of s 6J is that cls 24A.2(i), cl 24A.3 and 24A.4 have been approved by the legislature of Victoria and the clauses take effect as if enacted by the legislature of Victoria.[151] Section 6J was inserted by the *Casino and Gambling Legislation Amendment Act 2014* (Vic), which post-dated the enactment of ss 20 and 156 of *Casino Control Act*. There is a clear conflict between the effect of s 6J on the one hand, and section 156 on the other. Section 6J would prevail in that conflict, with the result that cls 24A.2(i), 24A.3 and 24A.4 would be given effect despite the inconsistency with ss 20 and 156.

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149 The Commissioner asked the CPH Parties for submissions on this issue: see question 3 in the letter from Solicitors Assisting dated 23 July 2021.

150 Submissions of Counsel Assisting, page 272, [2.8]-[2.9]

151 *Re Michael; Ex parte WMC Resources Ltd* (2003) 27 WAR 574, [24] (Parker J, with whom Templeman and Miller JJ agreed)

157. Any tension is put beyond doubt by s 7 of the *Casino (Management Agreement) Act 1993*. Section 7(1) provides that if a provision of the Casino Management Agreement is inconsistent with a provision of the *Casino Control Act*, the provision of the Casino Management Agreement prevails and the application of the *Casino Control Act* in relation to the Crown Melbourne Licence and the Melbourne Casino Operator is modified accordingly.

H.2 Genesis and rationale of the compensation provisions

158. It is important to understand the genesis and underlying rationale for the compensation provisions. Counsel Assisting contend in their submissions that the rationale for these provisions is unclear.[152]

159. In 2014, Crown Melbourne reached agreement with the Victorian Government on a number of reforms which had the aim of boosting Victorian tourism and creating new jobs to allow Crown Melbourne to compete more effectively in interstate and international markets.[153]

160. As part of the agreement, Crown Melbourne secured an extension of its licence from 2033 to 2050, an increased number of gaming products, and a lower amount of tax payable on VIP gaming. The Victorian Government also agreed that the Casino Management Agreement would be amended so that certain regulatory actions adverse to Crown Melbourne could trigger compensation, capped at $200 million (but indexed for each year after 2015).

161. In consideration for these amendments to the Casino Management Agreement, Crown Melbourne agreed to make a series of payments to the State of Victoria (which are set out at cl 21A):

    (a) payment of $250 million once the amendments to the relevant legislation, Casino Management Agreement and casino licence became effective;

    (b) payment of $100 million in the FY23 if the normalised gaming revenue at Crown Melbourne grows by more than 4.0% per annum (compound) over the period from FY14 to FY22;

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152 Submissions of Counsel Assisting, page 272 [2.10(b)]

153 Crown Resorts announcement to ASX on 22 August 2014 – *Crown reaches agreement with the Victorian Government on a licence reform package to boost tourism and jobs*: CPH.171.001.0001

(c) an additional payment of $100 million in FY23 if the normalised gaming revenue at Crown Melbourne grows by more than 4.7% per annum (compound) over the period from FY14 to FY22; and

(d) a payment of $250 million in 2033.

162. In total, the Victorian Government stands to gain $910 million from the agreement with Crown Melbourne and has already received the first payment of $250 million. It appears that the purpose of the amendments, including the compensation clauses, was to provide greater regulatory certainty to allow Crown to continue to invest in and increase employment at Crown Melbourne, and that Crown proceeded with its investments at Crown Melbourne and with payments to Victoria on that basis.[154]

163. As the Treasurer said at the time of the agreement, the deal was a 'win-win' outcome as it delivered *'substantial financial benefits to Victorians but it also helps improve investment certainty and protects jobs'* and it was *'good for investment, it's good for jobs, it's good for tourism and it's good for Victoria's bottom line'.*[155]

H.3 Repeal of compensation provisions will increase sovereign risk of investing in Victoria and Australia

164. That the purpose of the compensation provisions is to give Crown Melbourne regulatory certainty can be gleaned from the title of the relevant part of the agreement – *Part 5A – Regulatory Certainty*. Whilst not determinative, this heading is still revealing in terms of the intention of the provisions.

165. Further, not only are these clauses enshrined in agreement, the Victorian Government has taken the further step of giving the Casino Management Agreement legislative backing. As noted above, ss 6J and 7 of the *Casino (Management Agreement) Act 1993* give these clauses legislative force.

166. In *Commissioner of State Revenue v Oz Minerals Ltd*,[156] the Western Australian Court of Appeal said in relation to agreements of this nature at [179]:

> *A State Agreement is sometimes described as a "ratified agreement" because the State executes a written agreement with a mining corporation which is then ratified by an Act of Parliament. The purpose of ratification is to ensure that the State*

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154 Crown Resorts announcement to ASX on 22 August 2014 – *Crown reaches agreement with the Victorian Government on a licence reform package to boost tourism and jobs*: CPH.171.001.0001

155 Alison Savage, 'Melbourne's Crown Casino has its licence extended to 2050', ABC News (online, 22 August 2014) https://www.abc.net.au/news/2014-08-22/melbourne27s-crown-casino-has-its-license-extended-to-2050/5689370: CPH.171.001.0009

156 [2013] WASCA 239.

> *Agreement overrides any inconsistent provisions of the Mining Act 1978 or any other statute or law. However, even where a State Agreement has been ratified and its implementation has been authorised by an Act of Parliament, and it operates and takes effect despite any other statute or law, the provisions of the State Agreement remain contractual terms with force and effect as a contract*. *See* Re Michael; Ex parte WMC Resources Ltd *(2003) 27 WAR 574 ; [2003] WASCA 288 at [6] per Parker J, Templeman and Miller JJ agreeing.*

167. There is no question that contracting with state governments, whether it be through standard contracts or state agreements, is susceptible to sovereign risk. In this context, the sovereign risk arises if the government introduces legislation that amends the Casino Management Agreement without those amendments first being commercially negotiated with the other contracting party.

