# INQUIRY BY THE HONOURABLE PATRICIA BERGIN SC UNDER SECTION 143 OF THE *CASINO CONTROL ACT 1992* (NSW)

## AMENDED TERMS OF REFERENCE DATED 24 JUNE 2020

## SUBMISSIONS ON THE SUITABILITY REVIEW

**CROWN RESORTS LIMITED**

**CROWN SYDNEY GAMING PTY LTD**

# A. THE FRAMEWORK IN WHICH SUITABILITY IS TO BE ASSESSED

## A1. Introduction

1. On 14 August 2019, pursuant to s 143 of the *Casino Control Act 1992* (NSW) (**CC Act**), the Independent Liquor and Gaming (**the Authority**) appointed the Hon. P A Bergin SC (**Commissioner**) to preside over an inquiry into a range of matters concerning the casino licence relating to the Barangaroo restricted gaming facility and its licensee, Crown Sydney Gaming Pty Limited (**the Licensee**). The Licensee is a wholly owned subsidiary of Crown Resorts Limited (**Crown Resorts**). These submissions use the term Crown to refer broadly to the Crown group of companies.

2. Part A of the Amended Terms of Reference constitutes the 'Suitability Review'. This review is to occur in 'response to' allegations made on and from 27 July 2019 by the Nine Network, the Sydney Morning Herald, The Age and other media outlets which, the Amended Terms of Reference state, *"raised questions as to whether the Licensee remains a suitable person"* to hold a restricted gaming license for the purposes of the CC Act. Specifically, the Suitability Review requires the Commissioner to consider:

   (a) whether the Licensee is a suitable person to continue to give effect to the Barangaroo restricted gaming licence (**Restricted Gaming Licence**);

   (b) whether Crown Resorts is a suitable person to be a close associate of the Licensee;

   (c) in the event that the answer to either (a) or (b) above is no, what, if any, changes would be required to render those persons suitable.

3. Counsel Assisting has submitted that that the evidence presented to this Inquiry demonstrates that the Licensee is not a suitable person to continue to give effect to the licence and that Crown Resorts is not a suitable person to be a close associate of the Licensee.[1]

4. For the reasons set out in this opening section, and expanded upon in detail in subsequent sections, that submission is unbalanced and unsupported by a fair reading of the material before the Inquiry. In fact, Counsel Assisting's whole approach to the question of suitability is unsound, including because it pays no real regard to the conscientious and considered steps that Crown has taken to address the shortcomings and failings that have emerged during the course of the Inquiry.

5. A strange feature of the suitability review required by the Amended Terms of Reference is that suitability is to be inquired into expressly by reference to allegations in the media. That is, the Commissioner must inquire into and report upon the Licensee's suitability (and whether Crown Resorts is a suitable person to be a close associate of the Licensee) *"in response to the* [media] *Allegations"*. The Commissioner and Counsel Assisting must of course address the Amended Terms of Reference, but that circumstance should not be allowed to skew the assessment of suitability in the way that has occurred in the submissions from Counsel Assisting. Rather than considering suitability from an overall perspective, having close regard to the terms and objects of the CC Act, this framing of the terms of reference has led Counsel Assisting to analyse suitability vis a vis each topic of media allegations in a discrete and isolated way.[2] Counsel Assisting have examined each topic of media allegations referred to in the Amended Terms of Reference and concluded that, if they consider at least some of the

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[1] T4833/39 – 41 (Counsel Assisting closing submissions).

[2] Paragraph 15 of the Amended Terms of Reference exposes one of the difficulties in framing the Inquiry in this way. That paragraph states that "the Allegations" include allegations that Crown Resorts or its agents, affiliates or subsidiaries: (a) engaged in money-laundering; (b) breached gambling laws; (c) partnered with junket operators. Plainly, there was no allegation, nor could it ever reasonably be alleged, that Crown Resorts itself *"engaged in money-laundering"*.

allegations on a particular topic of media allegations to be substantiated on the evidence (in whole or part), it must follow that the Licensee and Crown Resorts are unsuitable. This, it is respectfully submitted, does not accord with how suitability is to be assessed under the CC Act, and establishes an exceptional and unprecedented standard not applicable to any other casino operator, either in Australia or overseas.[3]

6. Counsel Assisting have submitted that adverse findings should be made with respect to the suitability of the Licensee (and whether Crown Resorts is a suitable close associate of the Licensee) based, separately and individually, on matters concerning each of the following: Crown's failings in relation to anti-money laundering (**AML**) measures; Crown's previous dealings with junket operators; the arrests of Crown staff in China in 2016; the Melco transaction; and the influence of Mr James Packer and Crown's largest shareholder Consolidated Press Holdings Limited (**CPH**). No doubt Counsel Assisting would also say that the same matters, assessed cumulatively, would also support a finding of unsuitability. Nonetheless, it is noteworthy that Counsel Assisting have been prepared to advance a contention that Crown is unsuitable without undertaking a holistic assessment of all relevant circumstances, including reforms and remedies that Crown has progressively implemented.

7. The evidence in connection with each of these matters, and why that evidence, when directed to the question of the *current suitability* of the Licensee (and Crown Resorts as a close associate of the Licensee) does not warrant a finding of unsuitability in respect of either entity, is addressed in detail in the remaining sections of Crown's submissions. However, before addressing each of the contentions in detail, it is necessary to properly frame the question of suitability, and to identify the matters which bear upon that question.

## A2. The CC Act

8. Analysis of the framework in which suitability is to be assessed under the Amended Terms of Reference must begin with the text of the CC Act. Pursuant to s 143 of that Act, the Commissioner has been appointed to hold an Inquiry *"for the purpose of the exercise of* [the Authority's] *functions"* under the CC Act.

9. The function under which the 'Suitability Review' is being conducted is said by Counsel Assisting to be that prescribed by s 141(2)(c) of the CC Act, viz:

> *to keep under constant review all matters connected with casinos and the activities of casino operators, persons associated with casino operators, and persons who are in a position to exercise direct or indirect control over the casino operators or persons associated with casino operators.*[4]

Crown agrees with Counsel Assisting that this is the relevant provision.

10. Section 141(2)(c) contains no reference to suitability, and there is no textual indication in the section itself as to the scope of the *"constant review* [of] *all matters connected with casinos and the activities of casino operators".*

11. Counsel Assisting did not expressly identify the link between the test of suitability, as it appears elsewhere in the CC Act, and the *"constant review of all matters"* power conferred by s 141(2)(c)

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[3] The position in relation to international jurisdictions is dealt with in the closing section of these submissions. As for the experience in Australia, it is important to bear in mind that casino operators are, and have been, subject to regular and ongoing suitability reviews. This includes past reviews by the Authority into the suitability of The Star under the CC Act, and by the VCGLR into Crown Melbourne's suitability under the Victorian legislation. These reviews have previously looked into, for example, arrangements between these casino licensees and junket operators and not found those arrangements to render the licensee unsuitable (see, e.g., VCGLR, Sixth Review of the Casino Operator and Licence, June 2018 (Exhibit A91, INQ.140.010.2949); ILGA, Star Casino Licence Review by J M Horton QC, 28 November 2016 (Exhibit A75, INQ.080.050.0944) (**2016 Star Review**)).

[4] T4835/34 – 41 (Counsel Assisting closing submissions).

which is being exercised by the Commissioner in this Inquiry. Counsel Assisting did, however, correctly observe that the function in s 141(2)(c) is distinct from the functions conferred on the Authority by the CC Act which expressly invoke the concept of suitability,[5] viz:

(a) Section 31: which requires the Authority to review the ongoing suitability of a casino operator at periodic intervals not exceeding five years.

(b) Section 35(3): which requires the Authority, in considering whether to approve a major change in the state of affairs of a casino operator which involves a person becoming a close associate of a casino operator, to only provide such approval if satisfied that the person is a suitable person associated with the management of a casino.

12. The distinction between these powers and that conferred by s 141(2)(c) cannot be glossed over, particularly in circumstances where the Licensee is yet to commence casino operations at the restricted gaming facility at Barangaroo. Section 31 is, in its terms, a 'suitability review'. The concept of suitability is also directly invoked in the context of an *application* for a restricted gaming licence under s 13A of the CC Act. This Inquiry, conducted in exercise of the Authority's constant review power under s 141(2)(c), occurs in an interregnum between the Authority's decision to grant the Licence under Part 2 of the CC Act, and the first periodic review of the Licensee pursuant to s 31 of the CC Act. As noted, each of those statutory functions – the grant of an application and a periodic review – expressly invoke the concept of suitability. Section 141(2)(c) does not. The review has been progressing in circumstances where there is presently no *"casino operation"* being conducted by the Licensee in New South Wales, although that operation is scheduled to commence soon.

13. It is respectfully submitted that identifying precisely what work the concept of 'suitability' has to do, and the content of this concept, in the context of a *"constant review"* pursuant to s 141(2)(c) of the CC Act, conducted at a time *before* casino operations have commenced under the License, is not as straightforward as Counsel Assisting contends. Counsel Assisting referred to reviews of Star Casino conducted by the Honourable P D McLellan QC in December 1997 (**1997 Star Review**) and by Jonathan Horton QC in November 2016. Each of the 1997 Star Review and the 2016 Star Review were periodic licence reviews conducted under s 31 of the CC Act. As a result, they were exercising the Authority's function of a regular investigation into, among other things, the casino operator's suitability, which required all relevant aspects of the casino's operations to be taken into account.

14. While not approached in this manner by Counsel Assisting, it is respectfully submitted that, for present purposes, the concept of suitability is directed towards Crown's current suitability to hold its Restricted Gaming Licence. The focus on current suitability is supported by s 23, although that provision has no direct application. Section 23 concerns 'Disciplinary action against casino operator'. It stipulates that 'disciplinary action' means (a) the cancellation or suspension of the licence; (b) the imposition of a pecuniary penalty; (c) the amendment of the terms or conditions of the licence; (d) the issue of a letter of censure to the Licensee. Section 23(1) stipulates that, among the 'grounds for disciplinary action', is that:

> *the licensee is, for specified reasons, considered to be no longer a suitable person to give effect to the licence and this Act.*

15. It is important to note three matters about the text of this provision.

(a) First, the unsuitability must be for "specified reasons".

(b) Second, there is an express temporal element; namely, that the Licensee *"is no longer"* a suitable person. This temporal element, of course, refers back to the antecedent

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[5] T4835/43 – T4836/06 (Counsel Assisting closing submissions).

finding of suitability that was made at the time the Licence was applied for. But it also requires that attention be directed to suitability as at the time that consideration is being given to whether or not grounds for disciplinary action exist.

(c) Third, the suitability must be tied to giving "effect to" the Licence and the CC Act.

16. There is no definition of "suitable person" in the CC Act. Crown accepts that the words "no longer a suitable person" in s 23(1) mean that the factors required to be taken into account under s 13A(2) of the CC Act in assessing suitability at the time an application is originally made for a licence are also relevant in conducting a review of whether the licensee and its close associates continue to be suitable persons after the licence has been granted.[6] Those factors are, cumulatively:[7]

(a) whether the Licensee and each close associate of the Licensee (including Crown Resorts) are persons of good repute, having regard to character, honesty and integrity;

(b) whether the Licensee and its close associates are of sound and stable financial background;

(c) whether the Licensee has arranged a satisfactory ownership trust or corporate structure;

(d) whether the Licensee has access to suitable and adequate financial resources to operate the Barangaroo facility;

(e) whether the Licensee has or is able to obtain the services of persons who have sufficient experience in the management and operation of a casino or similar gaming facility;

(f) whether the Licensee has sufficient business ability to maintain a successful gaming facility;

(g) whether the Licensee or any of its close associates has any business association with any person, body or association who, in the opinion of the Authority, is not of good repute having regard to character, honesty and integrity or has undesirable or unsatisfactory financial sources;

(h) whether each director and officer determined by the Authority to be associated or connected with the ownership, administration or management of the operations or the business of the applicant or its close associates is a suitable person to act in that capacity.

17. Of the factors to be taken into account, only (a), (g) and (h) are relevant for the purposes of this Inquiry. This is what was submitted by Counsel Assisting. Paragraphs (a) and (g) are particularly important because they both define the concept that is relevant to an assessment of suitability, namely "good repute, having regard to character, honesty and integrity". This is a use of the expression "good repute" in the very specialised sense of the person's actual

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[6] See: T4836/28 – T4837/24; 1997 Star Review, p. 7; 2016 Star Review; VCGLR, Sixth Review of Crown Melbourne Ltd, June 2016. While these factors are relevant to the question of whether the Licensee "remains" suitable, it is not correct, as Counsel Assisting contended, that suitability is being assessed pursuant to s 13A of the Act, both in terms of the original decision to grant the licence and in the subsequent review of the licence and its conditions from time to time (cf: T4840/45 – T4841/04 (Counsel Assisting closing submissions)). Section 13A provides that the criteria in subsection (2) are for the "purpose" of the Authority undertaking the task stipulated in subsection (1). Subsection (1) provides that the *"[T]he Authority must not grant an application for a restricted gaming licence*". That section is, in terms, directed to the *grant* of *an application* for a licence.

[7] T4836/8–26 (Counsel Assisting closing submissions).

character, honesty and integrity. It is not concerned with repute in the sense of fame or public perception, which might be based on things such as rumour or unverified allegations.

18. The construction of *"good repute"* advanced by Counsel Assisting in their reply submissions is incorrect.[8] Counsel Assisting sought to advance a submission that good repute was effectively at large, unconstrained by the statutory context in which it appears. Crown does not accept that the Inquiry is to view the question of suitability having regard to the *"ordinary meaning of the expression 'good repute'."*[9] If one applies the principles relating to disciplinary hearings, which Counsel Assisting contended are 'apposite'[10], then one such principle is that notions of reputation, character, honesty and integrity are not at large.[11] They take their meaning from the particular statutory context in which they appear, having regard to the characteristics of the regulated industry or profession in question.

