Queensland Racing Commission of Inquiry

The Honourable Margaret White AO
February 2014

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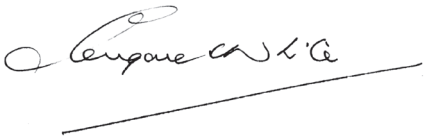
The Honourable Campbell Newman MP
Premier of Queensland
PO Box 15185
CITY EAST QLD 4002

Dear Premier

In accordance with Commissions of Inquiry Order (No. 1) 2013, as amended, I present the report of the Queensland Racing Commission of Inquiry.

Yours sincerely



The Hon Margaret White AO
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Queensland Racing Commission of Inquiry

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Chapter 1

Introduction

1.1 Overview

1.1.1 On 6 May 2013 the Attorney-General and the Minister for National Parks, Recreation, Sport and Racing announced that executive government would establish a Commission of Inquiry into Racing Queensland. The government was responding to wide ranging allegations about the management of the thoroughbred, harness and greyhound racing industries in Queensland by the control body, Racing Queensland Limited (RQL), a company limited by guarantee and its predecessors, Queensland Racing Limited (QRL), Greyhounds Queensland Limited and Queensland Harness Racing Limited.

1.1.2 RQL had been the subject of increasingly strident criticism by many participants in the three codes of racing since its appointment as control body on 1 July 2010. From that date the individual codes ceased to have their own control bodies and administrations and were merged; for all practical purposes, the thoroughbred code absorbed the two smaller codes.

1.1.3 But even prior to July 2010, the previous thoroughbred control body, QRL, had alienated many by its approach to the management of the industry. The Shanahan and Daubney/Rafter Reports into certain aspects of racing in Queensland in 2004 each referred to scurrilous gossip and unsubstantiated rumour and innuendo within the industry. As this Commission soon realised, many do not hold back when seeking to denigrate those with whom they disagree in the world of racing.

1.1.4 The Shanahan Commission was "struck by the animosity evident both within racing codes and among the three codes of racing", which it considered would make the integration of the commercial aspects of racing "extremely difficult".[1]

1.1.5 None of the people engaged on this Commission started with any particular knowledge of the racing industry. It was considered important that there be some understanding of the origins of this discord which was an impediment to an industry which supports, economically, thousands of participants directly and more remotely and has a legion of passionate followers who just love being associated with their code and the animals central to it.

1.1.6 To that end, all previous Royal Commissions and Commissions of Inquiry concerning racing in Queensland have been read[2] as well as a number of published texts.[3] The monumental three volume *The History of Australian Thoroughbred Racing* was a tremendous resource and placed racing (of thoroughbreds) in Queensland in the broader Australian context. It seemed a pity not to make the fruits of that historical research accessible to the reader of this Report who may be unfamiliar with some of the story. Accordingly, a brief history of racing in Queensland is to be found as Appendix B.

1 *Racing Industry Integrity Review 2004* page 10.
2 Appendix C for the details of those Commissions.
3 Appendix B footnote 1.

1.1.7 That history has demonstrated that the trend towards disharmony was apparent from the earliest days of racing in Queensland:

> *The biggest obstacle to the successful establishment of horse racing in Moreton Bay and the Darling Downs was the constant squabbling ....*[4]

And, 50 years later:

> *Queensland in the nineteenth century was a house divided, a misalliance of competing regions, a battle ground for factions. United, it could have been a much greater power in the Australian racing scene ....*[5]

The Royal Commission of 1936

> *... found evidence of some dissatisfaction with the present system of control [of racing] ...*[6]

1.1.8 Moving to more recent times, the Minister responsible for racing observed when introducing the Bill which became the *Racing and Betting Act 1980* (Qld)

> *... it is of absolute importance to the future of racing that all elements take the overall view and develop the highest possible degree of conciliatory liaison.*[7]

1.1.9 In 1991 the way thoroughbred racing was controlled in Queensland changed dramatically and the five principal clubs which, in one form or another, had managed racing from the early days in the colony were replaced with a single principal club.

1.1.10 There are many still active in racing circles who recall the failure of the experiment of the Queensland Principal Club, which comprised representatives of all the thoroughbred clubs. The bitterness and disappointments of that era seem to have cast a long shadow over racing in Queensland.

1.1.11 After lengthy and wide consultation the consensus was reached that the club model, for long the defining feature of racing, especially thoroughbred racing, was no longer the best way to manage the industry. The answer was to appoint corporations, created under the *Corporations Act 2001* (Cth), to manage each of the codes. The successful model of the privatisation of the TAB (no stranger to disputation on its board) in 1999 supported this thinking. The directors would be independent of the clubs, appointed on merit after application and a suitable selection process.

1.1.12 The new *Racing Act 2002* (Qld) gave effect to government policy, supported by industry and the Parliamentary opposition, to reduce government involvement in the commercial aspects of racing and regulate only gambling, the integrity of racing and the welfare of the animals bred, trained and raced.

1.1.13 The Racing Act has now been amended to abandon the corporate model and appoint an overarching statutory board, the Queensland All Code Racing Industry Board as the control body with three separate boards under it as control boards for the three codes of racing.

1.1.14 During the period of the Commission's investigations from 1 January 2007 to 30 April 2012, and for a decade or more before, Mr Robert Bentley was a dominant driving force in thoroughbred racing in Queensland and, in due course, in Australia and internationally. He was, undoubtedly, hard working and driven by a strong vision of how the industry should be run. It would be unfortunate if this Commission were perceived solely as an investigation into Mr Bentley.

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4 Appendix B, quoting *The History of Australian Thoroughbred Racing*, Volume One page 209.
5 Appendix B, quoting *The History of Australian Thoroughbred Racing*, Volume Two page 348.
6 Appendix B, quoting *Royal Commission Appointed to Inquire Into Certain Matters Relating to Racing and Gaming 1936*, page 23.
7 Appendix B, quoting the Honourable LR Edwards, Queensland Parliament 1980, Hansard 15 April, page 3251.

However, it is difficult to avoid the conclusion that a different person chairing thoroughbreds from the move to corporatisation in 2002, who was consultative, open to the ideas of others and inclusive, as well as hard working and visionary, might have made a success of the corporate model.

1.1.15 Although the Commission received some complaints of financial and other impropriety outside the Terms of Reference (which on investigation proved unfounded), much of the Inquiry relates to governance or process, or, more exactly, the failure to have regard to and for proper processes of management and governance.

1.1.16 Some of the submissions made on behalf of those who received notices of potentially adverse findings accused the Commission of putting form over substance and of failing to acknowledge that the previous administration achieved great things for the industry – the $110 million of tax money received for infrastructure works being the prime example.

1.1.17 That submission underscores, to a large extent, why this Commission of Inquiry was established. The funds were not private monies for which it could be considered unnecessary to follow proper process. The money which funds racing in Queensland through the control bodies is, in every sense, public money, derived through wagering revenue, license fees or by direct government grant.

1.1.18 It matters little how potentially advantageous a vision for racing may be, and how hard its proponents work to realise it, if the means to do so are flawed. Those are the matters with which this Commission has principally been concerned.

1.1.19 It would be a matter of great regret if this Commission were just another cathartic event in the history of racing in Queensland, from which no worthwhile lessons are learned. One way or another, in order to meet ongoing challenges, the industry must find ways to break the historical cycle of suspicion and division within and between the three codes.

1.2 Process of the Inquiry

1.2.1 Any modern Commission of Inquiry is reliant on a number of people working together. Without the intelligence, steadfastness and enthusiasm of a relatively small team of lawyers, paralegals and administrators the task of managing and analysing the large number of documents – in excess of 200,000 – evaluating the statements and writing the Report would have been crushing. The direction and inspiration to excellence of that team by counsel assisting, Mr James Bell QC and Mr Tom Pincus, ably supported by solicitor, Mr Sam Kingston have largely been responsible for the delivery of this report on time. I am greatly indebted to them. Not all on the team were involved for the whole period of the Commission, which was extended from three months to seven. I am grateful to each of them. Their names are in Appendix J.

1.2.2 The Commission's secretary/executive director, Ms Joanne Bugden has excelled in her role both operationally and administratively. She engaged closely with the content of the Report and has been personally responsible for a number of the Appendices, Schedules and calculations.

1.2.3 A Commission of Inquiry is an unusual entity, being born fully formed and ceasing to exist on the date it delivers its report. While the standard texts cover the theory of Commissions of Inquiry and offer some useful assistance on legal issues which may arise in the course of a Commission's life, a practical guide, especially about pre-Commission procedures, document management and evidence collection, would be of real assistance if government continues to utilise this method of investigating past events.

1.2.4 It was a real advantage that two other recent Commissions of Inquiry established by the government – the Child Protection Inquiry and the Health Payroll Inquiry – were coming to a close as this one commenced. This Commission was able to draw on the experience of their staff, which they willingly shared. The Commission is grateful for that assistance.

1.2.5 It is a challenging experience for an individual to be caught up in an investigation associated with a Commission of Inquiry. Some have the benefit of insurance or, in some other way, are not liable to fund their own representation. Even so, responding to requests from the Commission for documents and statements takes time. It is a greater burden for those who must fund their own representation or be self-represented. The Commission staff gave assistance to some in the latter category to settle their statements.