168. If the purpose of agreements such as the Casino Management Agreement is to ensure certainty and provide investors with confidence that obligations will not be undermined by future government action, then the passing of legislation that in effect annihilates the existing regulatory certainty provides a strong signal to investors that such guarantees have limited weight.

169. The CPH Parties submit that if a decision was made by the Victorian Government to unilaterally repeal the compensation clauses, then the benefits of entering such agreements in the first place would be drawn into question. A significant issue of sovereign risk would arise and as a result, future investors may be reluctant to make investment into Crown and indeed any ventures in the State of Victoria. This would be detrimental to the shareholders in Crown Resorts, including the CPH Parties; and detrimental to the State of Victoria.

170. The CPH Parties submit that the Commissioner should not recommend the unilateral repeal of the compensation provisions. The provisions should be retained, in order to preserve confidence in the community with contracting with the government and safeguarding the reputation of Victoria and Australia as a safe place to invest.

ANNEXURE A

Response to propositions which Counsel Assisting have sought to draw from evidence in this Commission and from the NSW Inquiry Report regarding the historic influence of the CPH Parties and Mr Packer in relation to Crown

Introduction

1. Given whatever influence CPH had over Crown Resorts has ceased, it is not necessary for this Commission to consider that influence, by reference to either the NSW Inquiry Report or the hindsight evidence given by Crown Resorts' remaining directors. The extent of CPH's responsibility for Crown's failings and cultural problems is largely irrelevant, as it is historic.

2. Nevertheless, to the extent that the Commission proceeds to consider those historic matters, it is submitted that it is not open to conclude that CPH (or any CPH person) was the sole or dominant cause of Crown's failings.

CPH Parties' participation in this Commission

3. At the outset, the CPH Parties observe that they were given leave to appear in this Commission, but were not asked, in correspondence or otherwise,[157] about the extent to which they agreed with the findings in the NSW Inquiry Report. No representatives of the CPH Parties were called to give evidence. None of the matters that are relevant to a determination of suitability[158] of Mr Packer or CPH have been examined in the Commission. To the extent that statements or findings from the NSW Inquiry Report concerning the CPH Parties are referred to in the submissions of Counsel Assisting, the CPH Parties have proceeded on the basis that those statements and findings represent the totality of the references to them from the NSW Inquiry Report that may be considered by this Commission. These submissions have been prepared on that basis.

4. The CPH Parties also observe that, as at the time of writing, and despite several requests, they have not been provided access to some 235 tendered documents, where it is not clear that any non-publication order applies to those documents. They also have not been provided with access to documents or parts of documents the subject of claims for privilege by Crown (and an application made for access to such

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157 Unlike Crown who were asked whether it accepted the findings in the NSW Inquiry Report: Transcript of opening statements dated 24 March 2021 at page 8.

158 These are discussed in the Submissions of Counsel Assisting, pages 18-19, [5.3]-[5.11]

materials by the legal representatives of the CPH Parties was not addressed). These include documents referred to in Counsel Assisting's submissions. Nor has parts of the transcript of certain closed hearings been made available to the CPH Parties, even when evidence from those hearings has been cited in Counsel Assisting's written submissions. Needless to say, no findings adverse to any of the CPH Parties or their interests can be founded on evidentiary material to which they have had no access at all, let alone any reasonable opportunity to consider and respond to.

5. In these circumstances, and in circumstances where the CPH Parties are not 'associates' of Crown Melbourne (as discussed in Part C of these submissions), it is unnecessary and inappropriate for the Commission to make any finding as to the suitability of the CPH Parties or any CPH person.

6. Counsel Assisting have submitted that *'if it were necessary to make a finding as to suitability of CPH,'* the findings in the NSW Inquiry Report would be relevant,[159] and that '*CPH's suitability was considered at length*' in the NSW Inquiry Report. That is incorrect. The NSW Inquiry Report made **no** findings as to the suitability of CPH or any CPH person to be or remain an associate of either Crown Sydney or Crown Resorts,[160] suitability being a core statutory concept under the *Casino Control Act* 1992 (NSW) in the same way as applies in Victoria. The terms of reference of the NSW Inquiry were not concerned with the suitability of any CPH Party or person; they were concerned with the suitability of Crown Sydney and Crown Resorts.[161] To suggest that unspecified 'findings' from the NSW Inquiry Report can be deployed to support a finding which itself ranges beyond this Commission's terms of reference is entirely at odds with basic notions of procedural fairness.

Evidence in this Commission

7. Care should be taken in accepting retrospective explanations from directors, such as Mses Coonan, Halton and Korsanos, for past failures, under the pressure of an inquiry or Royal Commission, when the company is in 'crisis mode', particularly by reference to Crown Resorts' 'culture', in the absence of a root cause analysis having been undertaken.

8. Counsel Assisting's submissions point to Ms Coonan's agreement with the proposition that CPH is a significant shareholder which, *'during her board tenure, exerted a large*

159 Submissions of Counsel Assisting, page 275 [3.2]
160 Ex RC0445: COM.0005.0001.0001 at .0006-.0007
161 Ex RC0970: COM.0005.0001.0334 at .0705-.0711

influence over Crown, through the composition of the board, its strategic direction on its culture.'[162] Consistent with Ms Arzadon's expert views, that evidence should be approached with a healthy degree of professional scepticism. In any event, Ms Coonan rightly acknowledged during examination that there are a multiplicity of factors that influence culture including the board of directors, the CEO of the company and the CEO's reporting of issues to directors.[163]

9. Similarly, Ms Halton agreed that a multi-factorial assessment should be applied to culture including, in addition to the matters noted above, the remuneration policy of the company and the extent to which remuneration is influenced by KPIs.[164] Ms Halton also agreed that a company could have a number of cultures or subcultures and that there may be cultural problems in different areas of a company.[165]

10. Counsel Assisting's submissions also refer to Ms Coonan's evidence '*that Crown's reformation could only occur following the departure of appointed directors'*[166] and that *'a change, a real change of approach wasn't possible with old management and old Crown.'*[167] It is simply not the case that CPH nominee directors stood in the way of each and every decision that would have prompted reformation within Crown.

