

COPY

BRIEFING NOTE - FOR INFORMATION

Richard

17/01/08

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| FROM | Treasury | | |
| FOR | Treasurer | | |
| SUBJECT | | | |
| Contact Officer: | Carol Perrett, Director, Investigations and Compliance, Office of Racing | Record No: QTO-02576 | Date: 15/07/2008 |
| Requested by: | Lachlan Smith, Ministerial Policy Advisor | Date Approval Required By: 15/07/2008 | |

PURPOSE

1. To provide policy advice on the proposed amendments to the Queensland Racing Limited (QRL) constitution.

BACKGROUND

2. Attached is a brief prepared by the Legal Services Unit (LSU) that sets out a summary of the changes proposed to the QRL constitution and a summary of advice provided to QRL by David Jackson QC and Andrew Herbert of Counsel.

The proposed amendments seek to:

- extend the initial term of directors from 3 to 6 years; and
- change the process for the appointment of directors.

ISSUES

3. LSU has not identified any legal impediment to the proposed amendments to the QRL constitution.
4. There are a number of policy-related matters that should be considered.

Formal Application for Approval

5. It is understood that you have been provided with a copy of the documents that have been forwarded to the members of the company under cover of a QRL "with compliments" slip. You have not been formally requested to approve the proposed amendments to the constitution.
6. In the circumstances you should not make any comment or make any decision on the proposal to amend the QRL constitution prior to being formally requested to approve the proposed amendments. Despite arguments advanced by QRL to date that the proposed amendments have widespread industry support it is likely that certain sections of the industry will remain opposed to these changes and have demonstrated a tendency to resort to legal challenge of any decisions they do not support. Accordingly, any advice or comments made on an informal basis could form the basis of a legal challenge to your decision.

Independent Recruitment Consultant

7. The proposed changes remove the requirement for an independent recruitment consultant to prepare a short list of applications by reference to the selection criteria contained in Appendix A of the constitution and for this process to be undertaken by the company secretary.

8. The Counsel for QRL refer to the cost involved in engaging an independent recruitment company and that it is unnecessary if the company secretary is competent to undertake this process.
9. The use of an independent recruitment company has been a fundamental aspect of the recruitment and appointment of board members to the thoroughbred control body since 2001 and has provided a good defence against criticism of the recruitment process. Furthermore, the use of an independent recruitment process was a primary consideration in assessment of recent corporatisation applications by the harness and greyhound control bodies.
10. An independent recruitment company has the professional expertise to review applications against the selection criteria, independent of any real, or perceived, influence from QRL. It is considered that this requirement provides an important safeguard from an integrity perspective to ensure independence and impartiality in the short-listing of applicants. Under the proposed arrangements, it could be argued that the company secretary may be influenced by the views of the board in short-listing applicants.
11. The removal of this requirement has the very real potential to be criticised on the basis that it will undermine the integrity of the recruitment system. It is considered that the argument of cost savings to QRL is not a sufficient reason to change this aspect of the recruitment process.

Government Policy on Racing

12. Since the privatisation of the Queensland TAB in 1999, it has been government policy to devolve responsibility for the day to day operations of the racing industry to the industry. This policy has been implemented by the *Racing Act 2002* (the Racing Act) which:
 - provides for a corporation whose directors are appointed in accordance with its constitution, to be the control body for each code of racing (rather than a statutory authority with members appointed by the Minister);
 - devolves wide ranging powers to each control body and limits the government's role to matters of integrity; and
 - provides the Minister with very limited powers regarding the internal operations/governance arrangements of racing control bodies.
13. It was envisaged that an application from a control body to amend its constitution would not be considered by you as the Minister responsible for racing, until the proposed amendment had been approved by the members of the company. In this way, the Government, and you specifically, are removed from the negotiation and initial decision-making process.
14. This approach is consistent with the approval process under the Racing Act for the disposal of land by race clubs which requires the approval of the members of the relevant club and the approval of the control body before an application can be made to the Minister responsible for racing to approve of the disposal.
15. This approach limits government involvement in industry decision-making while still providing a safeguard to ensure decisions of an inappropriate nature that may impact on the integrity of racing, or that may be unlawful, are not made. It was envisaged that the Minister would ratify the decisions of the members of the club and the control body unless there were sound grounds to justify a refusal.
16. If the members of the company support the proposed amendments, a decision by you to refuse to grant approval must be made on grounds that can be justified and are able to withstand legal scrutiny.