1.2.6 The Commission is obliged to all who cooperated to meet short deadlines and have suffered great disruption and inconvenience to their own work. I particularly refer to Contour Consulting Engineers Pty Ltd, which responded to very demanding requests relating to their work for QRL and RQL over some five years and I thank the directors for that cooperation.

1.2.7 The manner in which the Commission undertook its inquiries was different from some other Commissions. The initial time for the Inquiry was only three months, but the Terms of Reference covered a broad range of topics, relating to a number of entities and individuals, over a period of more than five years. The Commission was mindful of the difficulties mentioned in the Daubney/Rafter Report, of separating rumour and gossip from fact. The approach taken was therefore first to ask relevant persons and entities to provide the Commission with sworn statements and documents relating to the Terms of Reference. Those statements, which were placed on the Commission's website, became evidence without a formal tender process. The public, and other statement makers, were invited to examine these statements and respond to any matters contained in them. Responsive statements were received. The many documents produced were reviewed and reduced to those necessary for further consideration within the Terms of Reference. After counsel assisting had explored some matters at the public hearings, further statements and submissions were invited and received.

1.2.8 This method allowed time to interested persons to reflect, in most cases with the assistance of their lawyers, about what they wished to say to the Commission. It permitted the Commission to investigate and discount various unfounded allegations, and generally narrow the focus of investigation, before the public hearings commenced. The method also involved real transparency. The public hearings were live-streamed. The Commission kept its door open to anyone who had something to say on the subject matter of the Terms of Reference. Somewhat surprisingly, in view of the opinionated nature of those within the wider racing industry on almost every topic, the Commission received few statements outside those it expressly sought. It may be that the process followed by the Commission, requiring any allegations to be put on oath, tended to deter those who might otherwise have sought to present mere rumour as a subject worthy of investigation.

1.2.9 Mr Bentley, Mr Ludwig, Mr Hanmer, Mr Milner, Mr Tuttle, Mr Brennan, Mr Orchard and Ms Reid have complained that the process has been unfair. This seems to derive from a misconception of the nature of a Commission of Inquiry. It is not litigation. They have been provided with all the documents of Racing Queensland which have been provided to the Commission and all statements received by the Commission, including during the public hearings; they have had legal representation from the inception of the Commission; they have had access to the transcripts of all evidence given at the public hearings as well as each of the documents shown to each witness; they have had an opportunity to provide supplementary statements and submissions; they have received letters setting out potential adverse findings to which they could respond by further statements or submissions. Mr Bentley, Mr Ludwig, Mr Hanmer and Mr Tuttle

were examined by counsel assisting at the public hearings and each had put to him matters that might lead to adverse findings. Some had been extensively examined on earlier occasions by the Auditor-General's officers and Australian Securities and Investment Commission officers about the subject matter of two of the Terms of Reference. They were no strangers to these matters when they came to the Commission.

1.2.10 The process seemed to the Commission to be appropriately fair, and consistent with legal authority which has considered such matters.

1.2.11 Mr Bentley's lawyers contend that senior counsel assisting was unfair in that the documents on which it was proposed to examine him at the public hearings had not been provided (and in the order in which he was to be examined) in advance. This, again, misconceives the purpose of the Commission, which was to *investigate*. The method chosen was to elicit responses without the intervention of the lawyers or of advance warning. Ample opportunity was given to reassess the answers in supplementary statements and post-hearing submissions. This process was availed of by many witnesses including Mr Bentley.

1.2.12 From its inception the subject matter of the Terms of Reference suggested that three months would be insufficient to conduct the inquiries, prepare the Report and have it printed. It was expected to complete the task by Christmas. Executive Council extended the date for delivery of the Report to the Premier to 7 February 2014.

The Honourable Margaret White AO

Chapter 2

Executive Summary and Recommendations

2.1 Introduction

2.1.1 The Commission was directed to make inquiry into the operations of the former racing control bodies in Queensland (described as the relevant entities) and their controlled entities over the period 1 January 2007 to 30 April 2012 (described as the relevant period). The subject matter of the Commission's investigations comprises six separate areas which have been approached as "stand alone" topics.

2.1.2 Each topic constitutes a Chapter in the Report. Each is a distinct area of investigation and may be read independently of the other Chapters. This means that there is some repetition of certain events but it was thought more convenient to do this than to require the reader to move back and forth between the Chapters to obtain a complete picture of the events being discussed.

2.1.3 Notwithstanding this separateness, there are linking themes across the Chapters. Chapter 3 (Procurement), Chapter 4 (Management and culture) and Chapter 5 (Corporate governance) concern how the control bodies, particularly Queensland Racing Limited (QRL) and Racing Queensland Limited (RQL) operated in their conduct of large infrastructure projects, their internal management structures and how their boards and senior management guided them on behalf of the racing industry.

2.1.4 Chapter 6 (Government oversight) examines a number of the issues raised in Chapters 3, 4 and 5 but with the focus on the responsibilities cast on government, particularly under the *Racing Act 2002* (Qld), to maintain watchful oversight over the control bodies in carrying out their obligations for their codes of racing.

2.1.5 Chapter 7 (Employment contracts) engages in a close analysis of the circumstances surrounding the amendments to the employment contracts of four of the most senior executives of RQL, which enabled them to resign their positions on the same day (26 March 2012) and leave with departure payments significantly enhanced by those amendments. The responsibilities of the board and senior executives are tested against the principles discussed in Chapter 5.

2.1.6 Chapter 8 (TattsBet - race fields information) concerns the relationship between Queensland Race Product Co Limited (Product Co), the agent of the control bodies, and TattsBet Limited (TattsBet) over the deductions made by TattsBet from the wagering fees it was required to pay after the introduction of race fields legislation in New South Wales and other States from 2008. Those events are a particular application of issues of governance raised in Chapter 5.

2.1.7 Chapter 9 (Funds transfer) covers the transfer of money to RQL out of a fund, earlier set aside by government for racing infrastructure, just prior to the State election in March 2012 for the benefit of racing venues in various locations around the State. It has some matters in common with Chapter 3.

2.1.8 Chapter 10 (Future governance and other matters) makes some general observations and recommendations.

2.2 The Terms of Reference

Term of Reference 3(a) – Procurement, contract management and financial accountability

2.2.1 This Term of Reference is directed to a consideration of the adequacy and integrity of the procurement and contract management policies generally of the control bodies, but is particularly directed to the engagement of and payments made to Contour Consulting Engineers Pty Ltd (Contour) which undertook many infrastructure contracts on behalf of QRL and RQL. A number of the matters investigated under this Term of Reference had been the subject of adverse criticism and some controversy aired in both the racing media as well as more generally.

2.2.2 The Commission engaged in an analysis of the procurement policies of QRL and RQL over the relevant period of the Inquiry, their relationship with Contour, and the infrastructure projects in which Contour was involved. It also investigated the controversial decision to install synthetic tracks at two racecourses, Corbould Park at Caloundra and Clifford Park at Toowoomba.

2.2.3 The Chapter must be read in full for an understanding of the conclusions reached. They are, in short, that QRL's Purchasing Policy and RQL's Purchasing Policy and the Addendum to RQL's policy were not adequate either in terms of their internal coherence or their appropriateness for the significant infrastructure projects being undertaken by QRL and RQL. The Commission's investigations were largely confined to the infrastructure projects and led to the conclusion that the policies were not adhered to for those activities. On the Commission's findings, there was a culture of non-compliance with the policies within QRL and RQL.

2.2.4 The Commission has concluded that the contractual arrangements of QRL/RQL with Contour were not underpinned by sound procurement practices in that Contour was not subject to any competitive procurement process after its initial engagement in 2007. Allegations to the effect that Contour was awarded contracts worth (to Contour) between $20 million and $150 million were found to be grossly exaggerated. Contour was paid approximately $5.5 million for extensive work around Queensland over a period of more than five years.

2.2.5 The conclusion to which the Commission has come, that there were no sound procurement policies in place or adhered to, is a criticism of the control bodies and not of Contour. Contour was not made aware of any such policies until towards the end of 2011 after RQL began to pay more attention to procurement compliance in the context of seeking substantial government funding under the Industry Infrastructure Plan. Even then, RQL's purported tightening of its procedures amounted, in truth, to a further relaxation.

2.2.6 As a consequence of the inadequate procurement practices by QRL/RQL, the Commission has found it impossible to determine, retrospectively, whether value for money was achieved in the infrastructure projects undertaken, generally by Contour, during the relevant period. Appendix E is an analysis of each of the relevant Contour contracts with QRL/RQL.

2.2.7 The same conclusion is reached about contract management, which was a task QRL/RQL substantially outsourced to Contour without auditing, for the most part, or undertaking other processes to ascertain if value for money was being achieved.

2.2.8 The Commission has been informed by those who now conduct operations at Racing Queensland under the direction of the Queensland All Codes Racing Industry Board (QACRIB) that the issues considered by the Commission under this Term of Reference are under active investigation and remediation. The only recommendation is that consideration should be given to ensuring that the Purchasing Policy is made and published under section 81 of the *Racing Act 2002* (Qld).

Term of Reference 3(b) – Management and culture

2.2.9 The investigation into this Term of Reference reviewed the organisational and management structure of QRL/RQL and the control bodies of the other codes. This exploration of the corporate governance of those bodies revealed a plethora of mainly adequate policies, processes and guidelines whose function was to govern internal financial and human resources management. The Code of Conduct, which extended to the directors, senior executives and other employees, set high standards of integrity.