11. Ms Halton gave evidence of updates and improvements to the Crown Resorts risk management framework, refinement of its risk appetite, and the allocation of additional resources to risk management efforts from at least 2018, initiatives all undertaken with the support of the CPH nominee directors.[168] In her evidence, Ms Korsanos likewise referred to Board support for reforms and improvements following the China Arrests and following the 2019 media allegations.[169]

12. There is no suggestion that CPH nominees or any of the other former directors of Crown in any way impeded any of those efforts.[170]

13. Conversely, Ms Coonan's evidence of an example of an action she proposed (that Mr Barton stand aside pending the outcome of the NSW Inquiry) that was not supported by the Board, appears to have involved Ms Korsanos, a current independent director

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162 Submissions of Counsel Assisting, page 290 [5.57] and Coonan T3735.15-T3735.27
163 Coonan T3855.1-T3855.14
164 Halton T3640.27-T3640.29
165 Halton T3641.35-T3641.44
166 Submissions of Counsel Assisting, page 290 [5.58] and Coonan T3766.27-T3766.32
167 Submissions of Counsel Assisting, page 291 [5.58] and Coonan T3766.36-T3767:1
168 Exhibit RC0427: CRW.998.001.0152 at .0157 [49]-[54], at .0162 [89]-[95], at .0172-0173 [162]-[165]; Halton T3633.41-T3634.27
169 Korsanos T3661.36-T3661.41
170 In the NSW Inquiry, Ms Coonan gave evidence that it is very important to her personally that Crown is a 'compliant, ethical and responsible business' and that this was a 'shared objective' of all directors and that if this had not been so she would not have agreed to take on the role of Chairman. See Ex RC0970: COM.0005.0001.0334 at .0378 [51]

of Crown Resorts, among those who did not support that proposal, and Professor Horvath (someone characterised as part of 'old Crown') who did support that proposal.[171] The proposed action was, it seems, also contrary to legal advice received by Crown Resorts at the time.[172]

14. All this evidence, not referred to in Counsel Assisting's submissions, demonstrates that it is incorrect to attribute to CPH's influence the inability of Crown to make real change, or to simplistically attribute past failings to the asserted influence of CPH. Life, especially in a large organisation such as Crown Resorts, is far more complex than that.

15. Counsel Assisting's submissions also cite Ms Coonan's evidence regarding the '*loyalty*' of a number of non-independent directors and some independent directors who were appointed to the Board by Mr Packer.[173] While the matter of loyalty is considered in more detail at paragraph 32 below, it is important to note that while Ms Coonan agreed that certain directors had *'close ties to Packer,'*[174] she did not give any evidence that this loyalty affected the ability of the aforementioned directors to discharge their obligations to Crown.[175] Indeed, she said that following the draft VCGLR report concerning the China Arrests (the **Draft China Report**), and the 2019 media allegations, *'there was real momentum on the part of some of the directors, Ms Halton, myself, Ms Korsanos and Mr Horvath, and to a certain extent* ***with the cooperation of the nominee directors****, to start to look at some changes for the company*.'[176] (emphasis added).

16. Counsel Assisting submit that *'the Board did not ask questions, suggest further enquiry be made or require an explanation from management*'[177] following receipt of the Draft China Report. However, to the contrary, and as recorded in the relevant minutes in a passage to which Ms Korsanos was apparently not taken,[178] the Board, after noting the seriousness of the matters raised, requested the Executive Chairman to liaise with management regarding its concerns.[179]

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171 Coonan T3781.22-T3782.34
172 Coonan T3782.28-T3782.30
173 Submissions of Counsel Assisting, page 291 [5.58]
174 Coonan T3735.34-T3735.38
175 Coonan T3735.34-T3736.1
176 Coonan T3747.44-T3748.21
177 Submissions of Counsel Assisting, page 56, [3.110]
178 Ex RC278: CRL.503.001.0005 at .0017. The CPH Parties were not represented at the closed hearing of Ms Korsanos' evidence and large portions of the copy of the transcript of her evidence as provided to the CPH Parties have been redacted.
179 See also Halton 28.4.21 [146] [Ex RC0427 CRW.998.001.0152 at .0172; Coonan T3748.17-T3749.20]

17. Ms Coonan likewise gave evidence that there was *'collective concern about some issues to do with the matters that had been reported in the draft report'*[180] and as a result the Board tasked Mr Alexander (the then Executive Chairman) to make some investigation of management in relation to those particular matters and report back.[181]

18. Counsel Assisting's submissions speculate as to reasons why Crown may have sought the provision of an executive summary of the Draft China Report to the Minister,[182] but the answer is obvious: the minutes of the meeting record that this was the subject of a recommendation by Crown's external lawyers in the context of the ongoing class action.[183] This mistaken oversight undermines the following submission that the incident is illustrative of the Board condoning a *'defensive approach*' and failing to take the opportunity to *'be transparent and cooperate with the VCGLR'*. Further, it is unclear how the proposal to seek the provision of a short summary to the Minister can be relevant to, let alone a *'telling sign of [the Board's] attitude to transparency and cooperation*'[184] with the regulator, which by that time had already produced the Draft China Report. There is no evidence, in the minutes or otherwise, that the Board condoned inappropriate delays in the provision of documents that should have been provided to the VCGLR, let alone the provision of inaccurate information to the VCGLR (to the extent that occurred).

