
ROYAL COMMISSION INTO THE CASINO OPERATOR AND LICENCE
SUBMISSIONS BY MR JOSHUA PRESTON DATED 2 AUGUST 2021

Introduction

1. Mr Joshua Preston makes these submissions in response to the letter from the Solicitors Assisting the Commission dated 24 July 2021.
2. In that letter, Solicitors Assisting stated that:
 - (a) the evidence before the Commission includes advice given by Mr Preston to Crown Melbourne in relation to four matters;
 - (b) Mr Preston has had access to that evidence; and
 - (c) the Commissioner would be assisted by any submission Mr Preston wished to make on the issue of whether, having regard to that advice, it is open for the Commissioner to find that Mr Preston did not carry out his obligations, including his obligations as an Australian lawyer, in a proper manner and also to find that his conduct was improper.
3. The letter called for any written submissions by 5:00pm (AEST) on 2 August 2021.
4. Seeking submissions in this matter in this way is fundamentally unfair and denies Mr Preston procedural fairness. The making and publication of any positive adverse findings against Mr Preston in the circumstances in which his response has been sought would involve a denial of procedural fairness, and would breach the requirements of the *Inquiries Act 2014* (Vic) under which the Commission was established.
5. Further, any positive adverse findings against Mr Preston would be outside the scope of Commission's Terms of Reference and, in any event, unnecessary for the Commission to complete its inquiry.

Background

6. The Commission, through Solicitors Assisting, first indicated that it wished to contact Mr Preston by its letter to Allens Linklaters, solicitors for Crown, on 1 July 2021.
7. On 5 July 2021, having been notified that Grondal Bruining were the solicitors acting for Mr Preston, Solicitors Assisting wrote to Grondal Bruining to note that the Commission had received evidence in which adverse comments were made in relation to Mr Preston. The letter indicated that the Commission would bring the matters to Mr Preston's attention, should he wish to make any submissions on them, by further correspondence.

8. On 16 July 2021, Solicitors Assisting wrote to Grondal Bruining to make some 36 documents available to Mr Preston. That letter stated that the documents may be addressed in Counsel Assisting's closing submissions, and Mr Preston may wish to make responsive submissions in relation to them. A further 382 documents were made available on 19 July 2021.
9. On 20 July 2021, Solicitors Assisting provided Mr Preston the written closing submissions by Counsel Assisting. While those submissions refer to Mr Preston, they make no allegations against him nor do they invite any adverse findings against him. Because of this, Mr Preston did not seek leave to make oral submissions by the deadline of 21 July 2021.
10. On Saturday, 24 July 2021 – and so after the deadline to apply for leave to make oral submissions – Mr Preston received the letter to which these submissions respond.

The requirements of procedural fairness and the *Inquiries Act*

11. Section 12 of the *Inquiries Act* provides that the Commission must conduct the inquiry subject to the requirements of procedural fairness. There is no issue that Mr Preston is a person who must be afforded procedural fairness by the Commission in respect of the matters identified in the 24 July 2021 letter.
12. Procedural fairness in this matter requires that a person the subject of a possible adverse finding is provided with sufficient information so as to know the case they have to meet. Mr Preston has a right to expect the opportunity to ascertain the relevant issues and be informed of the nature and content of adverse material.¹ The Commission is required to direct Mr Preston to the critical issues or factors on which any finding or decision is likely to turn so that he has the opportunity to deal with them.²
13. Section 36 of the *Inquiries Act* expressly requires that if the Commission proposes to make a finding that is adverse to a person, the Commission must be satisfied that the person:
 - (a) is aware of the matters on which the proposed finding is based; and
 - (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.
14. Section 36 does not exclude or limit or enable the Commission to ignore the general requirements of procedural fairness. Indeed, the Explanatory Memorandum for the *Inquiries Bill 2014* stated, in respect of section 36, that it is “not intended for this clause to exhaust the

¹ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 162, quoting with approval from *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 590-591. See also *R (Bourgass) v Secretary of State for Justice* [2016] AC 384, 422-423.

² *Kioa v West* (1985) 159 CLR 550, 587; including appropriate particulars: see *Kelson v Forward* (1995) 39 ALD 303.

content or scope of a Royal Commission’s general obligation, imposed under clause 12(a), to afford procedural fairness in the conduct of its inquiry (generally) and in the preparation of its reports (specifically).”³

15. What is encompassed by a person being “aware” of matters on which the proposed finding is based and the person having an “opportunity” to “respond” to the matters is given meaning and substance by the requirements of procedural fairness.⁴
16. In Commissions such as this, and in the analogous corruption type bodies, the damage to those who are not accorded procedural fairness is now well understood. So too are the limits on redress for the damage to a person’s interests and reputation *after* the publication of adverse findings founded on denials of procedural fairness.⁵

Procedural fairness?

17. It is clear that the process proposed in the 24 July 2021 letter does not accord Mr Preston procedural fairness in at least two respects.

First matter – the allegations are not sufficiently particularised

18. The allegations against Mr Preston have not been sufficiently particularised to give Mr Preston a reasonable opportunity to respond to them.
19. The basis upon which the Commission first indicated that it would provide evidence to Mr Preston was that the evidence may be addressed in Counsel Assisting’s closing submissions, and Mr Preston may wish to respond.
20. As noted above, while Counsel Assisting’s submissions refer to Mr Preston, they make no allegations against him nor do they invite any positive adverse findings against him. There is no substantive indication in the submissions of the “critical issues or factors” upon which any potential adverse findings against Mr Preston may turn.
21. The submissions do not explain what it is that Mr Preston is asked to address (or the case he has to meet) in respect of any potential adverse findings.
22. The 24 July 2021 letter states, without reference to Counsel Assisting’s submissions, that the evidence before the Commission includes advice given by Mr Preston in relation to the following matters:

- (a) Crown Melbourne’s relationship with the VCGLR;

³ And see *Interpretation of Legislation Act 1984* (Vic), s35(b)(iii).