19. Crown of course accepts that the notion of reputation is relevant,[12] but it is reputation in the sense of the public's perception of the Licensee and its close associates having regard to their character, honesty and integrity. The problem with the width of Counsel Assisting's construction is exposed by the submission that the *"reputation of junket operators"* is relevant to the assessment of Crown's suitability.[13] That is wrong. Crown's dealings with junket operators are clearly relevant, but they are relevant only insofar as those dealings reflect on the public perception of *Crown* having regard to *Crown's* character, honesty and integrity.

20. Although the inquiry under s 23(1) of the CC Act does not expressly raise the question of suitability of *"each close associate"* of the Licensee, Crown accepts that, on the proper construction of the legislation, among the "specified reasons" that a Licensee could be found to be no longer suitable to give effect to the License is because a close associate of the Licensee is, for example, no longer considered to be a suitable person and for some reason that association cannot be adjusted or terminated.

21. The Authority's constant review function under s 141(2)(c) must be exercised having regard to the primary objects of the CC Act as set out in s 4A. Those objects are:

    (a) ensuring that the management and operation of a casino remain free from criminal influence or exploitation; and

    (b) ensuring that gaming in a casino is conducted honestly; and

    (c) containing and controlling the potential of a casino to cause harm to the public interest and to individuals and families.

22. Those objects are relevant to construing each of the functions conferred on the Authority by the CC Act and are, as explained below, critical to an assessment of suitability in this Inquiry.

23. In terms of the question of the suitability of the Licensee's close associates, the term close associate is defined in s 3(1) of the CC Act with reference to the meaning set out in the *Gaming and Liquor Administration Act* 2007 (NSW) (**GLA Act**). Under s (5)(1) of the GLA Act, there are two tests for ascertaining whether a person is a close associate of a licensee:

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[8] T5823/32 – T5826/28.
[9] T5825/25.
[10] T5828/16 – 19.
[11] *Prothonotary of the Supreme Court of NSW v Alcorn* [2007] NSWCA 288 at [57] – [60]; *Wang v Australian Securities and Investments Commission* [2019] FCA 1178 at [73]; *McBride v Walton* (NSWCA unreported, 15 July 1994 at [15] per Kirby P.
[12] Cf. T5825/26.
[13] T5824/5–6.

(a) if the person holds or will hold a relevant financial interest[14] or will be entitled to exercise a relevant power[15] in the business of the licensee and, by virtue of that interest or power, is or will be able to, in the opinion of the Authority, exercise a significant influence over or with respect to the management or operation of the licensee's business;

(b) holds or will hold any relevant position, whether in his or her own right or on behalf of any other person, in the business of the applicant or licensee that is or will be carried on under the authority of the licence.

24. Crown accepts that Crown Resorts is a close associate of the Licensee in that it has a relevant financial interest in the Licensee and that it, by virtue of that interest, is able to exercise a significant influence over or with respect to the management and operation of the Licensee.[16]

**A3. Principles relevant to assessing suitability under the CC Act**

25. Crown submits that the following principles are applicable to the assessment of whether the Licensee remains a suitable person, and whether Crown Resorts is a suitable person to be a close associate of the Licensee.[17]

26. *First*, as noted above, 'suitability' or 'suitable person' is not a defined term in the CC Act.[18] The primary factors to which regard is to be had are those identified in s 13A. As mentioned above, s 13A(2)(a) and (g) indicate that suitability is to be assessed by reference to a person's good repute having regard to that person's character, honesty and integrity; or by reference to the same characteristics of the persons with which it has business associations.

27. Relevantly, the objects of the CC Act are also directed towards matters of honesty and integrity. The first object in s 4A – ensuring that the management and operation of a casino remain free from criminal influence or exploitation – depends centrally upon the character, honesty and integrity of the operator. The second objective – ensuring that gaming in a casino is conducted honestly – likewise depends on the operator's character, honesty and integrity. And the third objective – containing and controlling the potential of a casino to cause harm to the public interest and to individuals and families – also centrally depends upon the operator's character, honesty and integrity. Consequently, the question of Crown's suitability should be approached by asking whether, at the present time and having regard to the plans and actions that Crown is implementing, the Licensee and Crown Resorts ought to be regarded as entities which have the character, honesty and integrity to fulfil the responsibility of operating the Barangaroo facility.

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[14] A "relevant financial interest" is defined by subsection 5(2) of the *Gaming and Liquor Administration Act* to mean any share of the capital of the business or any entitlement to receive income, rent or some other financial benefit or financial advantage from the business. See also T4834/35 – 46 (Counsel Assisting closing submissions).

[15] A "relevant power" is defined to mean a power, whether exercisable by voting or otherwise and whether alone or in association with others, to participate in directorial management or executive decisions or to elect or appoint any person to a relevant position; secondly, a person is a close associate if the person holds or will hold any relevant position, whether in the person's own right or on behalf of another, in the business of the licensee. And "relevant position" is defined in subsection (5)(2) of the *Gaming and Liquor Administration Act* to mean a director, manager, secretary or other executive position. See also T4835/01 – 08 (Counsel Assisting closing submissions).

[16] T4835/22 – 32 (Counsel Assisting closing submissions).

[17] Which include principles drawn from the authorities in Australian and in the United States. As Counsel Assisting observed, which Crown accepts, "*New Jersey and Massachusetts authority decided in the context of very similar suitability and probity reviews in those states, which requires an assessment of matters, including a casino's integrity, honesty, good character and reputation, which may assist you in determining the issue in this Inquiry*". T4838/25 – 29 (Counsel Assisting closing submissions).

[18] The test of a 'suitable person' is common in statutes that govern liquor and gaming licences: See, eg, *Casino Control Act* 1982 (Qld) s 20; *Liquor Act* 1992 (Qld) s 173EQ; *Casino Act* 1997 (SA) s 21; *Gaming Control Act* 1993 (Tas) s 76G; *Casino Control Act* 1991 (Vic) s 25; *Liquor Control Reform Act* 1998 (Vic) s 41; and *Casino Control Act* 1984 (WA) s 19(1a).

28. Crown submits that this assessment of suitability must be a comprehensive one, which takes into account all relevant circumstances, including the steps that Crown has taken to redress and remedy any shortcomings that have been exhibited in the past.

29. Understood in this way, the matters discussed in the last three paragraphs distil the essential questions which arise under Part A of the Amended Terms of Reference.

30. As outlined in further detail below, there is no basis in the evidence before the Inquiry to find that Crown Resorts has acted dishonestly. Nor is there any foundation for the submission that Crown Resorts' conduct is indicative of a lack of integrity. To the extent that past mistakes and cultural failings reflect adversely on the corporate character of Crown Resorts, the steps taken by Crown to recognise and address those matters demonstrates that the company has the character necessary to give effect to the Restricted Gaming Licence (through the Licensee) and the CC Act. It is Crown's character now, as opposed to at an earlier point in time, which is relevant.[19] In the absence of a finding that the Licensee and Crown Resorts has failed to conduct itself with honesty and integrity, or is not of good character, it is respectfully submitted that there is no sound basis to make a finding of unsuitability.

31. *Second*, and relatedly, careful attention must be directed to what the Licensee must be suitable for. Suitability is not assessed in the abstract. Rather, the statutory text, and the Amended Terms of Reference are clear: it is whether the Licensee is a suitable person to give effect to the Restricted Gaming Licence at Barangaroo. This same test is applicable to evaluating the suitability of Crown Resorts to remain as a close associate of the Licensee. That is, whether Crown Resorts being a close associate of the Licensee impugns the suitability of the Licensee to give effect to the *Restricted Gaming Licence*. The CC Act also requires the Licensee to be suitable for the purposes of giving effect to the legislation. This can be viewed as the need for the public to have trust and confidence in the character, honesty and integrity of the licensed activity.

32. The nature of the Restricted Gaming Licence, and the fact that the Licensee has not yet commenced any casino operations pursuant to that licence, are highly relevant matters to the assessment of suitability. Again, reference must be had to the objects of the CC Act, given, as Counsel Assisting accepts, this is the "lens" through which suitability is to be assessed. The question can be framed as follows:

> Having regard to the terms of the Restricted Gaming Licence, is the Licensee a suitable person for the purposes of:
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> (a) ensuring that the management and operation of a casino remain free from criminal influence or exploitation; and
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> (b) ensuring that gaming in a casino is conducted honestly; and
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> (c) containing and controlling the potential of a casino to cause harm to the public interest and to individuals and families?

33. For the reasons outlined in summary below, and expanded upon in further detail in the remaining sections of these submissions, there is no proper evidentiary foundation to conclude that the Licensee is not a suitable person for the purposes of giving effect to the Restricted Gaming Licence in light of these objects.

34. *Third*, there is some analogy between suitability and other familiar formulations such as 'fit and proper person' but it is far from exact. The latter expression is more at large than the statutory

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[19] *Ex parte Tziniolis; Re The Medical Practitioners Act* (1966) 67 SR (NSW) 448 per Holmes JA at 475.

concept of suitability which is tied specifically to character, honesty and integrity.[20] There is authority to the effect that concepts of fitness and propriety may extend to any aspect of fitness or propriety that is relevant to the public interest.[21] In Crown's submission, the concept of suitability in the CC Act is more focused, but that is not to dispute that the provisions of the CC Act exist for the benefit of the public, or that the statutory concept of suitability serves the public interest. However, it has been designed to achieve that end by concentrating on matters going to character, honesty and integrity.

35. A defect of character which is reasonably likely to cause concern as to the integrity of the licensee is relevant in considering whether that person is a suitable person to hold the particular licence in question. However, the concept 'suitability' is not without limits. The phrase takes its meaning from the statutory context in which it appears.[22] Here, that is, fundamentally, for the Licensee to be suitable to give effect to the Restricted Gaming Licence. It also means that conceptions of reputation are not at large; rather, as noted above, "good repute" is only relevant in the very specialised sense of the Licensee's and Crown Resorts' actual character, honesty and integrity. Allied to this is the well-established line of authority to the effect that whether a person is fit and proper, or suitable, must be considered in the context of the profession or occupation in relation to which the concept is used and according to the standards that prevailed in the relevant industry.[23]

36. *Fourth*, the suitability of the corporate licensee or close associate is to be evaluated by reference to all of the actions taken by its directors and senior management (that is, the officers primarily responsible for managing the corporation) up to the point at which the assessment is to be made. This point has been considered in several United States decisions in the casino licensing context, including in New Jersey, where each licence issued or renewed under their Casino Control Act requires an inquiry into the character of the prospective licensee. The New Jersey Supreme Court has held that corporate character under their casino licensing legislation is to be assessed by reference to the character of those responsible for its day to day operations, its major shareholder(s), and its board of directors.[24] Crown accepts the following characterisation of the position by Counsel Assisting:

> "*Of course, the character and integrity and therefore suitability of a company is informed by the character and integrity of those who control its affairs. It follows that a company's suitability may ebb and flow with changes to the composition of the company's board of management and others who influence its affairs over time*".[25]

37. *Fifth*, Crown also accepts that the suitability of the Licensee is not a matter that can be assessed in isolation from the suitability of Crown Resorts and, indeed, the practices of the entire Crown Resorts group.[26] Counsel Assisting contended that "*the examination of a company's conduct and business practices as part of a suitability review also requires a more holistic assessment of the company's corporate governance, including adherence to adopted policies and procedures*".[27] Crown submits that this holistic assessment must necessarily take into account efforts made to improve the company's corporate governance processes and practices over time. It is respectfully submitted that Counsel Assisting's submissions as they later proceed either ignore, or give insufficient credit

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[20] *Maxwell and Maxwell v Dixon* [1965] WAR 167 at 169.
[21] *Australian Broadcasting Corporation v Bond* (1990) 170 CLR 321 at 348 (*Bond*) (Mason CJ); *Boyd v Carah Coaches Pty Ltd* (1979) 145 CLR 78; *Hughes and Vale Pty Ltd v State of New South Wales No 2* [1955] 93 CLR 127.
[22] *Bond* at 380 per Toohey and Gaudron JJ.
[23] *Rex v Hyde Justices* [1912] 1 KB 645.
[24] *Trapp Rock Industries Inc v Kohl* 59 NJ 471, 284 A. 2d 161 (1971).
[25] T4839/14 – 17 (Counsel Assisting closing submissions).
[26] T4840/31 – 33 (Counsel Assisting closing submissions).
[27] T4839/29 – 32 (Counsel Assisting closing submissions).

to, the concerted actions Crown has undertaken, and is taking, to improve and strengthen its systems and processes and to remedy shortcomings that have been identified.

38. *Sixth*, while past conduct is, of course, a relevant consideration to be taken into account in assessing suitability, the weight to be given to such conduct will vary according to the circumstances of the particular case and the nature of the conduct in question.[28]

39. As the statutory test requires an assessment to be made at the present time as to the Licensee's suitability to operate the Restricted Gaming Licence *in the future*, the evaluation of suitability involves an element of prediction. The special nature of the operations that Crown will be conducting under the Restricted Gaming Licence is also an important consideration. A decision on whether or not to entrust the Licensee with the privilege of licensure in a protected field involves an estimate of the extent to which the integrity of the Licensee can be trusted to engage in the licensed activity in a proper manner.

40. While it may be said that a significant element in making a predictive judgement is past conduct, that past conduct must be properly contextualised and viewed in light of what, if any, steps have been taken by the Licensee to acknowledge, remediate and prevent future occurrences of that conduct. That is, the assessment must be made as to the likelihood of past misconduct *reoccurring* in the future. That is particularly so in circumstances where, as here, the Licensee is yet to commence operating under its Restricted Gaming Licence.

