



## **Dissenting Report - Non-government members**

### **Introduction**

The realisation of the Christmas Island Casino and Resort began in mid-1998. In January 1999 the casino and resort was advertised for expressions of interest. On 5 May 2000 the casino and resort was sold to Soft Star for \$5.7 million on a cash unconditional basis.

At the time of the Committee's report, more than fifteen months since the sale of the facility, and over three years since the commencement of the sale process, the casino and resort remains largely closed. Restoration of the complex has yet to begin and, furthermore, no timetable has been agreed upon for the refurbishment and re-opening of the casino and resort.

No discussions have commenced between the Commonwealth and Soft Star regarding amendments to the leases, no probity checks have been conducted with Soft Star and no agreement has been reached regarding casino gaming rates or legislative requirements for the operation of the casino.

In addition, there has been no application for a casino licence and no arrangements have been finalised between Soft Star and an operator and manager of the complex, or with an air services provider.

Non-government members of the Committee believe that because of the devastating effect that the closure of the casino and resort had upon the social and economic structure of the Island, the Commonwealth has a clear responsibility to do everything within its power to ensure that the facility re-opens as a casino and resort, as soon as possible. We do not believe that the Commonwealth has met this responsibility.

Although we agree with the factual accounting of the tender process, as well as the criticisms of this process contained within the majority report, non-government members do not believe that these criticisms go far enough.

## Basis of dissent

Our dissent is based upon evidence presented in the following areas:

- the purpose clause of the lease;
- conversion of the leases from leasehold to freehold title;
- the conduct of negotiations with ComsWinfair; and
- the sale of the casino and resort to Soft Star Pty Ltd.

## The purpose clause of the lease

Non-government members note that many of the Commonwealth's actions were founded on the premise that the purpose clause of the lease for the casino and resort is permissive and not prescriptive or mandatory in application.

The purpose clause of the lease states:

The Lessee shall use the premises only for the purposes of a hotel-casino and ancillary thereto, for personal services, retail and non-retail shops, recreation, accommodation and entertainment facilities or such purpose as may be approved in writing by the Commonwealth.<sup>1</sup>

The Committee heard evidence from the Department of Transport and Regional Services (DoTRS) that the purpose clause of the lease is permissive and not mandatory.<sup>2</sup> This would mean that the purpose clause *allows* for the use of the facility for the purpose stated in the clause, as opposed to stipulating that the facility be used *only* for the purpose stated in the clause.

---

1 Clause 3(b) of Christmas Island Resort Lease.

2 DoTRS, Submission No. 11, p. 1211.

We also note comments made by the Liquidator, who stated:

It was not a condition of the assignment of the crown leases to the eventual purchaser by the Commonwealth that the purchaser conduct specific operations at the casino and resort.<sup>3</sup>

DoTRS further told the Committee that because the purpose clause of the lease is permissive and not mandatory, 'failure to re-open the casino does not appear to constitute a breach of the lease'.<sup>4</sup>

Even if this interpretation is accepted, non-government members cannot understand why the Commonwealth failed to ensure that the operation of a casino and resort was mandatory within the purpose clause of the lease.

Non-government members, however, do not accept this interpretation. We believe that a different legal interpretation applies to the purpose clause. We believe that when general matters are referred to in conjunction with a number of specific matters of a particular kind, there is a *presumption* of interpretation that the general matters are limited to things of a like kind to the specific matters.<sup>5</sup>

In other words, things are only permitted under the purpose clause which are similar to 'personal services, retail and non-retail shops, recreation, accommodation and entertainment facilities' as ancillary to the operation of a hotel/casino.

The application of this presumption to the purpose clause of the lease means that the Commonwealth can only approve other uses as they are ancillary to the operation of a hotel-casino.

We therefore believe that the purpose clause for the Christmas Island Resort Lease is mandatory, and not permissive, and dissent from paragraph 5.161 in Chapter Five of the majority report, which states:

The Committee understands that the Commonwealth has no ability to compel the owner of the facility to use it for the purpose of a casino and resort.