Appropriate Term for Directors

17. Counsel for QRL stated:

"While there is no specific term of years that can be indicated as being either appropriate or inappropriate in this context, we are of the opinion that appointing directors for a term of six years before initial retirements are to occur does not offend any established principles of proper corporate governance in the specific context of the role and function of Queensland Racing, and is generally consistent with an approach that persons or entities charged with a public regulatory role should be permitted to undertake that task without being required to regularly seek continuing support and approval from the very persons in respect of whom they are required to exercise control and regulation, and potentially to make adverse, but proper, decisions."

18. There are arguments that a term of 6 years may have the potential risk of fostering a board which becomes stagnant and without fresh ideas. However, while that may be true of some boards, the directors of QRL (Bentley, Hamner, Lambert, Ludwig and Andrews) have shown no signs of being devoid of fresh ideas, with the thoroughbred code undergoing probably the greatest period of reform and improvements in its history. The board of QRL has implemented wide ranging reforms to the industry which has seen record product fee payments from UNITAB to the three codes of racing in Queensland and significant increases in prize money. The board has continued to lobby at the Australian Racing Board level for better classes of races for Queensland, continues to implement enhancements to race programming and has a program of wide ranging infrastructure projects planned across the State.

19. In the circumstances it would seem axiomatic that the current QRL Board is unlikely to suffer from either stagnation or a lack of fresh ideas.

Noted

Comments (back to Department/further action - if applicable)

| | Action Officer/Author | Director | (Initials) | ED/AUT | (Initials) | DUT | (Initials) |
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BRIEFING NOTE - FOR INFORMATION

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|------------------|---|--|--------------------|
| FROM | Treasury | | |
| FOR | Treasurer | | |
| SUBJECT | Queensland Racing Limited ('QR') - Meeting of Members | | |
| Contact Officer: | Shaun Butler, Legal Services Unit, telephone 3224 5178 | Record No: TRO-XXXX; DPF-XXXX; MIC-XXXX; OSR-XXXX; OGR-XXXX | Date: 14 July 2008 |
| Requested by: | Lachlan Smith | Date Approval Required By: N/A | |

PURPOSE

To –

- advise you of the substantive matters raised in recent correspondence from QR highlighting potential amendments to its constitution, and
- inform you of your options in this regard.

BACKGROUND

In accordance with section 26 of the *Racing Act 2002*, QR was approved by the relevant Minister to be the control body for thoroughbred racing in Queensland, effective from 1 July 2006. Condition 4 of the Control Body Approval Notice requires QR to 'obtain the ratification in writing of the Minister before implementing any amendment to the company's constitution'.

Clause 15 of QR's constitution operates such that the initial term of the founding directors expires at the first Annual General Meeting after 1 July 2009. Relevantly, the initial term of founding directors will just exceed 3 years.

Clause 17 of QR's constitution provides for the process by which potential replacement directors may nominate, be short listed by an independent recruitment consultant (having regard to established selection criteria in the constitution), are initially reviewed by class A and B members of QR and ultimately selected by a selection committee represented by class A and B members. Class A and B members on the selection committee have equal voting power in the appointment of directors, and in the case of a tied ballot, the successful appointee is determined by chance through a draw conducted by QR's secretary.

QR has written to its members to inform them of three meetings (a class A member's meeting, a class B members meeting and a general meeting of members), to be held on 6 August 2008. All meetings have been called to consider the same special resolution to amend the constitution of QR the general purpose of which is to –

- Extend the initial term of the board of directors of QR from 3 to 6 years before the process of retirement by rotation commences, and
- Change the way in which directors of the board of QR are appointed in the future. In particular, an independent recruitment consultant will no longer be engaged to shortlist candidates. Rather, short listing will be undertaken by the company secretary having regard to the existing selection criteria. Class A and B members will then meet separately to determine their preferred candidates from the shortlisted candidates. Also, the selection committee will be restructured to provide for 2 class A and 2 class B representatives and an independent representative (appointed either by the agreement of

the class A and B representatives or an external independent person where agreement cannot be reached). As there will be an uneven number of selection committee members, the situation of a tied vote and subsequent election of a person as a director through a chance draw should not occur. Finally, the constitution is to be amended to ensure that the votes by representatives of the member classes within the selection committee are not necessarily tied to the collegiate approach of preferencing candidates as determined at the prior member meetings.

- Clarify that the board may appoint directors up to the maximum 7 appointments as currently permitted and to fill vacancies.

The amendments to the constitution have been proposed by the directors rather than the class A members of QR. This is relevant in that the constitution was only adopted 2 years ago after the consultation of interested parties.

The directors of QR are the class B members whilst class A members constitute the various clubs, committees and associations involved in the Queensland thoroughbred racing industry.

QR has obtained legal advice from counsel on the above matters (see attachment 1).