## A4. The Licensee's suitability

41. In assessing the suitability of the Licensee, focus must be directed to the nature of the licence which the Licensee must be a suitable person to give effect to. In July 2014, the Authority granted the Licensee a Restricted Gaming Licence. The CC Act draws an express distinction between the "casino licence" and the Restricted Gaming Licence.[29] Although the Barangaroo restricted gaming facility is treated as a casino for the purposes of the CC Act, the nature of the licence, compared to the casino licence under the CC Act, and the casino licence operated by Crown in Victoria and Western Australia, is very different.

42. By reason of its Restricted Gaming Licence, Crown Sydney[30] will have a different profile from all other major casinos in Australia.[31] It will consist of a boutique, tables-only casino, which will not be accessible by the general public and will not contain poker machines.

43. The Restricted Gaming Licence held by Crown Sydney Gaming contains a number of conditions which limit the gaming operations at Crown Sydney.[32] The Restricted Gaming Licence contains, relevantly, the following provisions:

(a) Defined terms, including (cl 1):

(i) "Restricted Gaming Facility" means premises situated or proposed to be situated on that part of Barangaroo identified as the site of the Restricted Gaming Facility Site Map (being the map referred to in s 3(4) of the CC Act;

(ii) "VIP Gaming" means the conduct of gaming in accordance with this restricted gaming licence;

(iii) "VIP Guest Policy" means the VIP guest policy determined by the Licensee from time to time which relates to the Restricted Gaming Facility and which is

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[28] *The Queen v. Knightsbridge Crown Court Ex parte International Sporting Club (London) Ltd and Palm Beach Club Ltd*, Nos. 163-81, 191-81 at 2 and 17 (Q.B. Div'l Ct. June 5, 1981).

[29] Section 6, CC Act.

[30] A name used in these submissions to refer collectively to the operations of the entities Crown Sydney Gaming Pty Ltd (Crown Sydney Gaming) and Crown Sydney Property Pty Ltd (Crown Sydney Property).

[31] Third witness statement of Ken Barton dated 16 September 2020 (Third Barton Statement), [92].

[32] Third Barton Statement, [93].

consistent with the principles agreed between the Licensee and the State of New South Wales;

(iv) "VIP Membership Policy" means the VIP membership policy determined by the Licensee from time to time which relates to the Restricted Gaming Facility and which is consistent with the principles agreed between the Licensee and the State of New South Wales.

(b) The licence permits gaming to be conducted in the Restricted Gaming Facility from 15 November 2019 (cl 3(a)).

(c) Gaming in the Restricted Gaming Facility includes the operation of traditional table games, semi-automated table games and fully automated table games. Gaming in the Restricted Gaming Facility will not include the playing of poker machines (cl 4).

(d) Gaming in the Restricted Gaming Facility will not include the playing of games where the amounts placed for any single bet or wager on that game is less than the Minimum Bet Limit for that game determined in accordance with this restricted gaming licence (cl 5).[33]

(e) The Licensee must ensure that the Restricted Gaming Facility is not open to the general public and is open only to:

(i) VIP Members, defined to mean a Rebate Player[34] or any other person who has applied for and has been granted (and continues to hold) membership by Crown Sydney having regard to the VIP Membership Policy;

(ii) VIP Members' Guests, defined to mean a bona fide guest of a VIP Member determined in accordance with the VIP Guest Policy;

(iii) Licensee's Guests, defined to mean bona fide guests of the Licensee's management determined in accordance with the VIP Guest Policy (cl 6.1).

(f) The Licensee must have a VIP Membership Policy which includes the requirements specified in cl 6.2 of the Licence (cl 6.2).

44. In order to satisfy the Restricted Gaming Licence condition that the Restricted Gaming Facility not be open to the general public, Crown is required to have a VIP Membership Policy, a VIP Guest Policy and a Membership Review Policy. These policies have been incorporated into a proposed single Crown Sydney Membership & Guest Policy (**Policy**). The Policy is ready for submission to the Authority for approval.[35]

45. Under the proposed Policy, the sign-up process for Crown Sydney VIP membership will involve the following:

(a) verifying the applicant's identity, which requires, at a minimum, the applicant's first and last name, date of birth, residential address and photographic (primary) identification, with a copy retained on file at Crown Sydney;

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[33] Minimum bet limits in the case of baccarat, blackjack or roulette are the higher of: (a) $30 for baccarat, $20 for blackjack and $25 for roulette and (b) the amount which the Authority is satisfied is the lowest minimum bet limit for the relevant game in a comparable VIP gaming area located in Melbourne Crown Casino (or, if Melbourne Crown Casino, has ceased to exist or does not offer the relevant game, another Australian casino nominated by Crown Sydney).

[34] Rebate Player is defined to mean an international or interstate resident who participates in VIP Gaming either individually or as a participant in a junket, in accordance with a system of internal controls and administrative and accounting procedures applicable to that person agreed with the Authority and lodges the requisite front money (cl 1).

[35] Third Barton Statement, [98].

(b) provision of a headshot photo for the purpose of inclusion on the Crown Rewards VIP membership card. This can be taken onsite or provided by the applicant through a self-service mobile application;

(c) satisfaction of a background security check. In order to satisfy the background security check, the prospective member's details are entered into one of either (in the case of members who have activity at Crown Melbourne or Crown Perth) Dow Jones, or (in the case of patrons attending Crown Sydney) Acuris Risk Intelligence for the purpose of probity checks; and

(d) acceptance of the Crown Sydney VIP Membership terms and conditions, including the Restricted Gaming Facility Acknowledgement.[36]

46. Every person who proposes to enter the Restricted Gaming Facility will be required to provide a patron card (membership, VIP International, or guest card) with their photo, which will be scanned through Crown Sydney's Entry Management System. The Entry Management System will determine whether:

(a) that patron is permitted to enter the Restricted Gaming Facility;

(b) further information is required (for example, where the patron's membership has expired); or

(c) the patron is not permitted to enter the Restricted Gaming Facility (for example, where their membership tier does not permit access to certain areas within the Restricted Gaming Facility, or where they are otherwise not permitted such as due to the existence of a current exclusion order or ban).[37]

47. In order for a guest of a VIP member to enter the Restricted Gaming Facility, the guest will be required to register by providing identity information with current photo ID, which will be scanned and verified through a document verification service check. Guest details will also be passed through Acuris Risk Intelligence for the purpose of a PEP and Sanctions check, which will allow for the real time checking of the database.[38]

48. As briefly mentioned above, the fact that gaming operations at Crown Sydney will be fundamentally different from the casino operations at Crown Melbourne and Crown Perth is an important component of the suitability assessment. In particular, it is important to assess the relevance of matters which have been inquired into as part of the 'Suitability Assessment' under Part A of the Amended Terms of Reference in light of the restrictions that are already imposed on the Licensee by the Restricted Gaming Licence. Simply stated, the restricted operation at Barangaroo will be very different from operations under a general casino licence of the kind held by The Star in New South Wales and Crown in Victoria and Western Australia. The volume and nature of gaming at the Restricted Gaming Facility, combined with strict and closely supervised entry requirements, mean that, leaving to one side the additional controls that Crown has implemented, or is in the process of implementing, the evidence which has been adduced with respect to past concerns at Crown Melbourne and Crown Perth must be viewed in light of the different licence applicable to gaming at those casinos. The statutory analysis of suitability must, in the first instance, involve specific consideration of the terms of the licence in question.[39]

49. Further, as an entity which is yet to conduct any gaming operations pursuant to its Restricted Gaming Licence, the Licensee cannot itself be found to have failed to give effect to its licence

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[36] Third Barton Statement, [99].
[37] Third Barton Statement, [100].
[38] Third Barton Statement, [101].
[39] Relevant in this connection is the overstatement by Counsel Assisting of the relevance of the historic business operations of Crown's VIP international business and the conduct of restricted gaming operations at Barangaroo. See, eg, at T 4858.32; and T 4858-9.

or, for that matter, to any of the objects underpinning the CC Act. For example, there has been no failure by the Licensee to ensure that gaming in the Restricted Gaming Facility is free from criminal influence or is conducted honestly. Accordingly, it must be the conduct of the Licensee's holding company, Crown Resorts, which is attributed to the Licensee for the purposes of assessing the latter's suitability to give effect to the Restricted Gaming Licence from the time operations commence.

## A5. The suitability of Crown Resorts as a close associate of the Licensee

50. The need to consider the terms of the Restricted Gaming Licence at Barangaroo, and the nature of casino operations to be conducted at that facility, also applies to considering the suitability of Crown Resorts as a close associate. This is because the analysis is, again, in the first instance concerned with suitability to give effect to that restricted licence.

51. As for the allegations which have been the subject of detailed examination in this Inquiry in relation to the risk of money laundering, the China arrests, and junkets, for the reasons set out in the discrete sections of these submissions addressing each of these matters, when that evidence is properly and fairly analysed and understood, Crown submits that the identified defects in the past do not render Crown Resorts (and, therefore, the Licensee) unsuitable within the meaning of that term under the CC Act.

52. The evidence in relation to each of these matters identifies some serious mistakes and shortcomings, but it does not bespeak dishonesty by Crown Resorts, or a failure to act with integrity. We will come to each of these matters in some detail, but to take the China arrests, as an example, Crown accepts that its risk-management structures were not engaged in the conduct of its business in China, and that this non-engagement led to significant mistakes being made, including the Board being denied control of the risk appetite of the company in relation to China. But those mistakes do not reflect dishonesty or a lack of integrity. To the extent that the China arrests were the result of a failing of culture at Crown, those cultural failings did not encompass deceptive or dishonest conduct. The mistakes made in China were honest mistakes. The overwhelming evidence is that senior management relied at all times on the advice they received. In the aftermath of the China arrests, moreover, Crown took conscientious steps to address the failures that had occurred.

53. The evidence of past conduct of Crown Resorts in relation to the China arrests – as well as its dealings with junkets and management of money laundering risk - must also be viewed in its full and proper context. As already noted, the relevance of past conduct to the assessment of *current* suitability will vary according to the particular circumstances and the nature of the past conduct. It is respectfully submitted that the weight to be attached to evidence of past failings on a suitability review must be influenced by what, if any, measures have been taken by the licensee or close associate to remedy those failings. This must follow because the statutory enquiry is whether or not the Licensee is currently and prospectively suitable to give effect to the Restricted Gaming Licence and the CC Act, rather than whether it was suitable at any previous point of time.

54. These matters are addressed in detail later in these submissions, but Crown submits that the steps already taken, and now being taken, by Crown Resorts to address the shortcomings and failings apparent on the evidence adduced in this Inquiry are sufficient to negate any finding of unsuitability that might otherwise have been open on the evidence.

55. Before turning to the evidence, it is necessary to make a further general observation about Counsel Assisting's submissions on the notion of suitability. As already noted, Counsel Assisting's submissions use the concept of suitability and unsuitability in a manner that is divorced from its statutory meaning. The notion of suitability often appears in Counsel Assisting's submissions as an amorphous concept capable of applying to any aspect of Crown's business or organisational structure with which Counsel Assisting takes issue.

56. By way of example, Counsel Assisting have submitted that the independence of the Crown Resorts board is *"clearly"* something that must be addressed *"in order for the Licensee to be suitable and for Crown Resorts to be a suitable close associate"*.[40] While it is true that Professor Horvath, Ms Coonan and Mr Packer each acknowledged that the Crown board would be more independent in the future,[41] that is a separate matter to whether or not the Board, as currently comprised, renders the Licensee unsuitable or Crown Resorts an unsuitable close associate. It is respectfully submitted that it is a serious matter to suggest that the lack of adequate independence of the Crown Board means that the Licensee is not suitable to give effect to its Licence (i.e., because it will not act with honesty or integrity) or the objects of the CC Act (i.e., because of the risk of infiltration of crime into the Barangaroo Restricted Gaming Facility). Before making such a submission, a detailed analysis, through reference to the evidence and the meaning of "suitable person" under the CC Act, is required as to precisely why and how a lack of sufficient independence on the Crown Resorts impacts on character, honesty or integrity. No such analysis has been provided.

57. Another example concerns the China Arrests, where the mistakes by management that led to those arrests are said to be made relevant to a current assessment of Crown's suitability by virtue of the decision by its Board of directors to publish an advertisement in July 2019. As discussed later, that advertisement refuted the false allegation that Crown was deliberately breaching the Chinese criminal law. That refutation was rightly made, and the directors were faithfully acting on the basis of the information before them to the effect that the allegation was false.

58. This example is emblematic of Counsel Assisting's broad-brush and unbalanced approach to suitability. The approach taken is, in effect, binary. That is, Counsel Assisting either conclude that there is no substance to the allegation (e.g., in relation to visas) and dismiss it without further mention and without acknowledging that Crown was justified in refuting it; or, if there is any criticism capable of being made of Crown, that criticism is submitted to be directly relevant to an assessment of whether or not the Licensee is a suitable person. This approach should not be accepted. The statutory language imposes a different standard and the foregoing principles applicable to suitability must be applied. On the matters relevant to this Inquiry, failings or mistakes should only be submitted to be relevant to suitability if they bear on the question of whether or not the Licensee is a person of good repute, having regard to character, honesty and integrity, or is capable of giving effect to its licence and the CC Act by ensuring that the management and operation of a casino remain free from criminal influence or exploitation.

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[40] Submissions of Counsel Assisting: Influence of Mr Packer since November 2018, [77].

[41] Mr Packer (T3747/46); Professor Horvath (13/10/20 T4152/35 – 43); Ms Coonan (16/10/20 T4456/36 – 4457/26).

## B. THE CHINA ARRESTS

### B1. Summary

59. There is no dispute that failings occurred in relation to China. Risk-management structures and processes were not utilised. Important developments in the operating environment in China were not escalated to board-level committees and to the wider board. They should have been. The failure to escalate those developments meant that a small group of individuals made the decisions about how to respond to them. The board should have made those decisions. That small group, and not the board, set the risk appetite of Crown in relation to China. This should not have happened.