We further believe that because the purpose clause of the lease is mandatory, by not utilising the facility as the casino and resort for which it was built, Soft Star Pty Ltd is in breach of the lease. We therefore recommend the following:

---

3 PPB Ashton Read, Submission No. 7, p. 84.

4 DoTRS, Submission No. 15, p. 1460.

5 D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, 3<sup>rd</sup> edition, Butterworths, 1988, p. 75.

## Recommendation 1

**Non-government members recommend that if Soft Star Pty Ltd does not take demonstrable and significant steps towards the re-opening of the facility as a casino and resort within twelve months, the Commonwealth revoke the lease for the property and re-assign it to someone who will re-open the facility as a casino and resort.**

## Conversion of the lease from leasehold to freehold

The Christmas Island community holds grave concerns for the economic future of the Island. The Committee heard evidence throughout the inquiry that many Christmas Islanders feel that the tourism and small business sectors of the Island economy, in particular, are highly dependent upon the re-opening of the casino and resort for their survival.

It is within this context that non-government members believe that it is inappropriate to approve the conversion of the resort leases from leasehold to freehold title, even on a conditional basis.

Non-government members are particularly concerned that loss of direct control by the Commonwealth over the lease would impact negatively upon the community's ability to influence the use of the casino and resort. We are also highly concerned over the general dearth of consultation conducted with the Christmas Island community on this issue.

## Arguments against conversion of the leases to freehold title

Throughout the inquiry the Committee heard evidence of community concern that Soft Star intends to utilise the complex primarily as an administrative and accommodation facility for the Asia Pacific Space Centre. A number of witnesses argued that if the leases were converted to freehold, there would no longer be any means with which to apply pressure on Soft Star to re-open the facility as a casino and resort.

Mr Gordon Thomson from SOCI told the Committee:

Our view was that the principal of the two companies – APSC and Soft Star – was the same person and that the new owner was more likely to use the facility as an administrative and accommodation facility for his APSC project rather than for operating a resort. That was a widely held view and it was put to the Minister. The Minister...said 'Don't worry about that. It is not going to be like that, because the lease says it has to be a resort'. Now he is

considering a freehold title. That is clearly not in the interests of this community.<sup>6</sup>

Non-government members note evidence provided to the Committee that converting the leases to freehold would improve the commercial value of the project and thereby increase the likelihood of Soft Star re-furbishing and re-opening the facility as a casino and resort in the immediate future. However, we do not believe that the evidence is conclusive in this regard.

SOCI argued further that it does not believe that conversion of the leases to freehold would result in any significant improvement in the commercial viability of the project:

I do not think that you need to have freehold title to make an application to the Minister or the shire...I do not think that any reasonable authority wanting to see economic development in this place would be putting anything in the way of someone who is trying to develop it as a tourist facility. We are saying that you remove the power of the Minister and, therefore, of this community when you freehold – he does what he likes or he does nothing. That is what is happening now: nothing.<sup>7</sup>

The UCIW also informed the Committee that it believes that freehold title would remove any incentive for the owner of the leases, Soft Star, to re-establish the facility as a fully operational casino and resort. The UCIW told the Committee that it believes the casino and resort is a crucial factor in revitalising the Island's depressed tourism industry.

The UCIW believes that the Christmas Island community needs the Resort to be properly managed to provide the focal point of our tourist industry [and] to provide a significant level of employment for the local population.<sup>8</sup>

Non-government members of the Committee feel that, in light of continuing uncertainty in the redevelopment of the complex and its re-opening as a fully operational casino and resort, the approval of Soft Star's application for conversion of the leases to freehold title would remove any influence the Christmas Island community could hold over the management of such a vital economic resource in the Island's economy.

---

6 SOCI, *Hansard*, p. 109.

7 SOCI, *Hansard*, pp. 111-112.

8 UCIW, Submission No. 1, p. 4.

## Lack of community consultation

Non-government members of the Committee are particularly concerned about the total inadequacy of formal consultation with the Christmas Island community with regard to this issue.

We note evidence contained within Chapter Five of the majority report, which states that aside from discussions held with the Minister during an inspection of the Island in April 2000, no formal discussions have been held with Christmas Island representatives regarding community opinion on the issue of converting the leases from leasehold to freehold title.<sup>9</sup>

Non-government members were especially concerned over the response of the Department of Transport and Regional Services (DoTRS) to community concerns and objections to the granting of freehold title.