2.2.10 The Commission's inquiries revealed some general failures of adherence to policies and guidelines. For example, the Commission has concluded that the control bodies' audit committees, while generally complying with the requirements of their charters, were deficient in meeting key responsibilities in relation to procurement and financial accountability processes.

2.2.11 The other principal committee of QRL, the human resources and remuneration committee, failed to adhere to its charter in a number of ways. It reported infrequently to the board and did not adequately manage or respond to audits which produced findings and recommendations relevant to its function.

2.2.12 The equivalent committee at RQL, the remuneration and nomination committee, similarly failed to comply with its charter and fulfil its function. It did not address the important issue of periodic or annual reviews of the remuneration of the chief executive officer and senior executives, nor did it have in place plans for succession in respect of those senior executives, nor adequate director training.

2.2.13 The Commission concluded that its membership, Mr Robert Bentley, the chairman of the board, and Mr William Ludwig, an inactive member, compromised its ability to fulfil its functions in accordance with good corporate governance principles.

2.2.14 Two examples of failure to abide by the Code of Conduct were explored by the Commission. The first involved the actions of Mr Ludwig, Mr Bentley and Ms Shara Reid in relation to the misuse of a proxy vote at a QRL meeting in 2008 and their subsequent conduct in relation to that issue. The second related to the actions of Mr Bentley and Ms Reid during the recruitment process for the replacement of two QRL directors in 2009.

2.2.15 The management structure in place at QRL and RQL was unsatisfactory. According to principles of good corporate governance and management the chair of an organisation ought not to be a part of the executive management team. But that was what occurred in those organisations. It was a very "flat" corporate structure and substantially reliant upon the chairman for its day to day operations. Mr Bentley was closely involved in management decisions across the various departments (except integrity matters). It was an impossible situation for board oversight, particularly as the chair should be the conduit between the board and management.

2.2.16 QACRIB's chairman, the new chief executive officer and the former RQL chief financial officer but now general manager corporate services, informed the Commission of restructuring within the control body to create a more hierarchical organisation with more delegated responsibility, as well as other managerial changes, which again suggests that no recommendations need be made in respect to this Term of Reference.

Term of Reference 3(c) – Corporate governance

2.2.17 This Term of Reference is confined to RQL's corporate governance arrangements from the time it commenced as the control body for the three codes on 1 July 2010 to 30 April 2012.

2.2.18 The Commission investigated the adequacy and appropriateness of RQL's corporate governance arrangements and whether the directors, executive management team and other key management personnel, including the company secretary and those involved in integrity matters, acted with integrity in accordance with RQL's constitution, the best interests of the company, and of the racing industry; and whether they acted consistently with applicable Commonwealth and State policies and legislation.

2.2.19 The Commission also investigated the policies and practices to manage conflicts of interest and minimise the risk of directors and executives improperly using their position, and information obtained, for personal or financial gain.

2.2.20 The Commission investigated the board of RQL's pursuit of a generous indemnity insurance policy for its directors and officers taken out at the same time it was renegotiating the employment contracts for the four executives, the subject of Term of Reference 3(e) which is discussed in Chapter 7, and whether that conduct was in the best interests of RQL.

2.2.21 The Commission investigated the circumstances surrounding the removal of Ms Kerry Watson as a director of RQL and whether it demonstrated a lack of integrity by Mr Bentley and two other members of the board, Mr Anthony Hanmer and Mr Ludwig.

2.2.22 The Commission has concluded that RQL by the actions of the chairman, Mr Bentley, did not act with integrity, in accordance with the company's constitution or in the best interests of the company and the racing industry when Ms Watson was removed as a director of RQL in 2010.

2.2.23 The Commission has also concluded that, by the actions of its chair, directors and company secretary/corporate counsel, RQL may also be found not to have acted in the best interests of the company in relation to the 2011 directors' and officers' liability insurance and directors' deeds of indemnity. It would be appropriate for ASIC to consider this issue.

2.2.24 Other particular matters relating to corporate governance, directors' and officers' duties and matters of integrity are considered in other Chapters. The management issues are considered in Chapter 4; the renegotiation of the executives' employment contracts are considered in Chapter 7; and issues of the management of conflict and other integrity issues relating to the race fields information legislation are considered in Chapter 8.

2.2.25 The Commission concluded, as a result of its investigations, that the corporate governance arrangements of RQL appeared to be generally sound in as much as board meeting papers and minutes were prepared and circulated in a timely manner, board discussions appeared to be open and robust, and committee and reporting structures were established and functional. As is mentioned in Chapter 7, the board minutes appear deficient in recording debate on important matters. The issues identified by the Commission which have led to adverse findings against certain directors and executives are limited to particular instances rather than a criticism at large of the entire corporate governance arrangements.

2.2.26 The final inquiry for the Commission under this Term of Reference was whether employment contracts adequately restrained former officers from employment with RQL's preferred contractors and suppliers. The contracts did not impose any restraint on those officers for subsequent employment with preferred contractors and suppliers, but such a term is not usual with respect to non-competitive employment. The interests of RQL were sufficiently protected by the Code of Conduct and the employment contracts of the executives.

Term of Reference 3(d) – Government oversight

2.2.27 The Commission was given access to all relevant Ministerial briefing notes and Cabinet submissions and received statements relating to this Term of Reference from Ministers, chief executives and senior executives in the public service in response to requests from the Commission. Many, if not all, of these government documents would not otherwise be available for public scrutiny. Their release to the Commission has made this task a great deal more comprehensive than might otherwise have been the case.

2.2.28 The Commission uncovered no information and received no complaint to suggest that government oversight of the integrity aspect of racing committed to it by the Racing Act was not carried out appropriately.

2.2.29 The Commission investigated executive government's monitoring of the control bodies for racing pursuant to the Racing Act; for example, the annual programs and eligibility of a control body to continue to be licensed.

2.2.30 The Commission has concluded that the monitoring undertaken under the Racing Act was sufficient and appropriate. This conclusion, to some extent, has been reached having regard to how the Office of Racing saw its role, that is, primarily, as educative rather than as disciplinary.

2.2.31 Certain events, already considered in other Chapters as part of an assessment of the control bodies, were also analysed from a government oversight perspective. Weaknesses were identified in certain aspects of the process whereby QRL sought to amend its constitution in 2008, which required Ministerial approval, and the process leading to the approval of RQL's constitution.

2.2.32 The Commission has concluded that executive government oversight was neither sufficient nor adequate with respect to the particular matters of Mr Ludwig's use of the proxy concerning the amendment to QRL's constitution in 2008; the director approval process in 2009 for QRL; the approval of RQL's constitution in 2010; and aspects of the synthetic tracks project (discussed in Chapter 3).

2.2.33 It is likely that the failure was very much due to a mistaken belief that QRL/RQL, being companies created under the *Corporations Act 2001* (Cth), were independent of government so far as adherence to their own constitutions were concerned. It was also consistent with the underlying government policy when the Racing Act was brought in, that government would step back from the racing industry.

2.2.34 The Commission has recommended that the government consider amalgamating the policy and compliance functions of the Office of Racing with another established and compatible government regulator such as the Office of Liquor and Gaming Regulation. The implementation should avoid creating any separate racing industry business unit and ensure compliance functions and skills are transferable across other industries within the regulator.

2.2.35 Policy making which concerns the racing of animals should be in a unit administratively and physically separate from compliance activities. Such a unit might be the Office of Regulatory Policy (Liquor and Gaming Policy).

2.2.36 No adverse finding against any person is made with respect to this Term of Reference.

Term of Reference 3(e) – Employment contracts of executives

2.2.37 This Term of Reference was one which attracted considerable media attention because four senior executives of RQL resigned on 26 March 2012, the day the new government was sworn in after a State election on the previous Saturday, 24 March. Mr Malcolm Tuttle, chief executive officer, Mr Paul Brennan, director of product development, Mr Jamie Orchard, director of integrity operations and Ms Reid, corporate counsel and company secretary, left with large payouts after their contracts of employment had been renegotiated in August 2011.

2.2.38 The Commission investigated the background and circumstances giving rise to the amendments to the contracts, the engagement of two firms of solicitors to participate in those negotiations and their roles in the development of the new contracts; the concurrent renegotiation of the directors' and officers' policies of indemnity insurance; the conflicted roles of Ms Reid and Mr Tuttle; and the failure by the members of the remuneration and nomination committee of RQL, Mr Bentley and Mr Ludwig, to negotiate with the employees consistently with the best interests of RQL in mind. The other directors were much less involved but nonetheless, were found, on investigation, not to be sufficiently alert to protecting RQL's interests.

2.2.39 While the justification advanced at the time for the renegotiation of the senior executives' contracts was their retention to undertake vital projects and to assist in the renegotiation of the agreement with TattsBet, the outcome was that each was offered an amended contract which facilitated (and indeed encouraged) his or her resignation and departure from RQL at the earliest time with the maximum possible payout. That result, the Commission has concluded, was not in the best interests of RQL.

2.2.40 The Commission has recommended that two of the executives, Mr Tuttle and Ms Reid and the directors, Mr Bentley, Mr Ludwig, Mr Hanmer, Mr Robert Lette, Mr Wayne Milner and Mr Bradley Ryan be examined by ASIC to ascertain if there have been any breaches by them of certain provisions of the Corporations Act; and whether Mr Tuttle, Mr Brennan and Ms Reid received benefits in breach of section 200B of the Corporations Act.