⁴ Counsel Assisting note the content of procedural fairness under general law in the context of these legislative provisions: see closing submissions, p 21 [COM.0500.0001.0400] at paragraph 6.3.

⁵ E.g. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 579-582.

- (b) Crown Melbourne's international business strategy;
 - (c) Crown Melbourne's treatment of "bonus jackpots" for gaming revenue taxation purposes; and
 - (d) Crown Melbourne's lack of commitment to investigate potential money laundering at Melbourne casino.
23. The letter then states that the issue is whether, "[h]aving regard to the advice given by Mr Preston" – described only by the generalised categories (a)-(d) above – it is "open to the Commissioner to find that Mr Preston did not carry out his obligations, including his obligations as an Australian lawyer, in a proper manner and also to find that his conduct was improper." That constitutes an egregious failure to properly particularise the basis by which it is suggested that such a finding is open to the Commission. A letter to a legal practitioner by a regulatory body in these terms, alluding to impropriety in such terms, would be grossly unfair. Indeed, it is impossible to imagine a regulatory body making allegations of impropriety in this way and seeking a response to them. If this is so, the Commission should meet and fulfill a correlative duty to accord procedural fairness to Mr Preston.
24. The 24 July 2021 letter does not identify the evidence, among the 418 documents provided only days earlier, that might base any potential adverse findings. Nor does it identify which specific aspect(s) of the advices are being referred to or how it is suggested that such aspect(s) could indicate that Mr Preston did not carry out his obligations, including his obligations as an Australian lawyer, in a proper manner or that his conduct was improper. As noted above, Counsel Assisting's submissions do not suggest a finding against Mr Preston and so do not identify material said to be relevant to such a finding.
25. All the 24 July 2021 letter does is to state, as a conclusion, the positive adverse findings which may be made having regard to general categories of matters in respect of which Mr Preston gave advice.

Example: "bonus jackpots"

26. By way of example, the letter refers to advice said to have been given by Mr Preston in relation to the deductibility of "bonus jackpots". Counsel Assisting's submissions refer to advice that Mr Preston sought from Minter Ellison regarding "bonus jackpots". There is a submission to the effect that the instructions to Minter Ellison were inadequate in not providing certain material.⁶ Later, there is a submission that Crown disregarded Minter Ellison's advice,

⁶ Counsel Assisting's closing submissions, p 90 [COM.0500.0001.0469] at paragraph 1.55.

including updated advice, and that Crown's conduct in continuing to allow expenses associated with bonus jackpots to be deducted was unacceptable.⁷

27. None of those matters, as put in the submissions, relate to advice given *by* Mr Preston. If anything put in the submissions is asserted as a basis for an adverse finding in relation to Mr Preston, there is no explanation of how or why Mr Preston's conduct could give rise to the potential findings against him.
28. The manner in which Mr Preston has been treated can be contrasted with the manner in which Counsel Assisting, quite properly, addressed specific submissions in respect of the role of Ms Michelle Fielding, an existing associate of Crown, in these matters.⁸ Those submissions specifically address Ms Fielding's conduct.⁹ Further, the submissions reveal that the case against Ms Fielding was put to her when she gave evidence to the Commission.¹⁰

Second matter – insufficient opportunity to respond

29. Even if Mr Preston could understand the allegations from the way in which the Commission has addressed them, the Commission has not allowed him an adequate opportunity to respond to them.
30. Mr Preston no longer works for Crown and has not had any involvement in the Commission's inquiries. Mr Preston can say nothing of Crown's *current* suitability to hold the casino licence (and the suitability of its *existing* associates). He has not given evidence to the Commission. He received, for the first time, the fragments of evidence said to be relevant to him on 16 July 2021 and 19 July 2021, and received Counsel Assisting's submissions on 20 July 2021. He only received notice of the potential adverse findings against him on Saturday, 24 July 2021. Submissions are due today.
31. In circumstances where the potential findings against Mr Preston would be of a most serious nature, this is manifestly inadequate time to properly consider the materials and prepare a response.

⁷ Counsel Assisting's closing submissions, p 91 [COM.0500.0001.0470] at paragraphs 1.63 and p 92 [COM.0500.0001.0471] at paragraph 1.72.

⁸ Counsel Assisting's closing submissions, p 319 [COM.0500.0001.0698] from paragraph 14.38.

⁹ The conclusion is that there is insufficient evidence for the Commission to make an adverse finding in respect of Ms Fielding: Counsel Assisting's closing submissions, p 321 [COM.0500.0001.0700] at paragraph 14.49. The concept of a "suitable person" involves considerations similar to those apparently involved in the potential findings against Mr Preston: Counsel Assisting's closing submissions, p 18 [COM.0500.0001.0397] at paragraph 5.4.

¹⁰ Other than in one respect which is specifically addressed by Counsel Assisting on p 320 [COM.0500.0001.0699] at paragraph 14.43.

Scope of the Commission's Terms of Reference

32. The principal focus of the inquiry is whether Crown is a suitable person to continue to hold the casino licence (Terms of Reference, item 3(A) and whether any existing associates of Crown are not suitable persons (Terms of Reference, item 3(G)).
33. It is difficult to see how any positive adverse findings against Mr Preston would fall within these Terms of Reference or be a matter necessary to satisfactorily resolve the matters set out in the Terms of Reference (as contemplated by Terms of Reference, item 3(K)). Even though consideration of and commentary on Crown's conduct in the past, and that of people formerly involved, might properly be made, it is entirely unnecessary for any positive findings to be made against anyone who is not now an associate of Crown.

Personal Information