60. Further, the management of the external advice obtained in connection with the China operations was inadequate. All of that advice should have been provided to and assessed by Crown's internal lawyers.[42] That Crown's internal lawyers obtained copies of much of the advice only after the China arrests was a failing.[43]

61. Accepting that failings occurred, any balanced assessment of the decisions taken by individuals at the time must take account of the surrounding circumstances. Hindsight bias must be resisted. An important matter of context is the fact that those making the decisions looked at operating in China, as Mr Jason O'Connor put it, "through the eyes of a westerner".[44] They assumed that operating within the law would not lead to arrest and conviction for gambling crimes. That assumption was ultimately shown to be mistaken, but it was an understandable assumption to make.

62. Other relevant circumstances include that Crown had been operating in China, including having staff based in China, since at least the early 2000s,[45] without incident; that numerous competitors of Crown were also operating in China and had China-based staff;[46] that external advice was obtained on each occasion a development in China occurred, in response to that development; and that on each occasion that external advice, far from identifying an "obvious" and persisting increase in risk, was ultimately to the effect that no substantial change in operations was required. These matters must be borne in mind in passing judgement on the decisions taken by management.

63. On the topic of hindsight bias, it is worth mentioning at this early point that the characterisation of what happened in China as a series of obvious escalations in risk culminating naturally and inevitably in the arrests of staff should not be overstated. It does not reflect the evidence as to the way things were perceived at the time. Further, the analysis fails to grapple with the gulf, measured by more than a year, between the last of these events and the arrests themselves. And it fails to recognise that general perceptions of how China operates, and general perceptions as to the existence of any dependable rule of law in China, are very different now from what they were in the period between 2012 and 2016.

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[42] The 19 February 2013 advice (Exhibit M27; CRL.545.001.0615) was, however, received by the internal legal team, including Ms Debra Tegoni.

[43] See written submissions of counsel assisting on China (China submissions) at paragraphs 132-139, especially at paragraph 136, where they criticise the management of the legal advice obtained in relation to China.

[44] T2060/25-26, 32.

[45] Exhibit O67 (CRL.540.001.0114 at .0123 ([17]) (Barry Felstead's Federal Court statement); Exhibit R34 (CRL.540.001.0210 at .0217 ([33]) (Jason O'Connor's Federal Court statement).

[46] See Exhibit O33(A) (CRL.643.001.0005) (note that this was added to the existing Exhibit 033 (INQ.950.002.0147), which also refers to competitors). See also the statement of Ms Jane Pan, who was a member of sales staff imprisoned in China, which has been produced to the Inquiry (CRL.540.001.0193; no Exhibit number). Paragraph 37 of that statement identifies competitors with sales staff in China at the time. There is no reason to doubt Ms Pan's evidence.

64. Many matters put by Counsel Assisting in their closing submissions are not in issue. Those matters are set out in Annexure A to these submissions.

65. There are, however, certain submissions of Counsel Assisting that go beyond what the evidence fairly supports or that proceed from false premises. In short, Crown rejects the following propositions:

(a) that it adopted a narrow or technical interpretation of Article 303 of the PRC Criminal Law, thereby failing to comply with the spirit of the law;[47]

(b) that it acted contrary to its own idiosyncratic understanding of Chinese business law, thereby acting unethically;[48]

(c) that management appreciated that there was a material risk that staff would be arrested and convicted for gambling crimes (insofar as Counsel Assisting make such a submission);[49]

(d) that certain matters can only be construed as attempts to disguise or conceal things from Chinese authorities, or to mislead Chinese authorities;[50]

(e) that, by reason of the foregoing, Crown consciously adopted a business model that placed employees at risk of arrest and conviction for gambling crimes;[51]

(f) that decision-making in relation to China can be seen to be a product of undue CPH influence;[52] and

(g) that there has been no, or no sufficient, examination of the facts, matters, and circumstances pertaining to the China arrests.[53]

66. Turning to suitability, what occurred in China does not render Crown or the Licensee unsuitable. The focus of the suitability question must be directed to the position that Crown will be in when operations in Sydney commence. While the events in China of more than four years ago undoubtedly reveal serious failings, all operations in China ceased at that time. Further, the failings that occurred have led to significant reforms. Neither the personnel nor the structures nor the policies that were in place at the time of the China arrests are the same personnel, structures, and policies that are in place today. It follows that the events in China are not a sound basis for evaluating suitability as at the commencement of operations in Sydney. Nor are they a sound indication of how Crown will deal with circumstances that may arise at some later point in the future.

## B2. Acceptance of failings

67. As already noted, there is no dispute that failings occurred in relation to China.

68. The principal failing was constituted by a series of failures to prudently assess, and escalate, important developments in the operating environment in China to the board-level risk committees and the wider board. This was the root cause of what happened in China. It was attributable to serious misjudgements that developments in China could be adequately managed "on the ground".

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[47] See, for example, China submissions, paragraph 364.
[48] China submissions, paragraphs 150, 178-180, 351(a).
[49] China submissions, paragraph 350(a), (e).
[50] China submissions, paragraphs 179, 193.
[51] China submissions, paragraph 351.
[52] China submissions, paragraphs 11(c), 311, 356.
[53] China submissions, paragraphs 358, 362.

69. Whether operations in China remained within Crown's risk appetite in the light of those developments was a matter for the board. And because the developments were not escalated to the wider board as the relevant decision-making organ, the important decisions about how to proceed by way of response to those developments were not made by the board. Instead, those decisions were made by a narrow group of individuals all looking at the matter from broadly the same perspective.

70. Risk-management structures and procedures, through which each development in the operating environment could have been ventilated for wider assessment, did exist at the time. The statement of Mr Drew Stuart in the class action, which has been tendered in the Inquiry,[54] sets out the risk-management structures and procedures then in place at Crown Melbourne and at Crown, and explains the link between the two. It sets out how those structures and procedures were designed to identify, assess, and manage risks. As Crown apprehends Counsel Assisting's submissions, they do not cavil with the evidence in Mr Stuart's statement,[55] which was consistent with his oral evidence. Mr Stuart's evidence as to the risk-management structures in place at the time was not challenged.

71. What is apparent, however, is that the structures and procedures described by Mr Stuart were simply not engaged in relation to a series of important developments in the operating environment in China. That represents a failing. It shows a lack of awareness of the importance of escalating risks and a lack of awareness that a company's risk appetite is a matter for the board. The misjudgement that risk could be adequately managed "on the ground" speaks to the need to impress upon management (and for that matter directors) the importance of drawing risks to the attention of those administering risk-management structures so that they can be properly considered and debated through channels designed to do just that.

72. The need to impress upon all those who work for Crown the importance of utilising the risk-management processes is something of which Crown is acutely aware. It will not repeat the mistakes in China. Ms Anne Siegers was engaged in 2017 in the aftermath of the China arrests to overhaul the company's risk management policy, processes, and structures to ensure they represented best practice. Part of the risk-management training she designed and has delivered is directed to emphasising the importance of drawing to the attention of the risk-management committees anything that is potentially a risk – whatever view a particular individual might take of it. That training recognises that the breadth of perspectives brought to bear though engagement of the risk-management structures may well identify risks not perceived by a particular individual.[56]

73. Crown accepts that the following matters ought to have been exposed to wider consideration and assessment through Crown's risk-management structures and procedures (through which they would have come to the attention of the wider board):

    (a) the 6 February 2015 press conference held by Chinese authorities;[57]

    (b) the 17 June 2015 arrests of the South Koreans;[58]

    (c) the questioning of Mr BX and Mr JX in June 2015, and the request for the letter confirming Mr BX's employment;[59]

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[54] Exhibit O69 (CRL.540.001.0181).
[55] See China submissions, paragraphs 34-54.
[56] Mr Felstead referred to risk-management changes since the China arrests: see at T1244/1-22.
[57] China submissions, paragraphs 186-219.
[58] China submissions, paragraphs 220-244.
[59] China submissions, paragraphs 245-318.

(d) the CCTV news program in October 2015.[60]

74. Crown accepts that the failure to ventilate these matters through the risk-management processes and to draw them to the attention of the wider board was unacceptable.

75. Crown also accepts that the management of external advice received by the VIP international executives was inadequate. All advice as and when received should have been provided to Crown's internal legal teams for assessment and scrutiny. The legal department did see the core legal advice on Article 303.[61] However, it should not have been left to Michael Chen to manage and communicate the ongoing flow of advice, even if he was regarded as the person with the most knowledge and experience of Chinese affairs and as the person dealing directly with WilmerHale. A process should have been in place requiring all advice obtained by management to be passed on to internal lawyers. That would have ensured that any ambiguities or obscurities in the advices were clarified. Further, the fact that Crown's internal legal teams obtained copies of most of the later advices only after the arrests is another failing.[62]

76. Crown has addressed the failings in relation to management of advice. All external advice relating to jurisdictions outside Australia is now obtained through Crown's internal legal teams. Crown has improved its internal systems for the retention of external advice. It has implemented the "WorkSite" file management system and has adopted a practice of saving all external advice to that system using a naming convention.

77. Finally, while Crown does not accept the proposition that the VIP Working Group was effectively a CPH silo or an instance of CPH exercising undue control over decision-making in relation to China, Crown does acknowledge that it appears that the fact that Mr Johnston was an attendee of the VIP Working Group had some effect on the way in which Mr Felstead reported upwards. As Mr Felstead frankly acknowledged in his evidence, the way in which he reported on VIP operations in China was not uniform: he reported to Mr Johnston on some occasions; and to Mr Craigie on other occasions.

## B3. Context

78. How severely the individuals concerned should be judged for these acknowledged failings requires an examination of matters of context and an understanding of the wider circumstances in which events occurred. It is submitted that Counsel Assisting's submissions on China pay insufficient regard to these matters.

Rule of law assumption

79. The first matter of context is well captured by an aspect of Mr O'Connor's evidence: he spoke of looking at China "through the eyes of a westerner".[63] He said that he:[64]

> *"didn't fully appreciate that China's legal system doesn't operate the same way as the western legal system does and just because one might feel that they are on the right side of the strict letter of the law doesn't necessarily mean that that's the way it will be applied in China."*

80. While there was of course an appreciation that China was different in various respects from Australia, nevertheless it was assumed that operating cautiously within the bounds of the criminal law would not lead to arrest and conviction for gambling crimes.

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[60] China submissions, paragraphs 319-333.
[61] See O'Connor's email chain to Tegoni of 20 February 2013, Exhibit P4 (CRL.625.001.0079 – 0081).
[62] See China submissions, paragraphs 132-139.
[63] T2060/25-26, 32.
[64] T2060/32-36.

81. That assumption is shown to have been mistaken by the conviction of Mr O'Connor and three administrative staff for contravention of Article 303 of the PRC Criminal Law. Based on the authoritative interpretations of Article 303 published by the Supreme People's Court, there was no basis to fear, or to conclude, that those individuals were contravening that law. Article 303 is discussed in more detail later in these submissions, but it suffices to say for the moment that: (a) if Mr O'Connor can ever be said to have organised anyone to go abroad to gamble, at most it was one or two individuals on a given occasion;[65] and (b) it is difficult to see how the three administrative staff, who did not meet with customers, could be said to have organised anyone and, further, those three administrative staff certainly did not receive anything answering the description of "kickback or referral fees" (however broad a view one takes of that concept). They received only a standard wage, with no incentive component.[66] Yet Mr O'Connor and the three administrative staff were all convicted of contravening Article 303.

82. It is readily understandable that executives who knew of the legal advice from WilmerHale made the assumption that there was an identifiable rule of law in China that the Chinese authorities would follow. In hindsight, that assumption was mistaken, but that mistake should not be judged severely. It is submitted that latitude needs to be extended to management for making this assumption.

More than a decade operating in China without incident

83. The second matter of context is that, when the arrests occurred in October 2016, Crown had been operating in China (including by employing staff who worked in China) from at least the early 2000s.[67] That is, Crown had been operating in China for more than a decade prior to the arrests. It should not be forgotten that the events in China on which this Inquiry has focused concern the tail end of a substantial period of operating in China without incident. It is not the case that Crown's history of operating in China was beset with difficulties over a long period of time. Looking backwards from the time of the arrests, the questioning of the two staff members in June 2015 ought to have been seen to be a matter of serious concern and a warning sign. But as events were happening and as further advice was taken it was not perceived that way: see, e.g., Mr Felstead at T1219-1220. Some of those who knew of the questioning of Mr BX considered that it was an escalation of risk, such as Mr O'Connor.[68] However, he and others were comforted by the legal advice that was obtained in the context of the questioning having taken place. It was only with the benefit of hindsight that Mr Felstead and Mr Johnston considered that the questioning was a matter of serious concern and an escalation of risk, notwithstanding the legal advice.[69] Thereafter, nothing further occurred during that period to change perceptions. As a result, the arrests took everyone by surprise. This needs to be weighed in the balance in passing judgement.