It is the Government's policy position that freehold title will be available on the Island...I would say that the Minister is well aware of some views held in the community about that. There are other views on the Island which favour freeholding...I certainly do not dispute that [the Shire of Christmas Island] were democratically elected to represent views...but I would say that there are other views.<sup>10</sup>

Non-government members believe that there is an absolute obligation on the part of the Commonwealth to have due and proper regard to the representations of the Shire of Christmas Island – as the democratically elected representative body of the Christmas Island community. This is especially pertinent considering the complex administrative framework governing Christmas Island.

We believe that the level of consultation on this issue indicates that the Commonwealth has not fulfilled its obligation to consult the Island community fully on this issue, and to incorporate their concerns into any final decision.

Non-government members therefore believe that the leases for the casino and resort should remain under leasehold title, in order to ensure that the Commonwealth and the Christmas Island community retain the ability to influence usage of the facility for the benefit of the Christmas Island community.

We therefore dissent from paragraph 5.162 of the majority report, which states:

The Committee believes that a conditional form of freehold title would be appropriate for the needs and concerns of Christmas Island.

---

9 Evidence on this issue is presented in paragraphs 5.145 to 5.157 of Chapter Five of the majority report.

10 DoTRS, *Hansard*, pp. 225-226.

Non-government members also dissent from **Recommendation 4** of the majority report, which supports conversion of the leases to a conditional form of freehold title.

### **Recommendation 2**

**Non-government members recommend that the leases for the Christmas Island Casino and Resort not be converted to freehold title.**

**We further recommend that if conversion of the leases to freehold title is pursued, the Commonwealth consult with, and seek the approval of, the Shire of Christmas Island before any steps towards converting the leases to freehold are taken.**

The Committee's inquiry into processes relating to the casino and resort has highlighted the need for increased consultation with the Island community generally. We therefore make the following recommendation:

### **Recommendation 3**

**Non-government members of the Committee believe that, henceforth, no decisions or changes relating to the legal status or administrative processes of Christmas Island and its residents, be made by the Commonwealth without full consultation with the Christmas Island community through the Shire of Christmas Island.**

## **Negotiations with ComsWinfair**

Non-government members of the Committee believe that the evidence presented to the Committee clearly indicates that conditions under negotiation between ComsWinfair and the Commonwealth in the final stages of the tender process were capable of resolution.

We believe that ComsWinfair clearly emerged from the tender process as the only viable tenderer with the experience, financial resources and intent to refurbish and re-open the casino and resort to its full operational capacity. Coms21 have had considerable experience in gaming financing, development and operations. The Winfair Group specialises in the operation of resort complexes, in addition to offering aviation services from Singapore and Jakarta. ComsWinfair were further

planning for the development of new resort properties and activities and the creation of a broader tourist offering.

The Committee received evidence from the Liquidator, Mr Herbert, that concerns regarding the resolution of negotiations between ComsWinfair and the Commonwealth, the allocation of time for the conduct of the probity review and the prospect of running out of funds, were all contributing factors in his decision to terminate the tender process and seek an unconditional cash offer for the facility.

However, Mr Rodger Mortleman, Director of ComsWinfair Pty Ltd, informed the Committee that ComsWinfair believed that all outstanding conditions were essentially resolved as at January 2000. ComsWinfair informed the Committee:

The essential lease and license conditions of importance to our tender were largely satisfied by the Minister's letter on 27 January 2000. We have no reason to believe that the outstanding issues would not have been resolved, or waived by ourselves, given the opportunity.<sup>11</sup>

The Committee also received evidence that ComsWinfair were anticipating holding a 'soft opening' of the casino and resort before the end of 2000, and having the casino and resort fully operational by Chinese New Year in February 2001.<sup>12</sup>

With regard to the timeframe of the probity review, directors of Coms21 Ltd had recently collated similar information for the New South Wales Department of Racing and Gaming. ComsWinfair were thereby anticipating that the bulk of the information required would be available for submission by mid-January 2000.<sup>13</sup>

We believe that this evidence suggests that ComsWinfair were anticipating resolving all outstanding issues regarding both the conditions of sale and the probity review, in the shortest timeframe possible. This would have alleviated whatever concern the Liquidator held regarding the prospect of Christmas Island Resort Pty Ltd (CIR) running out of funds for the conduct of the realisation process.