Term of Reference 3(f) - TattsBet - race fields information

2.2.41 Complaints about Mr Bentley's conflict in occupying the position of chairman of QRL and RQL while at the same time being a director of Tatts Group/TattsBet had been ventilated in the racing world for many years. That conflict was at the centre of the investigations under this Term of Reference. The Commission's investigations were directed to the arrangement made in 1999 between Product Co, the agent of the three codes of racing, with UNiTAB and its successor, TattsBet, for the payment of an exclusive wagering fee for the supply of race information.

2.2.42 The arrival in Australia of the "corporate bookmaker" and betting exchanges, the relaxation of wagering laws to allow telephone and internet betting, and the competition which resulted to the licensed wagering operators (mostly the old TABs) saw the introduction of race fields legislation. This was said to be for the benefit of the racing industry because it required those new entrants into the wagering market to give something back to the racing industry, the providers of the product. However, it also came to capture the former TABs.

2.2.43 Chapter 8 must be consulted to understand the development of the situation which gave rise to this Term of Reference. In short, TattsBet was required to pay a fee, first in New South Wales and then other States and Territories, to use race fields information. It proposed to deduct those charges from the fee it paid to Product Co consistently, it maintains, with its understanding of the agreement between them.

2.2.44 The total amount deducted by TattsBet to 30 April 2012 was $90,448,277. In November 2008 and the months following, the directors of Product Co who were Mr Hanmer, Mr Ludwig, Mr Michael Lambert, Mr William Andrews, Mr Lette and Ms Watson, became aware of advice from QRL's solicitor, Mr David Grace, that TattsBet was not legally entitled to deduct these fees. Mr Bentley was the only director of QRL not on the board of Product Co, because of his conflict of interest.

2.2.45 The Product Co board did nothing of utility about this advice. The Commission investigated why this occurred and concluded that some, at least, of the directors had strongly held and unjustified personal opinions about the legal correctness of Mr Grace's advice and did not seek to test it. In due course those directors concluded that if TattsBet did not seek to recoup the fees charged by the control bodies in Queensland to other corporate wagerers caught by the newly introduced Queensland race fields legislation (as some thought it could), then it was a "fair" result overall.

2.2.46 Mr Lambert attempted to have Product Co address Mr Grace's advice. He was supported by Mr Andrews. The resistance, particularly from Mr Hanmer, was strong.

2.2.47 The Commission explored the understanding of Mr Bentley and the other directors of QRL, and those of Product Co, about the management of his conflict of interest with the Tatts Group. A dedication to form and little regard for substance was revealed.

2.2.48 The Commission has concluded that some of the directors of Product Co – Mr Hanmer, Mr Ludwig, Mr Lette and Ms Watson – may not have acted in accordance with their duty to act in Product Co's best interests or the control body which they represented. The matter should be investigated by an appropriate body such as ASIC.

2.2.49 The Commission has concluded that Mr Bentley may have breached his duty to QRL and RQL in failing to seek resolution of the uncertainty about the legal right of TattsBet to deduct the race field fees. In that regard, Mr Bentley, as a shareholder and director of Tatts Group, may have been influenced by his conflict of interest to the detriment of QRL and RQL. That factor may, possibly, justify further investigation by an appropriate body.

2.2.50 The Commission has concluded that there is no evidence to suggest that any director or executive used his or her position to gain personal advantage except, possibly, Mr Bentley as noted above in 2.2.49.

Term of Reference 3(g) – Funds transfer

2.2.51 This Term of Reference concerns the circumstances surrounding the Ministerial approval of some millions of dollars being transferred into RQL's infrastructure trust account in February 2012 just before the government went into caretaker mode. There was a perception that these funds were to be targeted into "key Labor electorates" and/or that there was improper influence on government to bring about the transfers by one or more directors of RQL.

2.2.52 The Commission traced the origin of the government's decision to direct 50 per cent of wagering tax revenue amounting, finally, to $110 million, to carry out remedial work on ageing racing infrastructure, build new facilities and generally make racing in Queensland more attractive and competitive.

2.2.53 This was Mr Bentley's vision and he worked hard, long and persistently to have government make the commitment. The campaign started in May 2009; was slowed by the amalgamation of the three codes in July 2010 – a precondition of government for funding; was impeded by the removal of the redevelopment of Albion Park from the funding mix; and was further stalled by the likely refusal of the Brisbane City Council for material change of use approval to build a multi-code facility at Deagon.

2.2.54 It was not until January 2012 that the plan reached its final formulation. Many of the approved projects had been included in the plan since May 2009.

2.2.55 In order to qualify for funds under the Racing Industry Capital Development Scheme (RICDS), the name given to the wagering revenue set aside by government for this purpose, Treasury was required to evaluate the business cases for each project. RQL struggled to produce business cases which aligned with government procurement policies and which otherwise found acceptability by Treasury officials.

2.2.56 But for these significant obstacles, the funds would have been allocated months, if not a year earlier than February 2012.

2.2.57 The Commission found no evidence that party political considerations were a factor in the projects approved nor that any person did or sought to exert any improper influence on government for the transfers to occur.

2.2.58 The transfers occurred in accordance with earlier Cabinet decisions and were made for proper purposes and were accordingly justified and appropriate.

Terms of Reference 3(h) and 5 – Future governance and other matters

2.2.59 After amendments to the Racing Act which came into effect on 1 May 2013, QACRIB, a statutory board, was created and appointed the control body for the three codes of racing in Queensland, assisted by control boards created for each of thoroughbreds, harness and greyhounds.

2.2.60 The Commission is asked to consider any recommended legislative and/or organisational changes to promote good corporate governance, integrity and a transparent and accountable culture for the new control body.

2.2.61 Term of Reference 3(h) permits the Commission to investigate and make recommendations about any other relevant matter as necessary.

2.2.62 It was thought appropriate to draw those two subjects together.

2.2.63 Chapter 10 describes the amendments to the Racing Act which are relevant to the subject matter and conclusions reached in respect of Terms of Reference 3(a), (b), (c), (d) and (g). The Commission has concluded that those amendments have addressed what the Commission has seen as weaknesses in the previous regime for controlling racing.

2.2.64 The Commission has recommended that, given the nature of the racing industry and the difficulties associated with its governance identified in the various Chapters of the Report, the chairperson of QACRIB be independent of the three codes.

2.2.65 In order to be alive to industry concerns, the Commission recommends that a review of the efficacy of the new model – QACRIB and three assisting boards – together with other initiatives, such as the creation of an Integrity Commissioner, be reviewed after the second anniversary of the amendments (that is 1 May 2015).

2.2.66 The Commission recommends that an investigation be undertaken into the future of racing in Queensland to develop an attractive product which will bring better returns to fund the industry in a sustainable way.

2.2.67 Although the Terms of Reference did not include the Racing Science Centre (RSC), the Commission recommends, in light of the recent Queensland Commission of Audit final report in February 2013, that government should consider if it is necessary and in the interests of racing (which pays for the Centre) to have a dedicated scientific facility.

2.3 Recommendations

The Commission makes the following recommendations arising out of its investigations:

Individuals

Mr Bentley

2.3.1 Mr Bentley's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed to QRL and RQL in failing to seek resolution of uncertainty about the legal right of TattsBet to charge Product Co, and thereby QRL and RQL, for the race fields fees TattsBet paid to interstate control bodies, and whether his inactivity was influenced by his conflict of interest
- whether in those circumstances he acted recklessly
- whether he acted in breach of the duties he owed RQL when he recommended to the board and voted in favour of the amendments to the employment contracts of Mr Tuttle, Mr Brennan, Mr Orchard and Ms Reid (the Executives) on 5 August 2011
- whether he acted recklessly in so doing
- whether he acted in breach of the duties he owed RQL when he waived the requirement of the Executives to give one week's notice when terminating their employment with RQL on 26 March 2012
- whether he acted recklessly in so doing
- whether he acted in breach of his duties to RQL when he voted in favour of the board resolution authorising Mr Adam Carter to make the termination payments to the Executives on 28 March 2012
- whether he acted recklessly in so doing
- whether he (with the other directors) caused RQL to give a benefit to Mr Tuttle, Mr Brennan and Ms Reid in breach of section 200B of the Corporations Act
- whether he (with the other directors) failed to act in the best interests of RQL when he resolved to cause RQL to enter into directors' and officers' liability insurance and directors' deeds of indemnity on 5 August 2011.

Mr Ludwig

2.3.2 Mr Ludwig's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed to Product Co and to QRL and RQL in failing to seek resolution of the uncertainty about the legal right of TattsBet to charge Product Co and, thereby, QRL and RQL, for the race fields fees TattsBet paid to interstate control bodies
- whether in those circumstances he acted recklessly
- whether he acted in breach of the duties he owed RQL as a member of the remuneration and nomination committee and as a member of the board when he voted in favour of the amendments to the employment contracts of the Executives on 5 August 2011
- whether he acted recklessly in so doing
- whether he acted in breach of his duties to RQL when he voted in favour of the board resolution authorising Mr Carter to make the termination payments to the Executives on 28 March 2012
- whether he acted recklessly in so doing
- whether he (with the other directors) caused RQL to give a benefit to Mr Tuttle, Mr Brennan and Ms Reid in breach of section 200B of the Corporations Act
- whether he (with the other directors) failed to act in the best interests of RQL when he resolved to cause RQL to enter into directors' and officers' liability insurance and directors' deeds of indemnity on 5 August 2011.