Presence of competitors in China

84. The third matter of context concerns the existence of competitors in China. It is evident that there were competitors with staff living in China, including at least The Star (branded Echo Entertainment prior to 2015), SkyCity Entertainment Group, Caesars, MGM, City of Dreams, Galaxy Entertainment Group, Las Vegas Sands and Gentings.[70] There has also been reporting

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[65] See Exhibit M180 and Exhibit M181; CRL.739.001.0001 attaching CRL.739.001.0002; Exhibit R34 (CRL.540.001.0210 at .0215 ([28])).
[66] T1371/37-T1372/3-23.
[67] Exhibit O67 (CRL.540.001.0114 at 0123 ([17])); Exhibit R34 (CRL.540.001.0210 at .0217 ([33])).
[68] T2030/44-T2031/2.
[69] T1220/21-28; T2977/7-14.
[70] See Exhibit O33(A) (CRL.643.001.0005). See also the statement of Ms Jane Pan, who was a member of sales staff in China, which has been produced to the Inquiry (CRL.540.001.0193; Exhibit AS2). [37] of that statement identifies competitors with sales staff in China at the time.

in the *Australian Financial Review* that The Star had at least 12 marketing staff in mainland China prior to the arrests of Crown's staff and that it had ramped up its marketing activities in the months preceding the arrests,[71] and that other casino operators "aggressively" reinserted staff into China by January 2017 and started recruiting new staff.[72] It would not be fair to characterise Crown as a cavalier outlier operating in an environment that the rest of the industry was not operating in. Rightly or wrongly, the presence of competitors with staff in China gave senior management comfort that the environment was one in which it was possible safely to operate. Nor did all other competitors have representative offices in China; some did, some did not, as WilmerHale's advice made clear.[73] It is certainly by no means clear, and there is no evidence to suggest, that all competitors had a licence to operate in China.[74]

External advice sought each time the development occurred

85. The fourth matter of context concerns the seeking of advice each time an important development occurred in the operating environment in China. Specifically:

(a) in response to the 6 February 2015 press conference, advice was sought on 9 and 10 February 2015 from WilmerHale[75] (advice was also sought on 25 February 2015[76]) and Mintz Group was engaged in early March;[77]

(b) in response to the South Korean arrests in June 2015, advice was sought from WilmerHale (23 June 2015[78]) and Mintz Group (19 June 2015[79]);

(c) in response to the questioning of Mr BX, advice was sought from both WilmerHale[80] and Mintz Group,[81] including in relation to the sending of the letter;

(d) in response to the CCTV news story in October 2015, advice was sought from WilmerHale on 15 October 2015[82] and from Mintz Group on 16 October 2015.[83]

86. Each development in China on which Counsel Assisting placed emphasis *was* assessed and considered by those individuals in the light of external expert advice, and they took it upon themselves to manage events at an operational level. It is important not to forget that. That way of managing things was a serious mistake, but management's misjudgement lies in thinking that it was sufficient to manage events "on the ground" and failing to appreciate the importance of engaging the risk-management structures for wider assessment.

Content of external advice reassured management

87. The fifth matter of context is that none of that advice was to the effect that Crown needed to withdraw its staff from China or that staff were at a material risk of being arrested and

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[71] Exhibit AS4; CRL.644.001.1640.
[72] Exhibit AS5; CRL.738.001.0001.
[73] Exhibit M141 (CRL.545.001.0021 at .0023) ("There were a number of cases in the past where foreign casino's [sic] rep offices were closed").
[74] Compare T5731/38-40.
[75] See Exhibit M141 (CRL.545.001.0021); Exhibit M143 (CRL.545.001.0054).
[76] See Exhibit M154 (CRL.545.001.0128).
[77] See China Submissions, paragraph 108; Exhibit M158 (CRL.527.001.1006); M159 (CRL.527.001.1007).
[78] Exhibit M195 (CRL.545.001.0098).
[79] Exhibit M188 (CRL.522.001.0527).
[80] Exhibit R15 (CRL.636.001.0411).
[81] Exhibit R17 (CRL.638.001.0001).
[82] Exhibit M234 (CRL.522.001.0076).
[83] Exhibit M235 (CRL.545.001.0014).

convicted for gambling crimes. On the contrary, the effect of the advice was that, while there was a heightened need for caution, no substantial change was required to operations in China.

88. Counsel Assisting make certain criticisms in connection with the external advice. They criticise the management of that advice and they say that certain assumption underlying it ought to have been clarified with the advisers.[84] The criminal law advice that Article 303 prohibited organising groups of ten or more did not depend on any assumption; that advice explicitly set out the authoritative interpretation of Article 303. In relation to the additional requirement of Article 303 that the person organising the groups must receive a kickback or referral fee, Mr Chen did clarify with WilmerHale that the bonus component of a salary package would not constitute a kickback or referral fee within the meaning of Article 303.[85] In the midst of those criticisms, it is important not to lose sight of the fact that advice was sought in relation to each development in China; that advice did not raise alarm bells; and that advice plainly operated upon the minds of those making decisions. Accepting Counsel Assisting's criticisms in connection with the external advice, those matters hold true. And they form an important part of the context in which decisions of management fall to be judged.

Reporting within management

89. One final matter to note, in fairness to Mr Felstead in particular, is that, while there was a failure to escalate important developments in China to the board-level risk-management committees and to the wider board, it was not the case that there was no escalation or reporting of matters at all. All of the important developments that Counsel Assisting emphasise, save for the CCTV news program, were escalated or otherwise circulated to Mr Felstead's superiors (either Mr Craigie or Mr Johnston). This extends to the following:

(a) The 6 February 2015 press conference, and the reference to casinos in that press conference: in relation to these matters, Mr Felstead said he "may well" have reported them to Mr Craigie, he just could not specifically recall; and he said that he assumed that Mr Craigie would have heard about it at the same time that Mr Felstead did, since Mr Craigie was on the same email lists as Mr Felstead.[86] Further, there was reference to the matter in a VIP international business update circulated at a CEO meeting on 18 March 2015.[87] Although Mr Craigie could not recall one way or the other whether he was aware of the February 2015 press conference prior to the South Korean arrests, he accepted he received various news articles mentioning it shortly after it was held.[88]

(b) The 17 June 2015 arrests of the South Koreans: in relation to this matter, Mr Craigie became aware of it at least by the time he was sent an email by Mr Rankin about the matter.[89] Mr Felstead sent an email to Mr Craigie addressing the matter.[90]

(c) The questioning of Mr BX: in relation to this development, this was drawn to the attention of Mr Johnston by email to him from Mr Felstead.[91] The matter also came to the attention of Mr Neilson, then General Counsel and Company Secretary of Crown.[92]

90. It is not the position, then, that there was no escalation or reporting of matters of importance amongst senior management. Most of the important developments got to the most senior

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[84] China submissions, paragraphs 132-139.
[85] Chen's Federal Court statement (CRL.540.001.0250) at paragraphs 51 and 52; Exhibit AS3.
[86] T1170/8-T1170-T1171/16.
[87] Exhibit AB16 (CPH.001.241.5285 at .5287).
[88] T1480/15-T1482/6.
[89] Exhibit M198 (CRL.545.001.1108).
[90] Exhibit M198 (CRL.545.001.1108).
[91] Exhibit R16 (CRL.636.001.1747).
[92] Exhibit R33 (CRL.638.001.0655).

officer (Mr Craigie), but not to the risk committees or the wider board, principally because management assessed these developments in the light of advice from China experts, WilmerHale and Mintz Group, which is discussed in more detail below.

91. Nevertheless, Crown accepts, without reservation, that these matters ought to have been drawn to the attention of the board-level risk management committees and to the wider board. It should be noted, however, that the February 2015 press conference and the South Korean arrests did come to the attention of Mr Craigie, who was a member of the Crown Risk Management Committee at the time. As he accepted in his evidence, it was a failing on his part not to raise those matters with the other members of the Risk Management Committee.[93]

**B4. Matters not in issue**

92. Many of the matters put by Counsel Assisting are not in issue. They are set out in Annexure A.

**B5. Matters in issue**

93. There are, however, certain submissions of Counsel Assisting that Crown says go beyond what the evidence fairly supports or proceed from false premises.

94. By way of summary:

(a) The proposition that Crown adopted a narrow and technical interpretation of Article 303 of the PRC Criminal Law, resting on fine distinctions,[94] and thereby failed to comply with the spirit of the law, is unfair and wrong. The interpretation of Article 303 that WilmerHale conveyed to Crown, and that Crown adopted, was consistent with the interpretation expressed by the Supreme People's Court in two official pronouncements in 2005.

(b) The proposition that management adopted an idiosyncratic view of Chinese business law, namely, that Crown would only need a licence if it was operating an office in China, and then consciously acted contrary to that view by operating an office without a licence, is not supported by the evidence. First, there is no clear evidence to support the unstated premise of the proposition, namely, that Crown required a licence for its activities in China, whether or not operating an office. Secondly, there is no clear evidence that anyone in management believed the Guangzhou apartment to be in breach of Chinese business law.

(c) The proposition that the "crackdown on foreign casinos" was directed to the "precise business activities" of Crown in China[95] is incorrect. First, one would not assume that the relevant remark in the 6 February 2015 press conference was directed to those engaged in lawful operations. One would assume any governmental "crackdown" was directed to those breaking the law. Secondly, what has been referred to as the crackdown on "foreign casinos" comprises one sentence in a lengthy press conference in which an official in fact referred to casinos in "neighbouring countries". There are good reasons to believe that these "neighbouring countries" were countries closely proximate to China, such as South Korea, and did not include Australia. Thirdly, the official's remark was made in the context of a press conference relevantly directed to so-called "yellow gambling crimes", meaning gambling crimes connected with prostitution and pornography,[96] activities in which Crown of course did not engage.

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[93] T1497/14-32.
[94] China submissions, paragraphs 190, 350(a).
[95] China submissions, paragraph 191.
[96] Expert Report of Margaret K. Lewis dated 9 December 2019 at [5.1]-[5.5] (CRL.540.001.0006).

(d) The proposition that the South Korean arrests, the questioning of Mr BX, and the CCTV report, were "obvious" and enduring escalations of risk may be correct as a matter of hindsight. But it tends to overstate the way in which those events were perceived at the time and does not pay sufficient regard to the advice that was obtained by management in relation to each of those events. Further, it tends to assume a close nexus between those events and the China arrests that is not apparent from the substantial gap (more than a year) between each event and the arrests.

(e) The proposition that certain matters, such as the content of the letter to Chinese authorities[97] and the lack of signage at the Guangzhou residential apartment,[98] can only be construed as attempts to disguise or conceal illegal activities from the Chinese authorities, or mislead Chinese authorities, is an extreme view. There are far more obvious explanations for these matters. These explanations include the fact that the advice Crown consistently received from WilmerHale and Mintz Group was to adopt a low-key approach; the fact that China was a jurisdiction in which gambling was itself illegal[99] and anything connected with gambling was a sensitive topic;[100] and the fact that Chinese patrons did not want their overseas gambling activities to be known to the authorities.[101] While these matters may give rise to their own problems, they gainsay the proposition that certain matters are only explicable as attempts to deceive the Chinese authorities.

(f) The proposition that "management appreciated that there was a risk of arrest, detention or conviction" for gambling crimes faced by staff[102] is not borne out by the evidence. As put by Counsel Assisting, the proposition does not speak of a "material" risk. However, given it is possible to say of almost anything that there is "a" risk that it might occur, the proposition will be treated as being that management appreciated that staff were at a *material* risk of arrest and conviction for gambling crimes. The evidence does not establish that. It does not go so far as to suggest that management, believing that Crown's operations stayed well within what was permitted by law, nevertheless perceived a material risk that staff would be arrested and convicted for gambling crimes. No advice received by management was ever to that effect. Further, the proposition is contrary to management's own actions in travelling to China, including as early as May 2015.[103] Mr Felstead travelled to China on numerous occasions and was accompanied by his wife on one such occasion (in the weeks before the China arrests).[104] Mr O'Connor was of course arrested and convicted while in China.

(g) The proposition that, by reason of the above matters, Crown consciously adopted a business model that placed employees at risk of arrest and conviction for gambling crimes in China[105] is contrary to the evidence that all relevant members of management proceeded on the basis of legal advice to the effect that Crown's operations in China did *not* breach gambling laws. Nor did any member of the board or management think there was a risk of arrest and conviction for gambling crimes. That is not to say that there were not risks of operating in a totalitarian state like China where arbitrary actions could occur.

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[97] China submissions, paragraphs 265 to 271.
[98] China submissions, paragraphs 174, 179.
[99] See China submissions, paragraph 145.
[100] T2068/25-34.
[101] T2068/25-34.
[102] China submissions, paragraph 350(a).
[103] Exhibit M180; M181.
[104] T1375/31-47.
[105] China submissions, paragraph 351.

(h) The proposition that decision-making in relation to China was subject to undue CPH influence[106] relies on inflating the role of Mr Johnston while ignoring that all the other key individuals (Mr Felstead, Mr O'Connor, Mr Chen) only worked for Crown entities.

(i) The proposition that there has not been any adequate examination of the facts, matters, and circumstances leading to the China arrests[107] disregards multiple streams of inquiry that have necessarily led to a detailed examination of what happened in China. Those streams of inquiry include the class action and the VCGLR investigation. Responding to the allegations in the class action required a detailed examination of whether various risks in operating in China (including the risk of arrest and conviction of staff) existed and, if so, whether they were known within Crown and, if so, by which individuals. The allegations also required a detailed examination of Crown's risk-management structures and procedures at the time. These issues, and the facts and evidence relating to them, were canvassed in multiple reports to the board by Crown's solicitors, commencing in late 2016.[108] The board was advised that the investigation of these matters should be carried out in this way, having regard to the pendency of the class action.[109] Responding to the VCGLR investigation, which traversed most of the same matters concerning China as those traversed in this Inquiry, similarly required a detailed investigation of what happened in China. The VCGLR investigation has, like the class action, been the subject of regularly reporting to the board by Crown's solicitors. Further, the board was provided with a draft copy of the VCGLR's detailed report in 2018[110] and a further version of the report in 2019.[111]

Article 303 of the PRC Criminal Law and alleged reliance on "fine distinctions"

95. Counsel Assisting submitted that Crown's view of Article 303 of the PRC Criminal Law involved "two precise questions" and rested on "fine distinctions".[112] It was said to be a "technical, narrow" view of the law.[113] From this premise, it was submitted that, whatever the letter of the law might have been, Crown failed to comply with its spirit.[114]

96. These contentions assume that there was scope for differing interpretations of Article 303 in relevant respects. In particular, they assume that Article 303 was open to be interpreted either as being engaged only where 10 or more PRC citizens were organised at one time to go abroad to gamble or, alternatively, as being engaged even where 10 or more PRC citizens were organised cumulatively over a period of time. However, as is explained below, two official pronouncements of the Supreme People's Court had removed the scope for differing interpretations relied on by Counsel Assisting.