By way of an example, a copy of the notice of meeting for class A members is attached (see attachment 2).

ISSUES

Extending the initial term of QR's board of directors

Among other things, legal counsel for QR makes or notes the following points –

- The constitution, in its present form, was developed in consultation with the previous Minister after extensive consultation with industry representatives throughout Queensland.
- The proposal to extend the initial term of office is to ensure greater stability of the QR board whilst involved in a range of significant policy matters and long term infrastructure projects including Corbould Park stabling, redevelopment of Deagon, development of Palm Meadows, construction of synthetic tracks at Inewoomba and the Gold Coast, merger of metropolitan clubs, aggregation of television rights etc.
- The maintenance of stability and continuity of a board is a reasonable approach to corporate governance provided it is balanced by appropriate levels of accountability to the members of a company, which in the case of QR, is difficult to quantify. This is because QR is a company limited by guarantee where members do not have a financial stake in the conduct of the company. Additionally, a reasonable and fixed term for directors of QR is desirable to the extent of avoiding the perception or reality of persons undertaking regulatory functions that could be improperly influenced by external considerations such as ones personal tenure as a director.
- In their opinion, whilst there is no specific term of years that can be indicated as appropriate for the appointment of a director, in the context of QR, an initial 6 year appointment of directors would not offend any established principles of proper corporate governance. Notwithstanding this, it is also noted that some directors will in effect serve a period of 8 years before being subject to re-election which is at the outer limits of an appropriate range for such an appointment.
- The ability to appoint a director of a government owned corporation up to a period of 5 years is offered as an example in support of this matter.

Comments in response to the points raised by QR's legal counsel are as follows –

- As QR's constitution was only recently developed, (understood to have occurred in 2006) and was done in consultation with the industry and the State, the question arises as to why this matter was not raised at that time.

- The other points raised in support of the amendments, (i.e. maintenance of stability and continuity of the board in times of addressing significant infrastructure projects and policy matters, the avoidance of improper influences whether perceived or real and proper corporate governance principles not being offended) may have some merit. Notwithstanding this, it is a question of what you consider to be appropriate in the circumstances
- Publicly listed companies undertaking significant capital intensive projects are required to respond to major policy initiatives generally have board member appointment periods far less than 6 years. Similarly, directors of Government Owned Corporations ('GOC's') are responsible for significant infrastructure development. The current practice for these bodies is to appoint directors for a period of 3 years. Also, members of regulatory bodies are usually entitled to be appointed for periods up to 5 years (for example see section 211 of the *Queensland Competition Authority Act 1997*). In this regard, the last appointment of the members of the Queensland Competition Authority was for a period of 2 years.
- Continuity and stability of QR's board of directors can be otherwise addressed through the ability to reappoint existing directors as provided in the constitution. In practical terms the reappointment of directors is the means by which continuity and stability are generally achieved.
- In a recent advice by Treasury's Legal Services Unit to the Office of Racing in regards to other control bodies, similar but not identical issues were considered. In that advice, whilst the Minister's power to become involved in and make determinations on such matters was acknowledge it was noted that some caution was required in exercising such powers in that it was not consistent with the usual practice by which corporations, its directors and shareholders/members operate. Rather, the usual matters including the details of a control bodies constitution should be resolved by the company internally unless the matter was unique or of some concern or risk to the State. Consequently, from an internal perspective, one could argue that these matters are ones for the members of QR to resolve, and that regardless of that outcome it is open to directors to be reappointed if that is what the members want.

Changing the process of appointment of a director of QR and filling vacancies

Relevant points by QR's legal counsel are as follows:

- Voting deadlocks and the selection of director candidates by a chance draw are removed.
- In the case of disagreement between class A and B representatives on the selection committee, the fairness of electing directors is maintained through the independent representative.
- There is little value (if any) in maintaining the role of the independent recruitment consultant to shortlist candidates. Also there are cost savings to QR in this regard.
- Proposed amendments to address the filling of vacancies from time to time are subject to the safeguard that no appointment made between annual general meetings can be for a term beyond the closure of the next succeeding annual general meeting.

Comments in response

Whilst no legal issues have been identified with the proposed changes, policy concerns have been raised by the Office of Racing in their briefing note to you.

Options

We note the comments from the Office of Racing that no formal request to approve the proposed amendments has been made at this time.

To the extent that a formal request for you to make a decision is received we note that such a decision would appear to be subject to the *Judicial Review Act 1991*. Therefore it is not necessary to prejudge the matter before any request is made.

Noted

Comments (back to Department/further action - if applicable)

| | | | | |
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* This officer may be required to provide further detailed information regarding the issue