Mr Hanmer

2.3.3 Mr Hanmer's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed to Product Co and QRL and RQL in failing to seek resolution of the uncertainty about the legal right of TattsBet to charge Product Co and, thereby, QRL and RQL for the race fields fees TattsBet paid to interstate control bodies
- whether in those circumstances he acted recklessly
- whether he acted in breach of the duties he owed to RQL when he voted in favour of the amendments to the employment contracts of the Executives on 5 August 2011
- whether he acted recklessly in so doing
- whether he acted in breach of his duties to RQL when he voted in favour of the board resolution to authorise Mr Carter to make the termination payments to the Executives on 28 March 2012
- whether he acted recklessly in so doing
- whether he (with the other directors) caused RQL to give a benefit to Mr Tuttle, Mr Brennan and Ms Reid in breach of section 200B of the Corporations Act
- whether he (with the other directors) failed to act in the best interests of RQL when he resolved to cause RQL to enter into directors' and officers' liability insurance and directors' deeds of indemnity on 5 August 2011.

Mr Lette

2.3.4 Mr Lette's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed to Product Co and Queensland Harness Racing Limited (QHRL) and RQL in failing to seek resolution of the uncertainty about the legal right of TattsBet to charge Product Co and, thereby, QHRL and RQL for the race fields fees TattsBet paid to interstate control bodies
- whether in those circumstances he acted recklessly
- whether he acted in breach of the duties he owed RQL when he voted in favour of the amendments to the employment contracts of the Executives on 5 August 2011
- whether he acted recklessly in so doing
- whether he acted in breach of his duties to RQL when he voted in favour of the board resolution authorising Mr Carter to make the termination payments to the Executives on 28 March 2012
- whether he acted recklessly in so doing
- whether he (with the other directors) caused RQL to give a benefit to Mr Tuttle, Mr Brennan and Ms Reid in breach of section 200B of the Corporations Act
- whether he (with the other directors) failed to act in the best interests of RQL when he resolved to cause RQL to enter into directors' and officers' liability insurance and directors' deeds of indemnity on 5 August 2011.

Mr Ryan

2.3.5 Mr Ryan's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed RQL when he voted in favour of the amendments to the employment contracts of the Executives on 5 August 2011
- whether he acted recklessly in so doing
- whether he acted in breach of his duties to RQL when he voted in favour of the board resolution authorising Mr Carter to make the termination payments to the Executives on 28 March 2012

- whether he acted recklessly in so doing
- whether he (with the other directors) caused RQL to give a benefit to Mr Tuttle, Mr Brennan and Ms Reid in breach of section 200B of the Corporations Act
- whether he (with the other directors) failed to act in the best interests of RQL when he resolved to cause RQL to enter into directors' and officers' liability insurance and directors' deeds of indemnity on 5 August 2011.

Mr Milner

2.3.6 Mr Milner's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed RQL when he voted in favour of the amendments to the employment contracts of the Executives on 5 August 2011
- whether he acted recklessly in so doing
- whether he acted in breach of his duties to RQL when he voted in favour of the board resolution authorising Mr Carter to make the termination payments to the Executives on 28 March 2012
- whether he acted recklessly in so doing
- whether he (with the other directors) caused RQL to give a benefit to Mr Tuttle, Mr Brennan and Ms Reid in breach of section 200B of the Corporations Act
- whether he (with the other directors) failed to act in the best interests of RQL when he resolved to cause RQL to enter into directors' and officers' liability insurance and directors' deeds of indemnity on 5 August 2011.

Ms Watson

2.3.7 Ms Watson's conduct should be examined by ASIC to consider:

- whether she acted in breach of the duties she owed to Product Co and Greyhounds Queensland Limited (GQL) in failing to seek resolution of the uncertainty about the legal right of TattsBet to charge Product Co and, thereby, GQL for the race fields fees it paid to interstate control bodies
- whether in those circumstances she acted recklessly.

Ms Reid

2.3.8 Ms Reid's conduct should be examined by ASIC to consider:

- whether she acted in breach of the duties she owed to RQL as company secretary and corporate counsel when, in a position of conflict, she favoured her own interests:
  - in failing to disclose or cause to be disclosed to the board of RQL or to any member of the board, other than Mr Bentley, the existence or contents of the first Clayton Utz advice of 2 June 2011
  - in failing to disclose or cause to be disclosed to the board or to any member of the board the existence or contents of the draft Norton Rose advice of 15 July 2011
  - in failing to advise the directors of RQL of their statutory obligations and to ensure that RQL complied with the Corporations Act
  - in instructing Norton Rose to make substantial amendments to their advice to RQL, deleting warnings to the board
- whether she received benefits in breach of section 200D of the Corporations Act
- whether she acted in breach of the duties she owed RQL as company secretary and corporate counsel in failing to advise the directors of RQL about their obligations concerning the new directors' and officers' liability insurance and directors' deeds of indemnity in August 2011.

2.3.9 Ms Reid's conduct should also be investigated by the Legal Services Commissioner to assess whether she acted in accordance with her ethical duties as a solicitor when she acted as set out above.

Mr Tuttle

2.3.10 Mr Tuttle's conduct should be examined by ASIC to consider:

- whether he acted in breach of the duties he owed to RQL as chief executive officer when, in a position of conflict, he favoured his own interests and acted inappropriately when instructing Norton Rose to make substantial amendments to their advice to RQL deleting warnings to the board
- whether he received benefits in breach of section 200D of the Corporations Act.

Mr Brennan

2.3.11 Mr Brennan's receipt of payments from RQL on 28 March 2012 should be investigated by ASIC to ascertain if they were in breach of section 200D of the Corporations Act.

Government

The Commission makes the following recommendations:

2.3.12 Executive government consider amalgamating the policy and compliance functions of the Office of Racing with another established and compatible government regulator such as the Office of Liquor and Gaming Regulation, avoiding creating any separate racing industry business unit and ensuring compliance functions and skills are transferrable across other industries within the regulator.

2.3.13 Executive government investigate whether the interests of racing integrity require the RSC to be a dedicated scientific facility within government (Office of Racing) and consider the advantages of absorption within a larger organisation such as a university or of outsourcing the scientific work now carried out by the RSC.

2.3.14 Executive government consider making changes to section 9AL(1) of the Racing Act, at a time appropriate for the good governance of the board, to require the chairperson of QACRIB to be one of the two *other members* of the board mentioned in section 9AI(1)(d) of the Racing Act.

2.3.15 Executive government review the suitability and efficacy of the present model of QACRIB as a statutory authority assisted by the three codes boards, and the position of the Integrity Commissioner, to meet the needs and best interests of the three codes of racing and the stakeholders in the racing industry in Queensland but not before the second anniversary of commencement, that is, after 1 May 2015.

2.3.16 Executive government initiate a consultative review, including to identify a sustainable financial model to support the three codes of racing in Queensland to reduce reliance on direct government funding, and in so doing to consider the desirability of a national regulatory body for wagering.

Chapter 3

Procurement, Contract Management and Financial Accountability – Term of Reference 3(a)

"(i) [T]he adequacy and integrity of, and adherence to, the procurement, contract management and financial accountability policies, processes and guidelines for the relevant entities including measures to ensure contracts awarded delivered value for money;

(ii) [T]he events surrounding the contractual arrangements between the relevant entity or entities and Contour Consulting Engineers Pty Ltd to manage contracts on behalf of those entities; and

(iii) [W]hether the resulting contracts were underpinned by sound procurement practices and whether appropriate payment policies and processes were implemented and were adhered to..."

3.1 Introduction

Overview

3.1.1 This Term of Reference requires an inquiry into the procurement, contract management and financial accountability of the operations of the relevant entities during the period 1 January 2007 to 30 April 2012.

3.1.2 *Procurement* in this context includes not only purchasing – acquiring for money – but also the process surrounding purchasing; the verb *procure* means "to obtain or get by care, effort, or the use of special means".[1] The notion of procurement "policies, processes and guidelines" and "procurement practices" incorporates consideration of how decisions are made about who will be the supplier of any particular good or service to be purchased and on what terms.

3.1.3 Once such a decision is made and a contract entered with the chosen supplier, in the case of contracts for services there then arises a need (speaking in broad terms) to manage the delivery of the services in accordance with the contract, ensure that payments are made by reference to what has been delivered, and keep accurate records of work done and payments made so that this can be accounted for as necessary. These are the concepts of contract management and financial accountability referred to in subparagraph (i) of this Term of Reference. It is understood that the question of financial accountability arises for assessment only in the context of procurement and contract management, rather than more broadly for all of each relevant entities' activities.

3.1.4 Procurement, contract management and financial accountability can all be understood as comprising measures aimed at ensuring that contracts awarded deliver value for money – both in the way that a supplier is selected and how (in the case of services) the delivery of supply is managed – and that this can later be assessed by reference to records kept. Indeed, all of these stages of the process are sometimes included in the intended meaning of the word procurement. In any event, the concepts of value for money and accountability are the central focus of the questions raised by this Term of Reference.

3.1.5 The Commission is required to consider the adequacy, integrity and soundness of the procurement and related policies and practices utilised by the former racing control bodies in Queensland during the relevant period. Precise definition of these somewhat overlapping terms is unnecessary; *adequacy* will be used below to encompass all three terms. Generally, the three terms focus attention on whether the policies and practices were fit for purpose in terms of their coherence, applicability to existing circumstances, and suitability for achieving value for money and accountability. However, *integrity* also implies questions of the moral or ethical soundness and robustness of the policies and practices, and of their development.