19. Further, there is information available to the Commission that CPH itself has not and does not take an approach with regulators of the kind criticised by Counsel Assisting. For instance:

    (a) upon the announcement of the NSW inquiry, CPH took steps to defer completion of part of the share sale agreement to be examined by that inquiry, in deference to that inquiry, and ultimately terminated that second part of the transaction.[185] The NSW Inquiry, which had relevantly been tasked with assessing whether or not that transaction breached any regulatory agreement, found that it did not;[186]

    (b) in the early months of the NSW Inquiry, CPH indicated to the solicitors assisting that inquiry, a preparedness to work towards an appropriate agreed statement

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180 Coonan T3749.7-T3749.9; Exhibit RC0427: CRW.998.001.0152 at .0172 [152]-[153]
181 Coonan T3749.17-T3749.20. See also Halton 28.4.21 [146] [Ex RC0427 CRW.998.001.0152 at .0172
182 Submissions of Counsel Assisting, page 57 [3.114]
183 Exhibit RC0278, Crown Resorts Limited Board Meeting Minutes, 12 June 2019, CRL.503.001.0005 at .0010-.0011
184 Submissions of Counsel Assisting, page 57, [3.114]
185 Ex RC0445: COM.0005.0001.0001 at .0019 [14]-[15]
186 Ex RC0970: COM.0005.0001.0334 at .0618 [122]

of facts. The solicitors assisting the NSW Inquiry did not engage with that indication;

(c) as discussed in greater detail at paragraph 9 above, immediately upon publication of the NSW Inquiry Report, Mr Johnston and Mr Jalland voluntarily resigned from the Crown Resorts board. CPH put forward undertakings to the ILGA, which undertakings were to the satisfaction of the ILGA. Neither Crown nor Counsel Assisting assert there is any continuing influence of CPH or Mr Packer in respect of the affairs of Crown.[187]

20. There is no evidence that any CPH person encouraged or instructed Crown management to underpay state casino tax payable by Crown or conceal deductions leading to underpayments from the regulator.[188]

21. There is no evidence that any CPH person encouraged departure from Crown's obligations in respect of the responsible service of gaming.[189] Indeed there is evidence that Mr Packer made clear he was not interested in earning gaming revenue from problem gamblers,[190] and made public statements supportive of Crown being more transparent in the provision of data relevant to responsible gaming considerations.[191] No CPH nominee director served on the Responsible Gaming Committee of the Crown Resorts Board.

22. There is no evidence that any CPH person encouraged disregard of Crown's AML obligations.

23. The evidence does not support that CPH or Mr Packer promoted a 'profits above all else' culture. While Chairman of Crown Resorts, Mr Packer's focus was creating a busines operating world class integrated resorts.[192] With Crown Melbourne as its flagship, Crown has achieved international recognition for the quality of its properties.

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187 Ex RC0415: CRW.512.212.0001_R. at .0004; Submissions of Counsel Assisting Page 275 [3.2] and T4038.23-T4038.24. Coonan, 27.04.21 at [17]-[18], [27]-[28] [Ex RC0437: CRW.998.001.0526 at .0214-.0215]

188 See generally Submissions of Counsel Assisting, pages 81-114. While Counsel Assisting's submissions refer to evidence given by Mr Mackay that the 2018 and 2019 advice was known to 'directors' (at pages 91-92, [1.62], [1.71]), it is unclear which directors are being referred to. The CPH Parties were not represented during the giving of that evidence, in closed hearing. Mr Mackay's evidence on the matter was uncertain (*'**if** they are made aware of that documentation* ..' (T1663.47); *'I **believe** so'* (T1664.12)) (emphasis added). The CPH Parties are not aware of any evidence corroborating Mr Mackay's assertion, and it seems Counsel Assisting accepts it to be incorrect, given Counsel Assisting's subsequent criticism of the Crown Resorts Board's lack of knowledge of the matter: page 113 [1.119].

189 See generally Submissions of Counsel Assisting, pages 115-140

190 Ex RC0124, VCG.0001.0003.1632 at .0039. Professor Horvath said in an interview with the VCGLR: '…*and the comment Mr Packer made to me is that he does not want to be in the position to make money from problem gamblers, and that our processes had to be robust to ensure that.'*

191 Ex RC0322III: CRW.510.073.0618 at .0621; Ex RC0002: COM.0005.0001.0077 at .0817, .0901.

192 See for example Crown's 2015 annual report at p 17: https://www.crownresorts.com.au/Investors-Media/Annual-Reports/Full-PDF-Downloads/Annual-Report-(7)

To achieve this Crown had to invest heavily in the facilities and infrastructure of its properties over many years.[193] This is not a 'profits above all else' approach.

24. The notion that Crown had a culture which uniformly disregarded the welfare of its employees or the community is also at odds with recognitions Crown achieved for its employment practices; its initiatives regarding indigenous employment, equal opportunity and creating employee training opportunities; and its work through the Crown Foundation, among others.[194]

25. As regards the China Union Pay process (**CUP Process**), Counsel Assisting's submissions correctly identify that the CUP Process was instituted in response to customer requests[195] and appeared to have commenced in 2012.[196] Both statements are consistent with the conclusions reached by external counsel following an investigation requested by the Crown Resorts Board.[197]

26. However, Counsel Assisting's submissions include a statement that the CUP Process was *'said to be a CPH initiative.*' That is not right. The evidence was relevantly as follows:

    a. The independent investigation commissioned by the Crown Resorts Board after learning of the CUP Process, led by Mr Archibald QC and Mr Carr QC (the **Archibald/Carr investigation**), relevantly concluded as summarised in Counsel Assisting's submissions: namely that the practice was instituted in response to customer requests, appeared to have commenced in 2012, and that Mr O'Connor had responsibility for making the decision to implement the CUP Process. [198] It did not conclude that the CUP Process was a *'CPH initiative*' or indeed that any CPH person had any role at all in the inception of that process;

    b. Ms Williamson was interviewed as part of the Archibald/Carr investigation. When shown the file note taken of that interview,[199] she did not recall all the comments recorded in it as having been made in the interview,[200] and