Non-government members believe that the evidence received during the course of the inquiry indicates that the primary impediment to the resolution of negotiations with ComsWinfair was the Minister's insistence that all parties who had expressed some interest in purchasing the casino and resort be made aware of tax conditions and concessions negotiated privately between the Commonwealth and ComsWinfair.

---

11 ComsWinfair, Submission No. 9, p. 1200.

12 ComsWinfair, *Hansard*, p. 198.

13 ComsWinfair, Exhibit No. 7.



Although the majority report does contain some criticism of the conduct of negotiations with ComsWinfair during the tender process, non-government members do not believe that it goes far enough.

We believe the decision to jettison negotiations with ComsWinfair, and to abandon the tender process as a whole, has denied the Christmas Island community the injection of revenue and investment it desperately needs, and has also jeopardised a substantial source of revenue for the Commonwealth.

## **Sale to Soft Star Pty Ltd**

Non-government members of the Committee dissent from a number of conclusions in the majority report with regard to the sale of the casino and resort to Soft Star Pty Ltd. These include:

- the appropriateness of commencing negotiations with Soft Star before the termination of the tender process;
- the fact that probity and financial background checks were not applied to Soft Star before the sale of the property; and
- the likelihood of Soft Star being aware of the highest bid made within the tender process through a breach in confidentiality.

## **Commencement of Negotiations with APSC/Soft Star**

Non-government members recognise that the commencement of negotiations with Soft Star before the termination of the tender process did not contravene the *Corporations Law*. However, we remain concerned about the appropriateness of commencing negotiations with an external party for a cash unconditional sale, while simultaneously negotiating tender conditions with a potential purchaser within the structure and preconditions of the tender process.

We acknowledge evidence provided by Mr David Kwon of APSC/Soft Star, who stated:

Soft Star did not participate in the tender process. The purchase of the resort/casino was a consequence of separate negotiations between Soft Star and the Liquidator after the termination of the tender process.<sup>14</sup>

The Liquidator, Mr Herbert, also told the Committee:

Although discussions with APSC/Soft Star started prior to the formal termination of the tender, no agreement, written or verbal,

---

14 Soft Star/APSC, Submission No. 13, p. 1421.

with APSC/Soft Star was entered into prior to the formal termination of the tender. Indeed, agreement with Soft Star was only reached at the end of March 2000.<sup>15</sup>

However, the fact remains that the Liquidator met with APSC/Soft Star on 2 February 2000 to discuss their offer. The outcome of these discussions was summarised in a letter from the Liquidator to APSC/Soft Star on 3 February 2000:

I am still yet to agree on the purchase price as offered by you...Subject to agreement on this...I will arrange to have a sale agreement prepared and will forward this to you for your inspection.

If there are no amendments to be made to the sale agreement, it may be appropriate to meet you on Christmas Island on 14 February 2000 to sign the sale agreement.<sup>16</sup>

The tender process was formally terminated on 4 February 2000. This clearly indicates that the tender process was terminated subsequent to an agreement being reached, however informal, between the Liquidator and APSC/Soft Star for the sale of the Christmas Island Casino and Resort to Soft Star Pty Ltd.

Non-government members accept that the commencement of negotiations with Soft Star before the formal termination of the tender process did not contravene the *Corporations Law*. However, we also believe that it was inappropriate and counter-productive to the aims and intent of the tender process.

### **Failure to apply probity and background financial checks**

Non-government members are also highly concerned that probity and financial background checks structured into the tender process through the probity review component of the casino licence application, were never applied to Soft Star. This concern is particularly acute in the context of community and Commonwealth expectations that the facility be re-opened as a casino and resort.