3.1.6 As will be seen, the policies of Queensland Racing Limited (QRL) and Racing Queensland Limited (RQL) relating to procurement methodology were inadequate on their face and were not fit for the purposes to which they were, or should have been, applied during the relevant period. They were largely ignored, or were the subject of lip service, wherever their application would have caused any inconvenience; there was a culture of non-compliance. Further, the significant procurement activities conducted on various large-scale infrastructure projects during the relevant period were outsourced to Contour Consulting Engineers Pty Ltd (Contour) without any attempt to communicate the requirements of QRL/RQL's policies to Contour or monitor how Contour conducted its procurements. When an attempt was purportedly made in the second half of 2011 to tighten compliance, there was a lack of integrity in this process: the changes made it *easier* to continue engaging contractors without undertaking any competitive selection process.

1 Macquarie Australian Encyclopedic Dictionary.

3.1.7 Various individuals involved in QRL and RQL's procurement activities are mentioned below. However, nothing which is said about any individual should be taken as an adverse finding about that individual. As will become apparent, the Commission's focus has been on matters of methodology and process. The inadequacies set out below should be seen as illustrations of systemic problems within QRL and RQL, the pervasiveness of which makes it impossible sensibly to attribute individual blame.

Approach to this Term of Reference

3.1.8 Subparagraph (i) of this Term of Reference is very broad. Read literally, it could be taken to contemplate inquiry into – for example – the way in which every single purchase of goods and services by each of the relevant entities during the relevant period was undertaken, including whether the method used was compliant with any applicable policies of the purchasing entity. Such an inquiry would involve a very extensive forensic review of various aspects of numerous transactions, large and small, over more than five years.

3.1.9 An inquiry of that nature cannot have been intended by this Term of Reference and could not justify the time and cost, including the engagement of specialist external consultants, which it would involve. Further, as already observed, it is clear from an examination of procurement activities on infrastructure projects that there were fundamental problems with the content and application of the procurement policies and related processes in place at QRL and RQL. It is unnecessary to conduct a more wide-ranging review for the purposes of this Inquiry.

3.1.10 An inquiry addressing such broadly defined issues as subparagraph (i) of this Term of Reference necessarily has to be somewhat reactive rather than proactive in identifying worthwhile avenues of investigation; the Commission's focus reflects the matters which have been brought to its attention by review of statements and documents provided to it. The assessment of what is worthwhile also involves a value judgment, primarily by consideration of what investigations are likely to produce analysis of benefit to those involved in future procurement activities in the racing industry.

3.1.11 The Commission sought statements and documents from representatives of all of the relevant entities concerning the matters in the Terms of Reference including the subject of subparagraph (i). Review of those materials readily revealed issues worthy of investigation concerning QRL's and RQL's procurements for infrastructure projects, involving the expenditure of extensive funds including sums advanced directly by the State for that purpose; consistent with the approach outlined above, those matters will therefore receive detailed attention.

3.1.12 On the other hand, there is no separate consideration of procurement issues in relation to the activities of Queensland Harness Racing Limited (QHRL) and Greyhounds Queensland Limited (GQL), which existed as separate control bodies until July 2010. Although some infrastructure projects were undertaken by these entities, they were not on the scale of those instigated by QRL/RQL in terms of both overall expenditure and government support.[2] There is evidence from directors of both QHRL and GQL to the effect that, as far as they are aware, there were procurement and related policies and processes in place and they were adhered to or, at least, the director is not aware of any non-adherence.[3] It should be noted, however, that independent evidence of such policies and the entities' compliance with the processes set out therein has not been provided to the Commission. Nonetheless, aside from one specific allegation

2 An example is a project undertaken at Logan by GQL, regarding which no issues have come to light to justify separate investigation.

3 Statement of Kerry Watson, 24 July 2013, pages 1-2; Statement of Robert Lette (concerning harness), 30 July 2013, page 1 para 1; Statement of Kevin Seymour, 16 August 2013, pages 2-4 para 3.

which cannot be the subject of any adverse finding,[4] the Commission's investigations have not otherwise identified any concerns of non-adherence by QHRL or GQL. The Commission has considered that, in these circumstances, a detailed analysis of QHRL and GQL procurements cannot be justified.

3.1.13 Consequently, the Commission's focus has been on procurement activities undertaken by QRL and RQL for the purposes of infrastructure projects. This also reflects the subject matter of subparagraphs (ii) and (iii) of this Term of Reference: Contour was first engaged by QRL in June 2007. The questions raised by those subparagraphs include, albeit with a focus on projects involving Contour, each of the issues in subparagraph (i).

3.1.14 As to subparagraph (ii), the reference to the events surrounding contracts with Contour to manage projects is again very broad. The Commission has examined those events in some detail, including a review of each Contour project file. A summary of the projects in which Contour was involved, and the procurement of key contractors for those projects, is included at Appendix E. However, in practical terms, the extent of useful recitation of such events in the body of this Report is limited by whether it assists in assessing the matters referred to in subparagraph (i).

3.1.15 As to subparagraph (iii), the reference to resulting contracts is taken to require attention to the procurement and practices relating to the engagements of Contour by QRL and RQL and also to Contour's engagements of other contractors for projects in which Contour had a management role. The questions concerning appropriate payment policies and processes are, again, concerned with those used in respect of the projects in which Contour had a management role.

3.1.16 Finally, the general limitations on the scope of this Term of Reference should be noted. An apparent criticism has been advanced in submissions that the Commission was "focused not on the carrying out of the work, the quality of the work..., whether it was carried out on time and within budget, nor whether it was carried out economically; but rather on the process that was followed".[5] It is said that this involved "well and truly putting form before substance".[6] The complaint is misconceived: the focus of this Term of Reference is plainly on the procurement and related *processes* that were followed, rather than the details of the work done. Such a focus is a sensible means of avoiding a retrospective audit of complex building projects, with likely uncertain conclusions, and attempting instead to discern deficiencies in process so that they can be considered, and addressed as appropriate, in future.

3.2 Outline of infrastructure projects during the relevant period

3.2.1 Given the focus under this Term of Reference on infrastructure projects undertaken by QRL and RQL during the relevant period, it is useful to outline those projects before discussing some aspects of them in more detail. They can conveniently be divided into three categories.

Synthetic tracks

3.2.2 The first category of infrastructure projects involved the installation of synthetic tracks, originally intended to occur at Caloundra (Corbould Park), Toowoomba (Clifford Park) and an intended third track in southeast Queensland at a location to be determined.

4 The allegation concerned the use of Watpac Limited to demolish a grandstand at Albion Park in 2008-9, but the relevant decision seems to have been made by the Albion Park Raceway Management Committee and there is insufficient basis to find a lack of integrity in the process or draw useful systemic conclusions. Questions of conflict of interest are addressed in Chapter 4.

5 Submission of Rodgers Barnes & Green (on behalf of Messrs Bentley, Hanmer, Ludwig, Milner, Orchard, Tuttle, Brennan, and Ms Reid), 1 November 2013, Part 2 page 2-11.

6 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-11.

3.2.3 QRL and the State entered a Funding Agreement on 26 June 2007, pursuant to which the State provided $12 million by way of a lump sum towards the anticipated costs of three tracks. It is clear that a major motivation for these projects, for both parties, was the serious maintenance problems which arose for grass tracks as a result of water shortages during the severe drought which had then gripped much of Australia for years.

3.2.4 A synthetic track was first installed at Caloundra, replacing an existing sand training track between the primary grass racing track and a secondary grass track for training; the two grass tracks were retained. Work commenced around August 2007 and the track opened in April 2008. It remains operational today, and is used primarily for training but also as a secondary racing option when wet weather renders the grass racing track unsuitable (an important advantage of synthetic tracks, properly installed, is their superior drainage).

3.2.5 At Toowoomba, a synthetic track was installed in place of the existing primary grass racing track. Work commenced in February 2009 and the track opened in July 2009. As many readers of this Report will likely know, a decision has subsequently been made in 2013 by the Toowoomba Turf Club to remove the synthetic track and restore the course proper to the original grass surface. That decision is outside the Commission's Terms of Reference, but is sufficient to illustrate that the synthetic track installation in Toowoomba has been particularly controversial.

3.2.6 Ultimately, although consideration was given to doing so at either the Gold Coast or at Deagon in Brisbane, no third synthetic track has been installed. The funding originally earmarked for the third synthetic track has been transferred to the Toowoomba Industry Infrastructure Strategy project to reinstate the grass track at Clifford Park.

3.2.7 Some additional aspects of the synthetic track projects, relating to procurement process, will be discussed at the end of this Chapter.