193 See Ex RC0445: COM.0005.0001.0001 at .0120 [14]-[20]
194 See generally Ex RC0445: COM.0005.0001.0001 at .0119-.0122 [6]-[13], [21]-[29]; Crown's Corporate Responsibility Report 2019: https://www.crownresorts.com.au/CrownResorts/files/6f/6fb4ea53-4b02-4da3-afb7-5dfb350057ba.pdf
195 Submissions of Counsel Assisting, page 141 [1.7]
196 Submissions of Counsel Assisting, page 141 [1.7]
197 Ex RC0268: CRW.900.002.0001
198 Ex RC0268: CRW.900.002.0001 at .0012-.0013, .0063 [45]-[52], [255]
199 Ex RC0351: CRW.900.004.0010
200 Williamson T3179.17

considered some aspects of it inaccurate,[201] although she agreed it broadly reflected the topics discussed in the interview. She said that by the time of the interview her memory had been '*polluted*' by events subsequent to the 2013 email advice about which she was questioned;[202]

c. During questioning in the Commission, Ms Williamson was taken to an email sent to her by Mr Theiler dated 10 July 2013, then forwarded by her to Ms Tegoni on 18 July 2013 with some commentary from Ms Williamson.[203] She explained that the email as so forwarded comprised Mr Theiler's original email to her, interspersed with notes that she took during a call with Mr Theiler that she embedded next to the original text of Mr Theiler's email to her.[204] Among that embedded commentary by Ms Williamson next to a query about China Union Pay was a phrase "*Is a CPH initiative*."

d. In responding to questions of the Commissioner, she said that "*I have no idea what China Union Pay was and I had no idea what he [Mr Theiler] was talking about*.[…] *I wouldn't have known, for example, it is a CPH initiative. I had no idea. He's telling me this*";[205]

e. In later questioning she said about the reference to *'CPH initiative'* that " *…I would say that Mr Theiler told me, rightly or wrongly, whether it was the case;*"[206]

f. She accepted that she had very little involvement in the CUP Process and no personal knowledge of how it came about; she also agreed her stated '*expectation*' that it came out of the VIP Working Group was mere surmise.[207] She accepted that she had no reason to doubt the accuracy of the conclusion recorded in the report produced by Messrs Archibald and Carr following the Archibald/Carr investigation as to the genesis of the CUP Process;[208]

g. Mr Theiler was also interviewed for the Archibald/Carr investigation. He did not describe the CUP Process as a '*CPH initiative'*.[209] Rather, he said that he

201 Williamson T3181.32-T3181.43, T3182.24
202 Williamson T3179.22, T3185.33-T3185.44; see also Ex RC0351: CRW.900.004.0010 [3]
203 Ex RC350: CRW.523.002.0355
204 Williamson T3173.24-T3176.47; T3188.15-T3189.30
205 Williamson T3175.26-T3175.30
206 Williamson T3188.4-T3188.5
207 Williamson T3185.41-T3186.8
208 Williamson T3186.43-T3187.6
209 Ex RC0952: CRW.900.004.0037

'*suspected*' that the **VIP working group** (which as noted below, commenced activity a year after the CUP Process was instituted) was a CPH initiative.

27. In short, nothing can be made of Ms Williamson's vague and uncertain references to the CUP Process possibly being a *'CPH initiative'* or emerging from the VIP working group. As she acknowledged, the notation *'CPH initiative'* was taken during a telephone discussion with Mr Theiler on a topic about which she had *'no idea'*. She had no direct knowledge of the CUP Process or its genesis at all. Her '*expectation*' that it emerged from the VIP working group was pure speculation, and inconsistent with the established fact that the VIP working group only commenced in 2013,[210] while the CUP Process appears to have begun a year prior.[211]

NSW Inquiry Report

28. This part of the CPH Parties' submissions addresses the matters set out in Counsel Assisting's submissions at page 208 and following under the heading *'Majority shareholder influence*.*'* (Technically, CPH is not a *'majority shareholder'* of Crown Resorts, given that it only holds approximately 36.81% of Crown Resorts shares).

29. Counsel Assisting's submissions at paragraph [3.1] refer to the NSW Inquiry Report as supporting the proposition that CPH and Mr Packer had a *'ubiquitous and powerful'* influence on Crown's corporate governance and risk management processes **generally**.[212] That is not right. That particular description of their influence was applied to CPH, Mr Packer and Mr Johnston by the NSW Inquiry Report in the context of the China arrests, not as a general matter.[213] The CPH Parties contend that even that limited description was not supported by the evidence before the NSW Inquiry. *A fortiori*, the broader proposition finds no evidentiary support.

30. It should also be observed that the NSW Inquiry Report specifically found that *'the ineffectual nature and functioning of the Crown risk and governance structures is the responsibility of all directors who served at the time of these failures*.'[214]

31. Counsel Assisting states that the NSW Inquiry Report found that ***'for Crown Resorts' directors who had duties and obligations towards Crown Resorts and CPH****, such as Mr Johnston, the interests of Crown Resorts appeared to be coterminous with*

210 Ex RC0268: CRW.900.002.0001 at .0016 [59]; Ex RC0445 p 245 [39]
211 Ex RC0268: CRW.900.002.0001 at .0012 [45]
212 Submissions of Counsel Assisting, page 208 [3.1]
213 Ex RC0970: COM.0005.0001.0334 at .0575 [89]-[90]
214 Ex RC0970: COM.0005.0001.0334 at .0528 [90]; see also at .0527 [81], .0534 [126]

CPH's interests'[215] (emphasis added). However, the passage from the NSW Inquiry Report cited in support of that contention[216] is concerned only with Mr Johnston and work performed by him under the subsequently terminated Services Agreement, and cannot be extrapolated to ***all*** CPH nominees, as Counsel Assisting has done, or to Mr Johnston acting as a director (as opposed to as an executive under the Services Agreement). Further, while that passage of the NSW Inquiry Report refers to Mr Johnston's '*exposure*' to conflicts, no actual instances of conflict between the interests of CPH and of Crown were identified. Nor does the NSW Inquiry Report identify any factual foundation for the assertion that the corporate needs or desires of Crown were *'not given precedence over those of CPH*.'