97. As is clear and not disputed, the view that Crown took of Article 303 was based on the advice it received from WilmerHale, a major international law firm. That advice reflected two official pronouncements of the Supreme People's Court as to the interpretation of Article 303. Whether or not the WilmerHale advice specifically referred to these pronouncements is not to the point. As is explained below, they were both published in 2005 and WilmerHale, as Chinese law experts, can be taken to have been aware of them and to have factored them into their advice to Crown.

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[106] China submissions, paragraph 11(c), 311, 356.
[107] China submissions, paragraphs 358, 362.
[108] T4398/1-3.; T4604/45-T4605/1-19.
[109] T4397/20-29; T4407/4-9.
[110] Board pack dated 20 June 2018 (CRL.506.007.6384 at .6638 to .6683).
[111] Exhibit MFIB.
[112] China submissions, paragraphs 190, 350(a), 364.
[113] China submissions, paragraph 31(b).
[114] China submissions, paragraph 364.

98. The first official pronouncement is the "Supreme People's Court and Supreme People's Procuratorate Interpretation on Several Questions Concerning the Specific Application of Law in Criminal Gambling Cases", issued in May 2005 (**2005 SPC/SPP Interpretation**). Article 1 of the 2005 SPC/SPP Interpretation provided as follows:[115]

> Any of the situations set out below, if undertaken for the purpose of profit, will constitute "gathering a crowd to gamble" as provided by Article 303 of the Criminal Law:
>
> (1) organising three or more persons to gamble and generating illegitimate profits by taking a cut of the winnings in amounts that equal 5,000 yuan or more **in aggregate**;
>
> (2) organising three or more persons to gamble where the amount gambled is 50,000 yuan or more **in aggregate**;
>
> (3) organising three or more persons to gamble where the number of people participating in the gambling is 20 persons or more **in aggregate**;
>
> (4) organising 10 or more persons who are citizens of the People's Republic of China to go abroad to gamble, from which **kickbacks or referral fees** are collected.
>
> [Emphases added.]

99. As can be seen from Article 1(4) of the 2005 SPC/SPP Interpretation, the requirement that "kickbacks or referral fees" be collected, and be collected from the organising, before Article 303 was relevantly engaged, was a requirement set forth in an official pronouncement of the Supreme People's Court. If the requirement that kickbacks or referral fees be collected, and be collected from the organising, is to be criticised as a "narrow" or "technical" interpretation of Article 303, that criticism must also be levelled at the Supreme People's Court.

100. It is also to be noted that Article 1 of the 2005 SPC/SPP Interpretation uses the expression "in aggregate" in paragraphs (1), (2), and (3). Yet the expression is conspicuously absent from Article 1(4), being the limb of the 2005 SPC/SPP Interpretation relevant to Crown's operations in China.

101. The second official pronouncement on the interpretation of Article 303 confirms that the law did not turn on the aggregate number of people organised over a period of time. That second official pronouncement is guidance issue by the Criminal Division of the Supreme People's Court in May 2005 (**2005 Criminal Division Interpretation**). The 2005 Criminal Division Interpretation was issued at the same time as the 2005 SPC/SPP Interpretation (May 2005). The 2005 Criminal Division Interpretation said this:[116]

> *"… the number of persons organized is not calculated on an aggregate basis; it is necessary that 10 or more PRC citizens are organized at one time to go abroad to gamble."*

102. Thus, an interpretation of Article 303 that required the organising of 10 or more PRC citizens to go abroad to gamble occur at one time, as opposed to the 10 or more PRC citizens being calculated by aggregating the citizens organised over a period of time, was the interpretation adopted in two official Supreme People's Court pronouncements: the first being the 2005 SPC/SPP Interpretation, which used the expression "in aggregate" in every paragraph except

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[115] China submissions, paragraph 107(c).
[116] Expert report of Professor Margaret K. Lewis dated 13 November 2020 at [4.2].

in the paragraph applicable to Crown; and the second being the 2005 Criminal Division Interpretation, which explicitly said that the 10 or more PRC citizens organised was not calculated on an aggregate basis.[117] Again, such an interpretation was not some narrow or technical interpretation unique to Crown or its advisers.

103. In attempt to make good their "fine distinctions" submission, Counsel Assisting submitted as follows:

> *"If you're breaking Chinese law and you go to jail if you're organising a tour group of more than 10 people on one occasion, but it's perfectly fine to organise a tour group of 10 people over two occasions, it remains the case … that that is a fine distinction or a precise legal question".*[118]

104. However, as the preceding discussion demonstrates, the interpretative choice postulated by Counsel Assisting in an attempt to illustrate Crown's alleged reliance on fine distinctions is not a choice that arose having regard to the authoritative pronouncements of the Supreme People's Court.

105. In short, Crown repeatedly sought advice as to compliance with Article 303 and the advice it received was consistent with the interpretation of Article 303 espoused by the Supreme People's Court in official pronouncements. In those circumstances, it is not a fair criticism to say that Crown took a narrow or technical view of Article 303 and failed to comply with the spirit of the law.

106. Insofar as Counsel Assisting place reliance on the agreement of certain directors to propositions put to them concerning "fine distinctions", that agreement carries no weight in circumstances where it was never put to the directors that official pronouncements of the Supreme People's Court meant that the putative ambiguity on which the propositions put to them were premised did not arise.

Chinese business law propositions

107. Before dealing with Counsel Assisting's submissions on Chinese business law, two preliminary observations should be made.

108. First, the contentions advanced by Counsel Assisting about Chinese business law are somewhat tangential. This is because neither any Crown company nor any Crown employee was ever the subject of regulatory action in China for allegedly breaching Chinese business law. Further, the media allegations did not say anything about Chinese business law at all. The media allegation that Crown operated "under the radar" was certainly not premised on any proposition about Chinese business law.

109. Secondly, Counsel Assisting's submissions on Chinese business law involve parsing WilmerHale advices that were responding to queries about compliance with Chinese criminal law. Rightly or wrongly, it is plain that business law was not something that Mr Chen had in mind when he sought those advices. That tends to undermine the assertion of unethical conduct, which assumes a conscious disregard for Chinese business law. To seek business law advice and then to disregard it is one thing. However, that did not occur here. Criminal law advice was sought and in the course of giving that advice certain remarks were made that are now grouped under the heading "business law advice".

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[117] WilmerHale referred to the Second Supreme People's Court binding interpretation in Exhibit M285, which includes an email from Kenneth Zhou to Debra Tegoni of 18 October 2016 (CRL.522.001.3952 at .3957).
[118] T5735/9-12.

110. Turning to Counsel Assisting's submissions, the main submission is that management of Crown adopted an idiosyncratic view of what Chinese business law required. That idiosyncratic view was that a licence to carry out Crown's activities in China would only be required if Crown were to operate a representative office. Crown then proceeded to act contrary to its own idiosyncratic view by operating an office without a licence, thus acting unethically.[119]

111. Counsel Assisting insist that they do not submit that, as a matter of Chinese business law, Crown required a licence to carry out its activities in China. But implicit in the submission that Crown adopted an "idiosyncratic view" of Chinese business law is the very clear suggestion that the view taken was erroneous. The "idiosyncratic view" submission very clearly suggests that Crown required a licence to carry out its activities in China, whether or not it was operating a representative office.

112. Further, it is apparent that Counsel Assisting are of the view that Crown was conducting business in China and, in that context, Counsel Assisting emphasise the following words in a WilmerHale advice from 2013: "conducting business in China requires a business license or otherwise government approval" (the proper interpretation of those words is discussed below).

113. In those circumstances, the claim that to attack the contention that Crown required a licence to carry out its activities is to attack a straw man can be seen to be specious.

114. As the following analysis shows, it is not possible to deal with the "idiosyncratic view" submission without examining its unstated premise, namely, that Crown required a licence for its activities in China, whether or not it was operating a representative office.

*No clear evidence that Crown required a licence*

115. Such evidence as there is as to Chinese business law does not clearly point to the conclusion that Crown was required to have a licence or other business registration for its activities in China. There are two reasons for this.

116. First, the remarks in the WilmerHale advice relied upon by Counsel Assisting are open to different interpretations.

117. Counsel Assisting focus on one part of a sentence in WilmerHale advice given on 19 February 2013 that reads: "conducting business in China requires a business license or otherwise government approval".[120] Counsel Assisting omit the first part of the sentence, which is important. It reads: "With respect to the potential liability on institutions". [redacted]

118. Properly understood, the effect of the remark in the WilmerHale advice of 19 February 2013 was that, *if* Crown registered a Chinese legal entity, it would be limited to a specified and permitted scope of business, such as marketing hotel resorts, but that scope would not extend to encouraging or assisting Chinese nationals to visit and gamble at casinos in Australia. This scope of business limitation applied "to China entities only".[122]

119. In the same 19 February 2013 advice from WilmerHale, they advised that Crown employees in China could lawfully engage with existing or potential customers provided they complied

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[119] China submissions, paragraphs 178-180, 351(a).
[120] Exhibit M27 (CRL.545.001.0615).
[121] Q2 (CRL.625.001.0151).
[122] Q2 (CRL.625.001.0151).

with WilmerHale's advice as to Article 303 (that is, employees could not organise at one time 10 or more PRC citizens for overseas gambling and must not benefit from such activities by receiving a kickback or referral fee).[123]

120. At the time WilmerHale gave their 19 February 2013 advice, they did not know whether Crown had registered a Chinese legal entity. However, by 19 August 2014 they knew that Crown had not registered such an entity.[124] In that context, WilmerHale's advice of 19 August 2014 conveyed that it was fine for a foreign company without any presence in China to have employee contracts with Chinese nationals.[125]

121. The 19 August 2014 advice went on to speak about the fact that it "may be advisable" to set up some formal business registrations, such as a representative office in China, but there was no suggestion that such a step was essential to comply with the law.[126] The remark that it "may be advisable" to set up a representative office is far from advice that Crown was required under Chinese business law to do so.

122. Armed with the knowledge that Crown did not have any licence or other formal business registration, WilmerHale continued to advise up until the arrests that Crown employees in China could lawfully engage with existing or potential customers provided they complied with the WilmerHale advice as to Article 303.

123. [redacted].[127] Consistently with that advice, when Mr O'Connor was asked about the part of the sentence in the 19 February 2013 WilmerHale advice that reads "conducting business in China requires a business license or otherwise government approval", he said that he did not regard Crown's activities in China as "conducting business".[128] Thus, even if the remark in the 19 February 2013 WilmerHale advice be interpreted in the way for which Counsel Assisting contend, it is not clear that Crown was "conducting business" in China in the sense engaging a relevant Chinese business law (whatever that law might be).

*No unethical conduct*

124. As noted, Counsel Assisting submit that management understood that a licence was required to operate a representative office and yet an office was operated without a licence.[129] This is submitted to constitute "plainly unethical" conduct.[130]

125. Three points need to be made in response to this submission.

126. First, the implication of the submission is that management consciously proceeded in a manner contrary to what they understood to be lawful as a matter of Chinese business law. The submission thus requires management to have specifically turned their minds to the requirements of Chinese business law and then to have chosen to disregard them. There is no clear evidence of that. As already mentioned, it is clear that the focus of management was on the criminal law. The WilmerHale advice relied upon by Counsel Assisting to support their

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[123] Exhibit M27 (CRL.545.001.0615).
[124] Exhibit P7 (CRL.625.001.0007 at .0010).
[125] Exhibit P7 (CRL.625.001.0007 at .0010).
[126] Exhibit P7 (CRL.625.001.0007 at .0010).
[127] Exhibit R43 (CRL.680.001.0006). Counsel assisting refer to this at China submissions, paragraph 144(c).
[128] T1993/36-49.
[129] China submissions, paragraph 164.
[130] China submissions, paragraph 178-180.

business law contentions was responsive to requests for advice by Mr Chen about compliance with the criminal law.

127. Secondly, the submission can only extend to those members of management who were aware of the Guangzhou apartment at the time. No director, including Mr Craigie,[131] was aware of it. Mr Felstead had no knowledge of it.[132] Mr Felstead specifically objected to a proposal to have a representative office in China.[133] Mr Felstead also said that he was not aware of any requirement to have a business licence.[134] The only members of management who said in their evidence that they were aware of the Guangzhou apartment at the time are Mr O'Connor, Mr Chen, and Ms Williamson.

128. Thirdly, as to those three members of management, there is no clear evidence that they considered the apartment to be in breach of Chinese business law:

(a) As to Mr O'Connor, his evidence was that, while he was aware that a residential apartment was being used to store visa-processing materials, he would not describe it as a representative office.[135] There is no evidence that he conceived of the use of the apartment as violating what he understood Chinese business law to require. He may or may not have been wrong. But the point is that his conduct cannot be described as unethical.

(b) As to Mr Chen, who no longer works for Crown, the Inquiry never heard from him. Whether he took the view that the Guangzhou apartment was operating in breach of Chinese business law is not the subject of evidence. Further, it is apparent that his focus was on the Chinese criminal law, which tends to weaken the suggestion of conscious disregard of the putative idiosyncratic understanding of Chinese business law.

(c) [redacted][136] That being the case, the remark in the 19 February 2013 WilmerHale advice that "conducting business in China requires a license", even if interpreted as Counsel Assisting contend, would not, in her eyes at least, have provoked an apprehension that Crown required a licence as a matter of Chinese business law.