Projects other than synthetic tracks or IIP

3.2.8 The second category of infrastructure projects includes those which did not involve the installation of synthetic tracks and were not funded pursuant to the Industry Infrastructure Plan (IIP) referred to below. Major projects were:

- Caloundra lighting
  An extensive upgrade of track lighting facilities was carried out on both the synthetic track and course proper at Corbould Park. Work commenced in September 2008 and the project reached practical completion on 30 January 2009. The overall project budget approved by the QRL board was $7.2 million.
- Caloundra stables
  The Corbould Park stables project involved the construction of a $12 million 256-stable complex. Contour commenced preliminary work on the project in March 2008 and construction was completed in October 2010.
- Beaudesert sand track replacement
  In early 2008, QRL coordinated the replacement of the sand track at Beaudesert racecourse after extensive flood damage, engaging Contour to provide engineering and project management services. Expenditure of up to $200,000 was approved by the QRL board. The project was completed in April 2008 within budget.
- Toowoomba lighting
  The Toowoomba lighting upgrade was considered necessary in order to facilitate twilight race meetings on the newly-installed synthetic track. Work commenced in April 2009. Although there were ongoing issues with the coverage of the lighting throughout 2010, the project was essentially complete in time for the opening of the synthetic track on 11 July 2009. The contract sum was $1,293,567.

- Rockhampton track upgrade
  A project to upgrade the sand and grass tracks at Callaghan Park entered the design phase in January 2008. The QRL board approved a doubling of the budget from $3 million to $6 million in November 2008. Construction commenced in April 2009. The official opening of the sand track was held in July 2009, with the course proper (grass) opening in late January 2010. At the completion of the project, a revised budget of $6.5 million was submitted by Contour to QRL.

IIP projects and planning

3.2.9 The third category of infrastructure projects for consideration comprises those which were funded by the State as part of the Racing Industry Capital Development Scheme (RICDS) under the IIP. The background to the IIP funding process and payments made pursuant to it is set out in Chapter 9.

3.2.10 The only project funded under the IIP on which construction work had substantially commenced during the relevant period was an upgrade of track and club facilities at Mackay.

3.2.11 QRL held documented concerns about the condition of facilities at Ooralea Park racecourse, in Mackay, from February 2009. An upgrade project was initially allocated a preliminary IIP budget of approximately $18 million in August 2010, but this amount was reduced to $7.44 million when the amended IIP was released in July 2011. The project was fast-tracked on workplace health and safety grounds, with the business plan and funding grant approved by Cabinet on 7 July 2011. Work on the track upgrade commenced in September 2011 and was completed in March 2012. On 5 May 2012, Stage 1 of the project – including the track upgrade, new jockey and stewards' building, new swab stall, and relocated judge's tower – was officially opened. The remaining infrastructure works to club facilities were completed in the 2012-13 financial year. At the conclusion of the project the total costs incurred by RQL amounted to $8,358,834 (in excess of the government funding received).

3.2.12 There was also, during the relevant period, extensive planning work undertaken in preparation for IIP works. Contour provided two stages of engineering and project coordination services to RQL in the development of the IIP: first, in relation to the preparation of strategic asset management plans for racing infrastructure that formed part of a submission to government dated 16 September 2010; and second, the provision of information in support of business cases required to obtain funding approval from government under the IIP.

3.2.13 RQL's submission to government dated 16 September 2010 annexed Contour's company profile and proposed the engagement of one of its directors, Mr Brett Thomson, as the civil engineer overseeing all IIP projects.[7] Contour envisaged its role as a type of partnership arrangement with RQL for the delivery of the IIP, whereby Contour would assume responsibility for all IIP projects as both project engineers and project coordinators.[8] On 31 August 2011, following the government's approval of the amended IIP on 7 July 2011, Contour submitted a fee proposal in the amount of $2.76 million to "provide professional engineering and project coordination services to assist RQL in the provision of information in support of Business Cases, as required by State Government funding protocols for the [IIP]" in relation to the Cairns, Townsville, Rockhampton, Deagon, Beaudesert and Gold Coast projects.[9] This proposal was retrospectively executed by Mr Robert Bentley on 29 March 2012.

7 RQL, Submission to Queensland Government, 16 September 2010, page 5.
8 Email from Brett Thomson to Michael Hodges (Nettletontribe) cc: Mark Snowdon (Mannix), 1 October 2010; Contour Consulting Engineers, typed notes with handwritten annotation "BAT" (end of 2010); Email from Brett Thomson to Mark Snowdon cc: Chris Fulcher, Ingrid Lambert and Tony Shelley, 18 October 2010.
9 Contour Fee Proposal to Racing Queensland Limited, 31 August 2011.

3.2.14 Pursuant to an agreement approved by then Treasurer, Mr Andrew Fraser, on 5 December 2011, the costs incurred by RQL in the engagement of external consultants to assist with the development of business cases were to be reimbursed by government through the RICDS to the value of $2.75 million.[10] An additional $200,000 per annum was also approved to be drawn to account for internal RQL resources expended for this purpose. RQL received a payment of $3,075,919.64 (incl GST) from the State government for these expenses on 2 March 2012.[11]

3.3 A note concerning Contour, Mr Tuttle and Mr Brennan

3.3.1 All of the projects in the above categories of infrastructure projects involved Contour. As a result, and given the express reference to Contour in subparagraph (ii) and the implicit reference in subparagraph (iii), the procurement and related processes on projects in which Contour was involved are the primary subject of Term of Reference 3(a) and will be given detailed attention.

3.3.2 The inclusion of Term of Reference 3(a) is understood to have been at least partly the result of a report to RQL by Deloitte on 29 April 2013 entitled *Examination of Procurement Processes*.[12] The introduction to the Report makes clear that Deloitte's engagement was prompted by the extent of Contour's involvement in QRL and RQL projects during the relevant period and the fact that two former senior executives, Mr Malcolm Tuttle and Mr Paul Brennan, took up employment with Contour after their resignations from RQL.[13] Other aspects of this Deloitte report will be discussed below, but some preliminary matters should be mentioned.

3.3.3 First, as the April 2013 Deloitte report itself observed,[14] Deloitte (on instructions from RQL) did not have any contact with Mr Tuttle or Mr Brennan in the preparation of that report. Deloitte also did not have any contact with Contour or access to its records of the transactions and processes in question.[15] The Commission has, by contrast, received detailed evidence from Mr Tuttle and Mr Brennan, and directors of Contour including Mr Thomson, and been able to examine Contour's extensive project files.

3.3.4 Second, it should be made clear at the outset that the Commission has not identified any basis to find that Contour, Mr Tuttle or Mr Brennan engaged in sharp practice or did anything dishonest or corrupt in relation to the engagement of Contour, or (although this is strictly outside the Terms of Reference) Contour's employment of the two individuals.[16] There is also no basis for a positive finding that any of the projects in which Contour was involved did not deliver value for money; although there are reservations in this regard, as to the difficulties which arise in assessing retrospectively whether value for money was achieved, none of the reservations can be attributed to any failings by Contour.

3.3.5 Third, the observation made in the opening address of counsel assisting on 19 September 2013 should now be repeated: the allegations made in the press and elsewhere, to the effect that Contour was awarded either $150 million or $20 million worth of contracts,[17] are greatly exaggerated.

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10 Letter from Andrew Fraser to Robert Bentley, 5 December 2011.
11 Statement of Adam Carter, 2 August 2013, page 62 para 286.
12 Statement of Adam Carter, 2 August 2013, exhibit ABC-94.
13 See also, in this regard, statement of Adam Carter, 2 August 2013, page 22 para 67.
14 Deloitte Report, 29 April 2013, para 1.1.
15 Statement of Brett Thomson, 27 August 2013, exhibit BAT-05.
16 There is further discussion of the employment of Messrs Tuttle and Brennan by Contour in Chapter 5 of the Report in the context of Term of Reference 3(c)(iv).
17 See, for example, Statement of Brett Thomson, 27 August 2013, exhibits BAT-01 and BAT-03, including, from *The Australian* (undated): "Just before last year's election defeat, the Bligh government approved more than $20 million in payments for a project management company that secured $158m in work from the then Labor-aligned board of Racing Queensland..."; and from *The Courier-Mail* (undated): "... the draft report by accountancy firm Deloitte raises concerns about the board's handling of major building contracts following allegations $150 million in contracts was awarded to an engineering firm without first going to tender. ... After the state election in March last year, RQ put a hold on all infrastructure spending, which included $100 million in contracts to Contour Consulting for track works and renovations".

Contour was paid approximately $5.5 million for extensive and ongoing work, on a number of projects, involving significant professional staff commitments, over the relevant period of more than five years.

3.4 Procurement policy – statutory framework

State Procurement Policy

3.4.1 During the relevant period, "statutory bodies" under the *Financial Administration and Audit Act 1977* (Qld), and its subsequent replacement the *Financial Accountability Act 2009* (Qld), and Government Owned Corporations, were required to comply with the Queensland Government's State Purchasing Policy or (as it was known after 2008) State Procurement Policy.

3.4.2 QRL and RQL were not, during the relevant period, statutory bodies as defined or Government Owned Corporations. The effect was that they were not bound to comply with the State Procurement Policy.[18] The position was the same for QHRL and GQL, from the time they became the control bodies for their respective codes on 1 July 2008. Since the end of the relevant period, the *Racing Act 2002* (Qld) has been amended to provide expressly that the new control body Queensland All Codes Racing Industry Board (QACRIB) is a statutory body,[19] with the result that its purchasing activities are required to comply with the Queensland Procurement Policy.[20]

3.4.3 Although it is therefore unnecessary at this stage to devote detailed attention to the contents of the State Procurement Policy, it will assist the discussion to note the following matters arising from the version which applied from September 2010 for the remainder of the relevant period:[21]

- the benefits of the policy were said to include maximising opportunities for suppliers, by means including public notifications of forthcoming procurements and providing "improved transparency and disclosure" in procurements
- the objectives of the policy included achieving value for money and ensuring probity and accountability for outcomes
- agencies were required to undertake an assessment of their procurement capability and performance at least once every three years, and have "Significant Procurement Plans" for procurements of high value and/or risk
- agencies were required to promote access to government procurement opportunities by publishing and maintaining information on a designated government website regarding future procurements and all open tender opportunities
- "Agencies should use open offer processes where possible. Limited and selected offer processes may be used where the Significant Procurement Plan demonstrates that this is the appropriate strategy. Limited and selective offer processes must not be used for the purposes of avoiding competition"
- all stages of a procurement process were required to be defensible and documented.