32. Counsel Assisting then recite statements in the NSW Inquiry Report as to directors and executives said to have '*loyalties*' to Mr Packer.[217] In doing so, their submissions go beyond the evidence before the NSW Inquiry or the findings made in the NSW Inquiry Report. It was not the case that findings were made as to all CPH nominee directors expressing such loyalty. No such findings were made in respect of either Mr Jalland or Mr Poynton. Only one witness, Mr Alexander, expressed the view that Mr Barton was *'very loyal'* to Mr Packer. Neither Mr Barton nor Mr Packer were asked about that matter. Mr Barton's evidence was that his relationship with Mr Packer was simply a business relationship. The proposition that *'most executives*' were loyal to Mr Packer was a statement made by Mr Alexander, without elaboration as to who he was referring to, and again was not taken up with Mr Packer, or with any of the executives questioned in the NSW Inquiry other than Mr Felstead, who denied his loyalties in respect of VIP International were to CPH or Mr Packer rather than Crown.

33. Further, the NSW Inquiry Report did not identify how the existence of such supposed loyalties operated in a way inconsistently with a duty to Crown, or inconsistently with compliance with formal reporting and governance structures. Unchallenged evidence from witnesses in that inquiry specifically rejecting that proposition was not addressed in the NSW Inquiry Report. Nor did the NSW Inquiry Report seek to assess why, given that Mr Packer's company was at all times a substantial shareholder of Crown so that his interests were aligned with those of Crown, any divergence of loyalties in respect of the matters considered by that inquiry may have arisen. There was no finding in the NSW Inquiry Report that any of the CPH nominee directors, or Messrs Alexander,

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215 Submissions of Counsel Assisting, page 208 [3.1]
216 Ex RC0970: COM.0005.0001.0334 at .0450 [121]
217 Submissions of Counsel Assisting, page 208 [3.2(a)]

Demetriou or Mitchell would or did compromise what they believed to be in the best interests of Crown as a whole for sake of '*loyalties*' to Mr Packer.

34. Counsel Assisting next cite the NSW Inquiry Report's finding as to Mr Packer's purported expectations that Crown directors and officers *'comply with his instructions and requests'.'*[218] That finding was made without reference to unchallenged evidence to the contrary from Mr Packer, Mr Johnston and Mr Alexander. The characterisation of '*Crown's operatives*' (not further identified, but presumably a reference to Crown directors and officers) as '*supine*'[219] is inconsistent with the evidence of Mr Ben Brazil cited elsewhere in the NSW Inquiry Report.[220]

35. The statements in the NSW Inquiry Report as to the consequences of Mr Packer's purported influence, referred to in Counsel Assisting's submissions,[221] are also unsupported by the evidence in the NSW Inquiry. Without seeking to be exhaustive, Mr Packer had no role in the '*blackout*' of information relating to Southbank and Riverbank; his unchallenged evidence was that he had not even heard of either entity until the inquiry.[222] Neither he nor any CPH nominee had any operational role in respect of Crown's operations in China. The Melco share sale agreement was not an agreement to which Crown was a party, and was found by the NSW Inquiry Report not to involve any breach of any regulatory agreement,[223] so it is unclear how that agreement could be said to represent a *'disastrous consequence'* for Crown. Mr Packer was not involved in the '*choice*' of junket operators and no person gave evidence that he influenced such choices.

36. Counsel Assisting's submissions[224] wrongly convey that there was a finding that the *'adverse effects'* were attributable solely to '*Mr Packer's influence*.' The asserted *'adverse effects'* were said in the NSW Inquiry Report to be as a result of the **combination** of Mr Packer's '*personality*' and the *'somewhat supine attitude adopted by Crown's operatives*.'[225]

37. Counsel Assisting then sets out what are said to be particular findings about the effects of '*Mr Packer's influence*.'[226] While it is true that Mr Packer accepted *'some responsibility*' for the sales culture in the VIP International business (which should be

218 Cited in Submissions of Counsel Assisting, pages 208 – 209 [3.2(b)]
219 Cited in Submissions of Counsel Assisting, page 209 [3.3]
220 Ex RC0970: COM.0005.0001.0334 at .0575 [71], [75]
221 Submissions of Counsel Assisting, page 209 [3.4]
222 Ex RC0445: COM.0005.0001.0001 at .0193 [183]-[184]
223 Ex RC0970: COM.0005.0001.0334 at .0618 [122]
224 Submissions of Counsel Assisting, page 209 [3.4]
225 Ex RC0970: COM.0005.0001.0334 at .0587 [20]
226 Submissions of Counsel Assisting, page 209 [3.4(a) and (b)]

understood as a responsibility associated with his role as Executive Chairman which ceased in August 2015, and in circumstances where relevant information was not brought to his attention) it is incorrect that the NSW Inquiry Report found his influence to have *'contributed*' to the *'aggressive sales culture'*.

38. Nor did that report find him to be a *'key stakeholder'* of the VIP International business generally. The finding cited in Counsel Assisting's submissions was in fact a reference to Mr Packer's evidence that he was a key stakeholder in that business ***'in the sense that*** *Crown Sydney was aiming for the VIP market, in particular*.' (emphasis added) As a result, the sentence in Counsel Assisting's submissions which immediately follows the inaccurate references to Mr Packer' contributing influence to the aggressive sales culture and his role as a *'key stakeholder'* convey a significance as to Mr Packer's role in the sub-culture of the VIP International business at the time, and its emphasis on profit, beyond that found in the NSW Inquiry Report.