The Committee received unequivocal evidence that no financial and background checks have been conducted for Soft Star Pty Ltd. DoTRS informed the Committee:

Matters such as the financial status of the potential purchasers were matters for the Liquidator in accordance with his legal responsibilities. No checks of Directors of any tenderers were conducted by the Commonwealth. As part of the standard lease transfer procedures Soft Star Pty Ltd was required to satisfy the

---

15 PPB Ashton Read, Submission No. 7, p. 90.

16 Annexure 46, PPB Ashton Read, Submission No. 7, p. 665.

Commonwealth that it had sufficient financial means to enable it to perform its obligations under the leases...<sup>17</sup>

The Liquidator informed the Committee that:

In reference to the comments made by the Department of Transport and Regional Services...regarding financial checks conducted by the Liquidator to determine that the purchaser was financially capable of operating the resort, I advise that no such checks were performed by me.<sup>18</sup>

The Liquidator further stated:

It was not my concern that the purchasing party had the financial capacity to operate a casino or resort, rather it was my concern that the purchasing party had the financial capacity to pay the purchase price on the terms contracted.<sup>19</sup>

Non-government members are astonished that the Commonwealth has undertaken no financial or background checks to ensure that the purchaser of the casino and resort even has the ability to operate a casino and resort, let alone to fulfil the stringent conditions of the casino licence Probity Review.

### **Concerns about Soft Star's purchase price**

Non-government members believe that there is significant evidence to indicate that there was a breach of confidentiality in the tender process, and that Soft Star was aware of the highest offer submitted within the tender process by ComsWinfair when Soft Star initiated final negotiations with the Liquidator on a purchase price for the casino and resort.

The final purchase price negotiated with Soft Star Pty Ltd was \$5.7 million. This was \$200,000 more than the purchase price bid by ComsWinfair during the tender process. The Committee heard evidence that Mr Kwon had initially been informed that bids were in the vicinity of between \$10 and \$12 million. The Liquidator told the Committee:

When we first had discussions with David Kwon...we suggested to him, through Frank Woodmore, that the assets would be available at \$10 million. In my first discussion with him, he suggested they would be prepared to offer \$4.5 million. How he found out, if indeed he found out, that ComsWinfair's offer was \$5.5 million, I do not know.<sup>20</sup>

---

17 DoTRS, Submission No. 15, p. 1447.

18 PPB Ashton Read, Submission No. 14, p. 1445.

19 PPB Ashton Read, Submission No. 14, p. 1446.

20 PPB Ashton Read, *Hansard*, p. 80.

Mr Rodger Mortleman of ComsWinfair also commented upon the lack of confidentiality surrounding the tender process. Mr Mortleman stated:

Leaks from the government organisation are so rare that I do not think they even occur; I am not aware of them occurring. Leaks from bid to bid sometimes occur. But in this instance, we may as well have put it in the newspaper.<sup>21</sup>

Non-government members believe that the evidence received throughout the course of the inquiry indicate that it is highly likely that information on the highest offer made within the tender process was somehow leaked to Soft Star Pty Ltd. We therefore dissent from paragraph 4.119 of the majority report, which states:

The Committee concluded that there was insufficient evidence to determine that Soft Star had been aware of the highest purchase price offered by ComsWinfair during the tender process.

## **Conclusion**

Non-government members believe that the tender process for the sale of the Christmas Island Casino and Resort was flawed from the outset. We believe that the Commonwealth's handling of its role within the process and its responsibilities to the Christmas Island community have been totally inadequate.

Lack of rigour and timeliness in the handling of issues pertaining to the Commonwealth's jurisdiction, and a pronounced lack enthusiasm for the process, have diminished the final outcome of the sale process for the casino and resort for both the Christmas Island community and the Commonwealth.

Overall, non-government members are disappointed that in a situation where Christmas Island could have benefited from the presence of both the satellite launching facility and the casino and resort, with all the employment and investment opportunities that this entails, the Island currently has no operational projects on this scale confirmed.

---

21 ComsWinfair, *Hansard*, p. 201.

Non-government members concur with evidence provided to the Committee by Mr Gordon Thomson:

The resort exists, it is there, and it can be up and running with the right decisions being made. The two engines can keep us going. We had 320 people employed at the resort before. We had a vibrant economy. We want to get that back.<sup>22</sup>

**Senator Trish Crossin**  
**Deputy Chair**

**Senator Brian Greig**

**Senator Kate Lundy**

**Senator Sue West**

**Ms Annette Ellis MP**

**Hon Warren Snowdon MP**

---

<sup>22</sup> UCIW, *Transcript*, p. 127.