129. Finally, insofar as it is submitted that management disregarded an instruction not to open an office, it is not clear that the instruction said to have been disregarded was directed to such premises as the Guangzhou apartment. The instruction said to have been disregarded was Mr Felstead's remark in a 10 February 2015 email that "having them operate as non-gaming offices doesn't seem overly practical to me".[137] This remark was in terms directed to non-gaming offices. Mr Felstead appears to have been saying that it did not make sense to open a non-gaming office, such as a representative office marketing Crown's hotels, in a context where Crown was seeking to attract Chinese patrons to gamble at its casinos. It is by no means clear that the operation of a residential apartment, used by only one administrative employee for visa processing purposes and to store visa-processing materials, was contrary to Mr Felstead's instruction.[138]

130. None of this is to say that the Guangzhou apartment ought to have been operating. Further, there is no doubt that its existence should have been drawn to the attention of the board-level

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[131] T1471/45-T1472/1.
[132] T1131/14-19.
[133] T1134/29-30.
[134] T1156/31-43.
[135] T1997/21-22.
[136] Exhibit R43 (CRL.680.001.0006).
[137] Exhibit M141 (CRL.545.001.0021).
[138] See Jane Pan's Federal Court statement at [11] (CRL.540.001.0193).

risk committees. But the suggestion that it demonstrates unethical behaviour because management believed its existence to be contrary to Chinese business law is not supported by the evidence.

Propositions concerning the February 2015 press conference

131. Crown does not dispute that the 6 February 2015 press conference was an important development in the operating environment in China. Crown accepts that it ought to have been drawn to the attention of the board-level risk committees and to the wider board, so that the decision as to how to proceed could be made by the board. It is not disputed that these matters represent failings.

132. But Counsel Assisting's submission that "[t]he precise business activities that Crown Resorts staff in China were undertaking had been identified by the Chinese government as being subject to the crackdown"[139] is not accurate for at least four reasons.

*The press conference was presumably directed at unlawful activity*

133. First, looking at the matter through western eyes, one would not regard one's activities as within the purview of a governmental crackdown if one had been advised that those activities were not in breach of the law. The convictions of Mr O'Connor and three administrative staff show that rule of law assumption to have been mistaken. However, armed at the time with legal advice that Crown's operations in China were lawful, management should not be judged as severely as Counsel Assisting suggest for taking the view that those operations could proceed.

*The press conference was directed at casinos in "neighbouring countries"*

134. Secondly, it is not clear that the relevant remark in the press conference was directed at casinos in Australia. What is described as the announcement of a crackdown on "foreign casinos" is in fact a single sentence forming part of an answer to a reporter's question in a lengthy press conference. In response to a question from a *Beijing Times* reporter in the question and answer component of the press conference, a Chinese official said:[140]

> *"Many of our neighbouring countries have casinos: they have established in China some offices to attract and solicit Chinese citizens to go outside the borders to gamble: this is also a focal point of the crackdown."*

135. The evidence of Professor Lewis in the class action is that the reference in this sentence to "neighbouring countries" was a reference to countries of close proximity to China.[141] It did not pick up Australia. That is consistent with the view taken by WilmerHale.[142] It is also consistent with the arrests of staff of South Korean casinos in the months following the press conference.

*The press conference was directed to those engaged in "yellow" gambling crimes*

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[139] China submissions, paragraph 191.
[140] Expert Report of Margaret K. Lewis dated 9 December 2019 (CRL.540.001.0006 at [5.5.3].
[141] Expert Report of Margaret K. Lewis dated 9 December 2019 (CRL.540.001.0006 at [5.5.3.2].
[142] Exhibit M195 (CRL.545.001.0098): "Chinese gamblers have started to travel more frequently to neighbouring countries/regions such as South Korea, Malaysia, and Vietnam"; Exhibit M234 (CRL522.001.0076 at .0078): " … it appears that government is now focusing on casinos in neighbouring countries which has attracted a large number of Chinese nationals, such as Korea".

136. Thirdly, the relevant part of the press conference was focused on "yellow gambling crimes", meaning prostitution and pornography,[143] and these were of course not activities in which Crown was engaged. Consistently with the focus of the press conference on "yellow gambling crimes", the South Korean operators whose staff were arrested in the months following the press conference were alleged to have been arranging prostitutes for clients.[144]

*Passage of time between press conference and China arrests*

137. Fourthly, if there were a "precise" correspondence between the February 2015 press conference and Crown's activities, it is not apparent why nearly two years passed between those events.

*Crown accepts that the February 2015 press conference should have been reported*

138. Notwithstanding the points made in the preceding paragraphs, Crown accepts that the February 2015 press conference was a serious change in the state of affairs in China and a potential heightening of the risks of a company such as Crown operating in China.[145] Those matters tend to emphasise the serious mistake that both Mr O'Connor and Mr Felstead made in not reporting the February 2015 press conference to Crown's risk management committees. There is evidence, however, that the press conference statement about a crackdown was widely known at management levels by March 2015, including by Mr Craigie.[146]

139. What is clear from the evidence is that concern about the February 2015 press conference waned after further legal advice was obtained. One illustration of that is that Mr Felstead and Mr O'Connor resumed their travels to China by May 2015[147] after a short break while the position following the February 2015 press conference was clarified.

Assertion that events should have been seen as "obvious" escalations of risk

140. As has been acknowledged already, the South Korean arrests, the questioning of Mr BX, and the CCTV news report were important developments in the operating environment in China that ought to have been drawn to the attention of the risk-management committees and to the wider board. That they were not represents a failing. There is no dispute about that.

141. Whether it is right to suggest that these events ought to have been perceived at the time as "obvious" and persisting escalations of risk[148] in the face of the legal and other advice that was obtained is another question.

*South Korean arrests*

142. As to the South Korean arrests, it is difficult to see how the evidence allows that event to be fairly characterised as an "obvious" and persisting escalation of risk at the time in the eyes of Mr Johnston, Mr Craigie, Mr Felstead, Mr O'Connor, and Mr Chen. Those individuals all received advice from Mintz Group that the South Koreans arrests were "an isolated case".[149] Mintz Group said it was "convinced" of that.[150] The advice drew attention to the Koreans'

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[143] Expert Report of Margaret K. Lewis dated 9 December 2019 (CRL.540.001.0006 at [5.1]-[5.5].
[144] T1590/15-27.
[145] See the evidence referred to in the China submissions, paragraphs 203-206.
[146] See Exhibit AB15 (CPH.001.241.4993), attaching AB16 (CPH.001.241.5285) and Exhibit M169 (CRL.522.001.0136).
[147] See, for example, Exhibit M180 and Exhibit M181.
[148] See, for example, China submissions, paragraph 336.
[149] Exhibit M202 (CRL.522.001.4220).
[150] Exhibit M202 (CRL.522.001.4220).

contravening of Chinese currency laws and use of cash for "client entertainment",[151] by which was meant prostitution.[152] Neither of those activities was engaged in by Crown.

143. Further, the submission that the South Korean arrests represented an "obvious" escalation of the risk to staff assumes a strong nexus between that event and the arrests of Crown staff. But there was one year and four months passing between those events.

144. None of this is to dispute that, with the benefit of hindsight, the South Korean arrests can be classed as an obvious escalation of risk. However, the factors affecting the thinking of management at the time must be acknowledged.

*Questioning of Mr BX*

145. Turning to the questioning of Mr BX, the submission that this ought to have been seen by management and Mr Johnston at the time as an "obvious" escalation in risk does not fairly account for the advice management received at the time. The request for a letter confirming Mr BX's employment was certainly not seen by WilmerHale as alarming. They advised that a letter *should* be furnished.[153] Mintz Group had the same advice and said that such a request was "normal".[154] Further, when the letter was furnished, Mr BX reported that he had been told by the police that everything was all right.[155] Mintz Group's remark that, unavoidably, the letter "could" be used as evidence was as to a possibility not a probability.[156]

146. It was asserted by Counsel Assisting that, upon the questioning of Mr BX, management and Mr Johnston "knew that there was an informant".[157] At times, Counsel Assisting also seemed to assume a continuing informant. That assertion appears to assume consciousness of illegal activity (one does not inform on lawful activity). However, Counsel Assisting accept that Crown did not knowingly break the law.

147. Further, the submission that the questioning of Mr BX and the request for the letter was an obvious escalation of the risk to staff disregards the expert advice that had been given from early times that such questioning was something that occurred in China[158], and assumes a close nexus between those events and the arrests of staff that is not apparent from the 15 months between them. The assertion that Chinese authorities "were no doubt enlarging the evidentiary pile"[159] in this lengthy period is speculation. Moreover, it is not apparent what further material needed to be added to the "evidentiary pile" in those 15 months given the details in the letter and what Mr BX had apparently told authorities (including that Crown had casinos in Australia).

*CCTV news program*

148. As to the CCTV news program, the advice of WilmerHale sought in response to that program indicated that the government was focused on "casinos in neighbouring countries which has [sic] attracted a large number of Chinese nationals, such as Korea".[160] The advice was that employees should not "get involved in any activities which may potentially raise money-laundering or foreign exchange evasion issues" and that marketing materials should not

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[151] Exhibit M202 (CRL.522.001.4220).
[152] T1590/15-27.
[153] Exhibit R15 (CRL.636.001.0411).
[154] Exhibit R17 (CRL.638.001.0001).
[155] Exhibit O36 (INQ.950.002.0157).
[156] Exhibit R17 (CRL.638.001.0001).
[157] T5738/22.
[158] Exhibits M14 (CRL.545.001.0595) and M15 (CRL.545.001.0750).
[159] T5738/43-44.
[160] Exhibit M234 (CRL.522.001.0076 at .0078).

"expressly" promote the casino business.[161] That is far from advice from which one would draw, as an "obvious" conclusion, that staff were at risk of arrest and conviction for gambling crimes. The advice of Mintz Group on 15 October 2015 was that "your team should not feel overly concerned".[162] That advice was followed up on 19 October 2015 with the following advice:[163]

> *"[I] thought I would pass along the key results of our inquiries with about 8 separate sources these past 5 days. All point to the recent arrests being very much pointed at the Korean entity in question, and not part of a broader crackdown underway. Your team should be in good shape for its activities this week, though the same ground rules are suggested as we discussed earlier."*

149. Advice that "[y]our team should be in good shape for its activities this week" is hardly advice from which a conclusion of escalating risk to staff is "obvious".

150. Further, the premise embedded within the proposition that the CCTV broadcast was an "obvious" escalation of risk, namely, that there is a clear nexus between that event and the China arrests, does not sit conformably with the whole year that passed between those two events.

*Hindsight bias*

151. Again, none of the foregoing is to say that these events were not significant and not a cause for alert. Nor is it to say that they should not have been reported up the line to the CEO, Mr Craigie, to the board-level risk committees and to the wider board. There is no doubt that they should have been. But the proposition that they should have been seen at the time as "obvious" and persisting escalations in the risk of being arrested and convicted for gambling crimes is influenced by hindsight, tends towards overstatement, and ignores the content of the advice received in response to each event. It also assumes a close nexus between each event and the China arrests that is difficult to reconcile with the periods of time, measuring more than a year, passing between them.

Alleged "disguising" and "concealment" of matters from the Chinese authorities

152. Counsel Assisting characterised certain matters, such as the content of the letter to the Chinese authorities and the lack of signage on the residential apartment, as constituting attempts to "disguise" or "conceal" Crown's activities from Chinese authorities, or to mislead Chinese authorities. Allied to this notion seems to be the proposition that anything less than specifically calling attention to the fact that Crown was a gambling company is to be equated with deception or dishonesty.

153. These propositions ignore other, more obvious explanations for the matters said to be instances of attempted deception and also ignore certain realities of operating in China. There are at least four points to make in this regard.

154. First, restrictions on gambling-related activity in China were very extensive.[164] Gambling itself was illegal in China.[165] The vast majority of gambling-related enterprise in China was illegal.[166] So far as gambling matters are concerned, there was a very narrow field within which one could operate with the law, as set out in the authoritative official interpretations of Article 303. This

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[161] Exhibit M234 (CRL.522.001.0076 at .0077).
[162] Exhibit M230 (CRL.545.001.0015).
[163] Exhibit M235 (CRL.545.001.0014).
[164] Exhibit A265 (INQ.500.001.2504).
[165] See China submissions, paragraph 145.
[166] Exhibit A265 (INQ.500.001.2504).

is the environment in which Crown, a casino and resort company, was operating. To minimise the risk of inadvertently trespassing upon wide-ranging restrictions on gambling-related activity (or being mistaken to be trespassing upon such restrictions), it was not irrational or unreasonable not to actively call attention to the fact that Crown was in the business of gambling. Common sense, rather than deception, is a far more probable explanation for the low-key approach that was adopted.

155. Secondly, there were community and cultural sensitivities about anything to do with gambling in China.[167] Further, Chinese patrons had a strong desire that their gambling activity not to be known to authorities.[168] Travelling overseas to spend large sums of money on gambling was apt to make one a target of the Chinese authorities' attention.[169] That was because the corruption crackdown had directed the attention of Chinese authorities to the wealth of private citizens and the fact of gambling overseas was an indicator of that wealth.[170] Once again, these matters are a more likely explanation for the low-key approach adopted than some active attempt to deceive Chinese authorities.

156. Thirdly, an approach whereby Crown did not call attention to Crown's core business was the approach advised by the China experts, WilmerHale and Mintz Group, neither of which would have advised anything that they considered would increase the risk to staff of arrest and conviction for gambling crimes. For example:

(a) In WilmerHale's advice of 9 February 2015 following the February 2015 press conference, they advised: "Employees should also avoid dealing with government officials to the extent they can because of the ongoing anti-corruption campaign."[171]

(b) In WilmerHale's advice of 15 October 2015, they said: "Under the current environment, it appears important that our marketing (and marketing materials) do not expressly promote the casino business".[172]

(c) In Mintz Group's advice of 13 March 2015, they said: "… proceed with marketing efforts, but keep them low-key, with small groups at a time, and no publicity".[173]

(d) This advice to adopt a "low key" approach was repeated in Mintz Group's advice of 25 March 2015.[174]

(e) In Mintz Group's advice of 28 June 2015 following the South Korean arrests, they said that it was important "not [to] allow activities to become too high profile".[175]

157. Thus, an approach in which Crown did not call attention to the nature of its core business in China was an approach consistent with the advice it was receiving from Chinese legal and security experts, who as mentioned would not be providing advice that they considered increased risk. The advice Crown was receiving is a further, more probable explanation for the low-key approach than an attempt to deceive Chinese authorities.