39. Nor did the NSW Inquiry Report find that "***Mr Packer's*** *influence*" (emphasis added) was '*an important factor behind the blurred reporting lines and development of the VIP International Business' own culture which meant that risks were not escalated through Crown's corporate governance and risk management structures to the Crown Board*.' Again, this summation by Counsel Assisting[227] incorrectly abbreviates the relevant finding. The findings in fact made were that:

    (a) *'a number of factors'* purportedly *'impacted on Crown's ability to change its course'* in connection with the China Arrests, of which one *'very important factor'* was said to be the influence of CPH, Mr Johnston and Mr Packer; and

    (b) *'Blurred reporting lines'* were said to result from the *'insinuation of Mr Johnston'* into the management of the VIP International group, and that this *'contributed to'* failure to escalate risks to the appropriate mechanisms within the Crown organisation, which in turn was said to *'result in'* the VIP International business *'operating as a separate business having its own culture …and driving profit to the detriment of its staff*'.[228]

40. There are numerous deficiencies in these conclusions. They are unsupported by the evidence in the NSW Inquiry. They are conclusions that were not put of Messrs Packer, Johnston, Jalland or Poynton in questioning in that inquiry. The NSW Inquiry Report does not attempt to explain how this attenuated causal chain is said to have manifested, when there is no evidence that Mr Johnston was '*insinuated*' into the

227 Submissions of Counsel Assisting, page 209 [3.4(b)]
228 Ex RC0970: COM.0005.0001.0334 at .0575 [90]-[91]

'management of the VIP International group'; or that even if he was so *'insinuated*', why it was ***that matter*** that *'contributed to'* failure to escalate risks and in what way, or why the failure to escalate risks *'result[ed] in'* the VIP International business having a siloed culture. The evidence was that Mr Packer had no interaction with any operational aspect of the VIP International business, and that Mr Johnston's interaction with it was limited.

41. Counsel Assisting go on to summarise the NSW Inquiry Report as finding that '*senior directors and executives "reported" to Mr Packer and yet did not share important information about criminal infiltration of the Southbank and Riverbank accounts, and the risk to Crown staff arising from Chinese police questioning a Crown employee*.'[229]

42. First, this sentence does not clearly convey that these matters were ***not*** reported to Mr Packer (as the NSW Inquiry Report accepted).[230]

43. Secondly, as with the NSW Inquiry Report itself, no attempt is made to reconcile the contentions of *'blurred reporting lines'*, '*reporting*' and '*loyalties*' to Mr Packer, on the one hand, against the accepted fact that Mr Packer (and for that matter, Mr Johnston) was not informed of key matters detrimental not only to Crown but to CPH's interests in Crown. If there was such a separate, compromised reporting line, one might expect a succession of matters to be '*reported*' to Mr Johnston or Mr Packer, but not to organs of the company to whom such reporting should have occurred. That is not what happened. No relationship was identified between the matters on which Mr Packer did receive information,[231] and the issues relating to the China Arrests, junkets and money laundering examined in the NSW Inquiry Report.

44. Thirdly, Counsel Assisting's summation does not delineate different periods of time in which different matters considered by the NSW Inquiry occurred. Over that period Mr Packer was the Chairman of Crown Resorts until August 2015, and then a director for certain periods of time, ceasing in March 2018. The Controlling Shareholder Protocol operated from October 2018. The phrasing deployed by Counsel Assisting conveys that all senior directors and executives '*reported*' to Mr Packer throughout this period and beyond and implies illegitimacy in doing so throughout, when that is not what was found by the NSW Inquiry Report. The specific reference to Riverbank and Southbank suggests some role or awareness by Mr Packer in respect of the bank accounts of those companies, which was not found. Indeed, the passage cited by Counsel Assisting does not find that Mr Packer's influence was the or a reason for executives

229 Submissions of Counsel Assisting, page 209 [3.4(b)]
230 Ex RC0445: COM.0005.0001.0001 at .0193 [181]-[182]
231 Ex RC0445: COM.0005.0001.0001 at .0178 [103]-[110]

not escalating issues relating to ANZ's concerns with those accounts, instead describing that omission as '*inexplicable*'.[232] Nor did the CPH nominees have any different information to the rest of the Crown Resorts Board regarding ANZ's concerns about those accounts; none of the Board was informed of those concerns.[233]

45. Paragraph [3.5] of Counsel Assisting's submissions in this section[234] set out a series of matters discussed by the NSW Inquiry Report concerning Crown's corporate governance. The NSW Inquiry Report did not find that all these corporate governance failures fell solely or predominately at the feet of the CPH Parties, so it is unclear why this matter is addressed under the heading *'majority shareholder influence'*. For example, there were no findings to the effect that anyone from CPH was involved in the *'mismanagement of legal advice'*; and as discussed in paragraph 31 above, there was no finding of any actual conflict of interest as between CPH and Crown on any topic examined by the NSW Inquiry. Rather, the passages cited by Counsel Assisting simply refer to *'questions .. as to whether there were circumstances that would give rise to a* ***perception*** *of conflict*' (emphasis added) and being *'exposed'* to potential conflicts.

46. Counsel Assisting overstate matters to suggest that the NSW Inquiry Report's recommendations in relation to governance ***'focused on*** *minimising the influence of CPH and Mr Packer"*[235] (emphasis added). Those recommendations covered a range of matters, of which the influence of CPH and Mr Packer was only one. Further, while Counsel Assisting refers to those recommendations relating to CPH and Mr Packer being made *'even though the Services Agreement and Controlling Shareholder Protocol had been terminated*', an examination of the relevant recommendation shows that it simply involved implementation of mechanisms to effect regulatory scrutiny of any similar arrangements in the future.

47. As to the recommendation regarding shareholdings, that is not one that concerns '*governance*'. The topic of shareholding limitations is addressed further at Parts C to F of the CPH Parties' submissions, above.

48. Paragraph [3.7] of this section of Counsel Assisting's submissions miscites a recommendation of the NSW Inquiry Report, which in substance is no more than a reference to provision of services by CPH executives (specifically, directors of CPH) to Crown, as relating to Crown's Board representation. To the contrary, the NSW

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232 Ex RC0445: COM.0005.0001.0001 at .0193-.0194 [182]-[185]

233 Ex RC0970: COM.0005.0001.0334 at .0460-.0461 [153]; Ex RC0970: COM.0005.0001.0334 at .0381 [64], .0508 [136]

234 Submissions of Counsel Assisting, pages 209-210 [3.5]

235 Submissions of Counsel Assisting, page 210 [3.6]

Inquiry in this recommendation expressly contemplated nominees of CPH remaining on the Crown Resorts Board.[236] Further, it is incorrect to state that Crown '*removed*' all CPH nominee directors. Mr Johnston and Mr Jalland voluntarily resigned from the Crown Resorts Board immediately following publication of the NSW Inquiry Report.

49. In paragraph [3.8], Counsel Assisting inaccurately summarises the evidence of Ms Coonan and Ms Halton. Neither of them, in the parts of their evidence cited, referred to Mr Packer. Further, Counsel Assisting omits that:

(a) Ms Halton clarified that what she meant by directors or executives not being '*beholden*' to CPH was no more than having *'no history with CPH;"*[237] and

(b) Each of Ms Halton and Ms Coonan accepted that a range of other matters were important to an organisation's culture, including the board as a whole; the CEO; the CEO's reporting of issues to the Board and downstream; and that it is possible for an organisation to have a range of sub-cultures within it.[238] Those matters are also relevant to consideration of the NSW Inquiry Report, which did not (for example) give any consideration to the role of Mr Craigie, Crown Resorts' long standing CEO (until April 2017), in relation to Crown's culture. His tenure spanned a period which encompassed the China Arrests and other topics considered by the NSW Inquiry.

50. Despite the framing of the preceding paragraphs by reference to CPH's position as a major shareholder, in paragraph [3.9] Counsel Assisting accept that it is its ability to influence the board and senior executives, not shareholding per se, that is the relevant consideration.[239] The CPH Parties agree. As explained above, the CPH Parties lack any such influence given the various actions which have been taken and the undertakings given to ILGA and proposed to the VCGLR.

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236 Ex RC0970: COM.0005.0001.0334 at .0496 [77]
237 Halton T3625.28-T3625.30
238 Halton T3640.3-T3640.36, T3641.35-T3641.44; Coonan T3854.31-T3855.26
239 See also Submissions of Counsel Assisting, page 274 [1.4]

ANNEXURE B

Current ownership structure – Crown Melbourne and Crown Resorts

1. In its 2020 Annual Report, Crown Resorts reported that it had 677,158,271 ordinary shares on issue, held by 47,957 shareholders.[240] In that report, the shareholders of Crown Resorts were recorded as being distributed as follows:[241]

Distribution of shareholders as at 31 August 2020

Size of Holdings	Number of Shareholders	% of Issued Capital
1 – 1,000	33,689	1.82
1,001 – 5,000	12,553	3.99
5,001 – 10,000	1,141	1.19
10,001 – 100,000	523	1.61
100,001 and over	51	91.39
Total	**47,957**	**100.00**

The number of shareholders holding less than a marketable parcel of ordinary shares is 3,828 (based on a closing market price of ordinary shares on 31 August 2020).

***Figure 1**: table from Crown Resorts 2020 Annual Report, p.146*

2. In its 2020 Annual Report, Crown Resorts was recorded to have three 'substantial shareholders,' as follows:[242]

Substantial shareholders as at 31 August 2020

The following information is extracted from substantial shareholder notices received by Crown.

Shareholder	Date Received	Number of Ordinary Shares	% of Issued Capital
Consolidated Press Holdings Pty Limited	11 June 2019	249,253,302	36.81%
Midnight Acacia Holdings Pte. Limited	1 May 2020	67,675,000	9.99%
Perpetual Limited	6 April 2020	63,194,756	9.33%

***Figure 2**: table from Crown Resorts 2020 Annual Report, p.146*

3. The 36.81% shareholding in Crown Resorts that is attributed to CPH in Figure 2 is in fact held by CPH Crown (which holds approximately 35.92% of the CPH Parties' shares) and CPH (which holds approximately 0.89% of the CPH Parties' shares) combined.

4. The current directors of CPH are Mr Johnston and Mr Jalland. Mr Packer ceased to be a director of CPH on 27 June 2018. CPH Crown (of which Mr Johnston is, and at all relevant times has been, the sole director) is a wholly-owned subsidiary of CPH.

240 Crown Resorts 2020 Annual Report, page 146
241 Crown Resorts 2020 Annual Report, page 146
242 Crown Resorts 2020 Annual Report, page 146

5. The ultimate holding company of both CPH and CPH Crown is Consolidated Press International Holdings Limited (**CPIHL**). Mr Packer is one of the ultimate beneficial owners of CPIHL.

6. The changes in the CPH Parties' combined shareholding in Crown Resorts since October 2011 (as recorded in the relevant 'substantial holding' notices lodged by Crown Resorts with the ASX over this period of time) may be summarised as follows:

Date	Shareholding in Crown Resorts held by the CPH Parties as at that date	Hyperlink to relevant 'substantial holding' ASX notice
06.06.2019	36.81%	Link
07.03.2018	46.01%	Link
30.11.2017	47.20%	Link
09.08.2017	48.46%	Link
25.05.2017	49.72%	Link
31.08.2016	48.20%	Link
10.11.2015	53.01%	Link
19.12.2012	50.01%	Link
12.04.2012	48.09%	Link
10.10.2011	46.00%	Link