158. Fourthly, Counsel Assisting's submissions as to "concealment" and "disguise" appear to assume consciousness of illegal activity. Counsel Assisting submitted that that "there is an important distinction between acting *legally* in a low-key way and Crown Resorts deliberately trying to disguise or conceal its activities in China from the Chinese authorities".[176] But Counsel

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[167] T1976/1-8; T2068/25-34.
[168] T1976/1-8; T2068/25-34.
[169] Exhibit A150 (INQ.100.011.0022).
[170] Exhibit A150 (INQ.100.011.0022).
[171] Exhibit M141 (CRL.545.001.0021
[172] Exhibit M234 (CRL.522.001.0076 at .0077).
[173] Exhibit M166 (CRL.522.001.0168 at .0169).
[174] Exhibit M176 (CRL.522.001.0127 at .0133).
[175] Exhibit M202 (CRL.545.001.0021 at .0023).
[176] T5738/14-17.

Assisting accept that the media allegation that Crown knowingly breached the law was false. At the very least, there is a tension between Counsel Assisting's submissions as to "concealment" and "disguise" and their acceptance that Crown did not knowingly break the law.

159. Turning to the specific matters that appear to be relied on by Counsel Assisting as instances of concealment or deception:

(a) The letter to authorities – the letter was sent on Crown letterhead. It identified the full names of three Crown entities, including Crown Melbourne and Crown Resorts, and set out the company details of each.[177] As to the form of words used, WilmerHale advised that the letter should contain "one or two sentences on Crown Resorts, such as it is a well-known resort hotel in Australia with a long history".[178] The sentence went beyond that and said: "Crown Resorts is one of the leading hotel, resort and entertainment companies in Australia and is listed on the Australian Stock Exchange". The reference to "entertainment", to which WilmerHale did not advert, is a euphemism for gambling. The formulation is generic and commonly used.[179] The proposition that the letter was some sort of attempt to be less than honest with the authorities has no sound basis.

(b) Lack of branding of the Guangzhou apartment[180] – this was a residential apartment. The proposition that the lack of Crown branding on a residential apartment indicates deception travels well beyond any reasonable view of the matter. Insofar as Counsel Assisting rely on Mr Craigie's agreement with the proposition put to him that the Guangzhou apartment was an attempt to disguise from the Chinese authorities the fact that Crown was operating an office in China, Mr Craigie had no contemporaneous knowledge of the Guangzhou apartment (and nor did any other director asked about it). Mr Craigie did no more than agree with a proposition based on a set of assumptions in circumstances where he had no knowledge of how or why the Guangzhou apartment was leased.

(c) The existence of a set of marketing collateral for China different from that used in other jurisdictions[181] – as Mr Craigie's evidence showed, this was simply a matter of compliance, not deception. Mr Craigie drew an analogy with vetting Victorian marketing collateral to remove poker machine imagery.[182] When that is done as a matter of compliance, as it is done, it is not suggested that it involves some sort of disguising of Crown's activities in Victoria. Likewise, there is no basis to find in the existence of a different set of marketing collateral for China some attempt to deceive authorities in that jurisdiction.

(d) The removal of the Crown logo from private jets – to the extent that these jets flew into China,[183] the removal of the Crown logo was consistent with the desire on the part of Chinese patrons for discretion and was consistent with adopting a low-key approach in China, which approach was not irrational or productive of increased risk for the reasons already identified.

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[177] Exhibit R18 (CRL.638.001.0005).
[178] Exhibit R15 (CRL.636.001.0411).
[179] T2255/24-34.
[180] China submissions, paragraphs 174, 179.
[181] China submissions, paragraph 194.
[182] T1491/14-20.
[183] See T1136/39-41.

160. Michael Chen's proposal to obtain foreign worker permits[184] requires separate attention. The proposal never went anywhere. That suggests Mr Chen thought better of it. There is no doubt that the idea indicates a moment of very poor judgment. Mr Jalland rightly described it as a stupid idea.[185] The idea should never have been conceived. However, the proposition that it was triggered by an intent to deceive Chinese authorities is less clear, and somewhat extreme. It may be that the idea was driven, not by a desire to deceive Chinese authorities, but by a concern to reassure staff (so much is suggested by Mr Chen's description of the proposal as a "precautionary measure").[186] Mr Chen, who has not worked for Crown since early 2017 years, did not give evidence as to why he floated this proposal but did not pursue it.

161. The interactions of the three Chinese staff members with police also needs to be dealt with separately. What exactly they said to the authorities who questioned these staff members is unclear. We have Mr BX's direct account of what he told authorities, which included the fact that the company he worked for had casinos in Australia.[187] He also said that his role was processing visa applications.[188] If and to the extent that he lied to authorities, that is of course improper. In that regard, it should be acknowledged that Mr Chen's email to Ms Williamson and Mr O'Connor of 9 July 2015 said that Mr BX told police that he worked for Crown Resorts and assisted in organising leisure trips for customers.[189] If he said this, it was misleading, but that is Mr Chen's third-hand account and it does not coincide with Mr BX's own account in Chinese (as translated).[190] Nor does it match Mr Zhou's account in his email of 9 July 2015 after speaking directly to Mr BX.[191] The email between Mr O'Connor and Mr Felstead of 10 July 2015 reflects Mr BX's direct account.[192]

162. Whatever the true position, it is instructive to try to put oneself in the shoes of a local Chinese staff member. As already noted, gambling was illegal in China. There was likely to be a sensitivity about anything connected with gambling, as Mr Chen's statement to the VCGLR alludes to.[193] This is understandable in circumstances where many gambling-related activities were unlawful in China, including organising PRC citizens to go abroad to gamble outside certain defined circumstances. Mr BX may also have said that he did not organise "groups" of gamblers because he was conscious that the organising of such groups was illegal were the number organised at the one time was 10 or more. In the circumstances, it is far from clear that those Crown executives who read the emails should have concluded that their employee had lied, or that they should take any action by way of informing on their own employee and endangering him. More importantly for present purposes, the ultimate question is the relevance of these events to current suitability. In that regard, Crown submits that the idea that statements made by a local Chinese worker under questioning from authorities speaks to a cultural problem running throughout Crown and persisting to the present day should not be persuasive.

163. Another point to bear in mind, particularly when assessing the position of the local Chinese staff under questioning from Chinese authorities, is that any charge of gambling offences, even if erroneous, was almost certain to result in a conviction. The unchallenged evidence of Professor Lewis in the class action is that China had at the time of the arrests a conviction rate of 99.92%.[194] The atrocious conditions faced by anyone in Chinese prison are described in

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[184] Exhibit M139 (CRL.545.001.0025).
[185] T3296/20-44.
[186] Exhibit M139 (CRL.545.001.0025).
[187] Exhibit O36 (INQ.950.002.0157).
[188] Exhibit O36 (INQ.950.002.0157).
[189] Exhibit R15; see also T5326/12-17.
[190] Exhibit O36 (INQ.950.002.0157).
[191] Exhibit R33 (CRL.638.001.0655).
[192] Exhibit O28 (INQ.950.002.0140).
[193] Exhibit N28 (INQ.140.020.0247 at 0247_049, 0247_071 and 0247_080).
[194] Expert Report of Margaret K. Lewis dated 9 December 2019 (CRL.540.001.0006 at p 42 [1.2].

harrowing detail by Mr O'Connor in his Federal Court statement.[195] Bearing in mind the near certainty of a charge resulting in a conviction and the conditions that one would face in Chinese prison, and bearing in mind the limited scope within which it was lawful to organise gambling tours, the responses of the local staff to the Chinese authorities under questioning can be seen in a more sympathetic light.

**Alleged appreciation of the risk of arrest and conviction for gambling crimes**

164. Counsel Assisting submitted that "management appreciated that there was a risk of arrest, detention or conviction" for gambling crimes.[196] As noted above, this submission will be dealt with on the basis that it refers to an appreciation of a material risk to staff of arrest and conviction for gambling crimes. The evidence does not establish any such appreciation.

165. Counsel Assisting referred to the email from Michael Chen sent on 26 March 2013 in which he referred to the China team "living in constant fear of getting tapped on the shoulder".[197] By "tapped on the shoulder", Mr Chen was referring to the possibility of staff being questioned by Chinese authorities. There is no reason to think that he was referring to staff being arrested and convicted for gambling crimes. He said that it was not uncommon or unusual, whatever the industry, for authorities in China to "show up unannounced and interrogate a staff member". The point that Mr Chen was making in the email was that, while unannounced questioning by authorities did occur in China, Crown had obtained advice that "the activities we undertake in China do NOT violate any criminal laws" and that, as to the possibility of questioning, a protocol had been developed with WilmerHale. Mr Chen drew a distinction between the present position and the position when he worked at Caesars. He said that, when working for Caesars, the team would "duck for cover" from time to time because "we did not have good advice to know that the activities were NOT illegal".

166. His email was principally to say to Mr Felstead that steps had been taken to deal with the concerns of staff about being "tapped on the shoulder": (1) a protocol had been prepared; (2) advice had been obtained to the effect that Crown's activities were clearly not illegal. The email was not saying that there was an outstanding concern that needed to be addressed. Relevantly for present purposes, while the email drew attention to the possibility of unannounced questioning by authorities, it did not say that, notwithstanding the clear advice Crown had received that its activities were lawful, staff were at risk of being arrested and convicted for gambling crimes. It was to the opposite effect.

167. Mr Chen's email is relied upon by Counsel Assisting to suggest Mr Felstead and Mr O'Connor (who received the email) appreciated that staff were at risk of arrest and conviction for gambling crimes. However, the email does not go so far. It falls short of a warning that staff were at material risk of arrest and conviction for gambling crimes notwithstanding the legal advice.

168. Further, the notion that management perceived a material risk of arrest and conviction is contrary to their own actions in travelling to China after the email, as Mr Felstead, Mr O'Connor and Mr Chen frequently did. Quite apart from their concern for the welfare of staff,[198] they would not have travelled to China if they had considered there to be a material risk of arrest and conviction.

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[195] Exhibit R34 (CRL.540.001.0210). [150]-[174] (.0243-.0247) deal with Mr O'Connor's time in prison. His statement also deals with the coercion that was applied to him to get him to sign a statement (in Chinese) ([126]-[149]; .0238-.0243). Further, Mr O'Connor explains how he would have faced the prospect of enduring indefinite detention had he not pleaded guilty (at [175]-[178]; .0247-.0248).

[196] China submissions, paragraph 350(a).

[197] Exhibit M30 (CRL.545.001.0611).

[198] See Exhibit M136 (CRL.522.001.0572).

169. To the extent that it is suggested that the deferral of travel by senior executives to China in February 2015 was triggered by a fear of arrest and conviction, this is not borne out by the evidence. Mr Felstead rejected that proposition.[199] He said the decision was about keeping a low-key profile and not doing a large road show until the picture was clearer.[200] That is entirely consistent with the resumption of travel to China VIP international executives in May 2015.[201]

Alleged CPH silo in relation to China decision-making

170. To the extent that it is suggested that the decision-making in relation to China was unduly influenced by CPH,[202] that proposition is not sustainable.

171. The key executives involved in decision-making on China were Mr Felstead, Mr O'Connor, and Mr Chen. None of those executives was a CPH representative. Mr Craigie was aware of certain developments in China. He was not a CPH executive.

172. The proposition that CPH had substantial influence in the decision-making in relation to China relies on overstating the role of Mr Johnston. It involves characterising the VIP Working Group as "Mr Johnston's group".[203] No witness accepted that "CPH Working Group" was an appropriate label for the "VIP Working Group".[204] Attendees of the VIP Working Group were Mr Felstead, Mr O'Connor, Mr Chen, Mr Theiler; and, less frequently, Mr Barton, Ms Maguire, and Mr Kunaratnam. None of those individuals was a CPH representative. The CPH representative who regularly attended that group was Mr Johnston, and he had been a director of Crown Resorts since 2007. There is some evidence that Mr Kady and Mr Bennett from CPH attended one of the early meetings, but it does not go further than that. Everyone else attending that group worked only for a Crown entity.

173. The evidence shows that the key decisions in relation to China were made by Mr Felstead, Mr O'Connor, and Mr Chen. Mr Johnston was aware of certain events and was consulted about certain matters. Mr Johnston's evidence was that he attended the VIP Working Group in order to lend assistance on issues where he had special expertise,[205] and there was no serious challenge to this evidence. The suggestion that he directed the course taken in China in the exercise of supposed CPH control overstates his role and is not supported by the evidence.

174. As to the overall strategy to be followed in China, that may have been discussed at the VIP Working Group, but it made no decisions. The decision to adopt the platform junket strategy was made by the board on the recommendation of Mr Craigie.[206]

175. As to the effect of the VIP Working Group on reporting lines, although it appears that the reporting lines that Mr Felstead followed were affected to some extent by the fact that Mr Johnston was an attendee at the VIP Working Group, this should not be overstated. It is certainly not correct to say that the VIP Working Group was itself a separate reporting line or that Mr Felstead reported to the VIP Working Group.

176. Moreover, there was certainly no intention to affect reporting lines. The evidence of Mr Johnston and others, as quoted by Counsel Assisting at T5710/8 to T5711/23, was that the idea behind the group was that Mr Johnston could lend his particular expertise to guide and assist the VIP executives in the execution of their duties. There is no evidence that the VIP Working Group was established for anything other than a bona fide purpose.

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[199] T1195/18-21.
[200] Ibid.
[201] M180 (CRL.505.010.4316); M181 (CRL.505.010.4318); T1374/22-37.
[202] China submissions, paragraphs 11(c), 311, 356.
[203] China submissions, paragraph 356.
[204] Compare T1460/5-7.
[205] T2935/22.
[206] T1494/16-25.