18 By the definition of "agency" in the State Purchasing/Procurement Policy.
19 *Racing Act 2002*, section 9AC.
20 The latest version, approved by Cabinet for application to agencies including any "statutory body" as defined in the *Financial Accountability Act 2009*, took effect on 1 July 2013. A statutory body under the just-mentioned Act includes, by section 9(3), one stated to be such in the Act establishing the entity: that applies to QACRIB. The Queensland Procurement Policy was known as the State Procurement Policy prior to July 2013.
21 Exhibited to Statement of Ronald Mathofer, 5 September 2013, part of RM-61.

Statutory framework for, and status of, the QRL/RQL Purchasing Policy

3.4.4 During the relevant period QRL and RQL had a policy in place which governed contract management, financial accountability, and payment processes. QRL and then RQL had a policy in place called the Purchasing Policy. This included matters of procurement methodology and related matters of payment and accounting process. Before discussing its terms and operation, it is necessary to consider the statutory context under the Racing Act.

Relevant provisions of the *Racing Act 2002*

3.4.5 In relation to the function and process of creation of policies during the relevant period, the Racing Act provided:

- by section 37, that a control body must have "internal controls" to perform its function of managing its code(s) of racing effectively, including for example information systems to separate its commercial and regulatory operations and record actions under its licensing scheme
- by section 78:
  - the main purposes of Chapter 3 (which includes sections 81-84) include to provide for the way in which a control body may perform its function of managing its code(s) of racing
  - this function will generally be performed by making policies about the management of the code(s)
  - "a control body's policies ensure there is guidance for persons involved in the code of racing and transparent decision making relating to matters dealt with by the policies"
- by section 79, that the policies made by a control body for its code(s) of racing are statutory instruments within the meaning of the *Statutory Instruments Act 1992* (Qld) (which governs aspects of interpretation, and citations, but says nothing about enforceability or the consequences of non-compliance)
- by section 80(1), that a control body may make a policy for its code of racing because (a) the policy is required by the Act or by a ministerial direction or (b) "the control body believes it is good management to have the policy"
- by section 81, that a control body must have a policy for its code(s) of racing about each of 23 specified matters (none of which includes procurement/purchasing, contract management or financial accountability)
- by section 83, which relates to all policies whether under section 80(1) or section 81:
  - each policy must state the policy's name, date made and date of taking effect, its purpose, who will be affected by it, how the control body will make decisions about matters provided for by the policy, and whether or not rules of racing are to be made for the policy
  - a policy is made when entered in the control body's minutes as having been made and only takes effect when made
  - "If a control body wishes to amend a policy, it must make a new policy"
- by section 84, which again relates to all policies, that a control body must make sure that its policies are publicly available and (without limitation) must:
  - "give a copy to the chief executive within 14 days after it makes the policy"
  - make the policy available for inspection free of charge at its business address, and on its website.

3.4.6 The statutory scheme, accordingly, only contemplates the making of policies by a control body either because:

- they are mandatory under section 81 or, despite the word "may", under section 80(1)(a) when required by the Act itself or a ministerial direction
- the control body voluntarily decides to make a policy, under section 80(1)(b), because it believes it is "good management" to do so.

The status of the QRL/RQL Purchasing Policy

3.4.7 Arguments were advanced during the public hearings, and in some subsequent statements and submissions, to the effect that the Purchasing Policy was only *internal* and was not, in fact, a policy under the Act.[22] That seems to have been the perception prevalent within QRL and RQL. It may explain why the policy was not in the form contemplated by section 83 and, so far as the Commission has been able to determine, was not provided to the chief executive initially or when new versions were made, and was not published on the QRL or RQL websites.

3.4.8 However, it was conceded during the public hearings by Mr Bentley and Mr Tuttle that the Purchasing Policy was made, and the various versions of it approved by the boards of QRL and then RQL, because it was considered *good management* to do so.[23] It is thus difficult to conclude that the Purchasing Policy was not made as a policy under the Act and therefore subject to its provisions in the same way as other policies. The alternative seems to be that the Policy was, despite its name, merely an "internal control" made under section 37; that does not appear to fit the subject and apparent purpose of a document of this kind.

3.4.9 There was no justification for treating the Purchasing Policy as merely an internal control measure. It concerned the same topic as the State Procurement Policy, which would have applied if QRL and RQL were statutory bodies, and which was, of course, publicly available. Like the State Policy, the QRL/RQL Policy would likely be of significant interest and assistance to anyone considering seeking or offering to provide goods or services to those entities. It would seem a clear example of a policy which should, to use the words of section 73(3) of the Act, ensure there is guidance for persons involved in the code(s) of racing and transparent decision-making (relating to procurement). This conclusion is strengthened by the considerations that:

- a large part of the funding for infrastructure developments undertaken by QRL and RQL came directly from the government by way of wagering tax redirection for defined purposes (as for the synthetic track projects and the IIP)
- the other major source of funding for the control bodies' activities was the 39 per cent of wagering revenue they received from TattsBet Limited (TattsBet) pursuant to the Product and Program Agreement, which was a mechanism established by the government to fund directly the control bodies' activities, effectively instead of the government first collecting that percentage and then distributing it to the control bodies.

3.4.10 Ultimately it is unnecessary, for the purposes of this Report, to resolve whether or not the QRL/RQL Purchasing Policy was made under section 80(1)(b) of the Act or was outside the legislative scheme. As already noted, one effect of the 2012 amendments to the Racing Act was to make the State Procurement Policy applicable to QACRIB. However, the Queensland Racing website as at the date of finalising this Report includes access to various non-section 81 policies but not to the current QACRIB-specific Purchasing Policy.

22 See, for example, the submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-11 paras 40, 42; and Transcript, Malcolm Tuttle, 1 October 2013, page 57 line 10 - page 58 line 12.

23 Transcript, Robert Bentley, 25 September 2013, page 6 lines 30–50; Transcript, Malcolm Tuttle, 1 October 2013, page 60 line 5.

3.4.11 For any entity which is created by and/or obtains its powers from legislation, and receives and expends extensive public funds, consideration should be given to ensuring that its specific procurement processes are clearly defined and publicly available.[24] If this does not occur in the Racing Act context by the control body making its Purchasing Policy under section 80(1)(b), as desirable for good management, consideration should be given by the Minister to directing the making of such a policy under section 80(1)(a).

3.5 Content and development of QRL/RQL Purchasing Policy

Draft version 1.02 of the Policy

3.5.1 QRL's first Purchasing Policy appears to have been created in draft by Mr Adam Carter, then Finance Manager, in August 2006; the source of its contents is unimportant.

3.5.2 A second draft, produced as version 1.02 in November 2006, is a convenient starting point for this analysis. As will be seen, the substance of the policy changed little in any way relevant to this Inquiry between the draft version 1.02 and the end of the relevant period.

3.5.3 Version 1.02 of the Purchasing Policy relevantly provided as follows (with alpha/numerical additions for ease of reference):

a) QRL should adhere in its purchasing activities to six key principles, including *value for money, open and fair competition* and *accountability of outcomes*

b) In relation to short-term, one-off contracts for *Consulting Services*:

i. For contracts under $10,000 in value, preferred supplier arrangements can be used. That is, where a purchasing officer is satisfied that a consultant that has provided a high quality service in the past, has the necessary expertise to undertake the work, and is available in an appropriate timeframe, that consultant can be appointed without a formal competitive process being undertaken. If such a person is not available, three quotes from prospective consultants should be obtained and evaluated;*

*(*Please note that where preferred supplier arrangements are referred to later in this document for other categories of purchasing, similar procedures to those above will apply)*

ii. For contracts between $10,000 and $100,000, tenders should be called from at least three "preferred" contractors. The selection of these three preferred suppliers, and subsequent evaluation of their proposals, should take into account the six key purchasing principles. The evaluation of the proposals should be undertaken by two accountable officers, and be approved by a delegated officer (Chief Operations Manager or Finance Manager).

iii. For contracts over $100,000, a public tender process is required, including appropriate advertising of the consultancy. Tenders are to be evaluated, in accordance with the six key purchasing principles, by a panel of no less than two accountable officers, and be approved by a delegated officer.

c) *For longer-term consultancy arrangements..., which may involve the use of a preferred supplier or suppliers for a range of individual tasks over an extended period of time, the following guidelines are to be followed:*

24 Publication appears to be done not only by many government departments but also, for example, by universities; each of the University of Queensland, James Cook University and the University of Southern Queensland has a policy available on its website.

i. *The purchasing officer may select a consultant for a range of tasks from a panel of preferred suppliers for the type of work involved;*

ii. *Prior to such selection, a competitive process, adhering to the six key purchasing principles… to appoint the panel of preferred suppliers must have been undertaken, be appropriately documented, and be signed off by a delegated officer;*

iii. *In selecting the preferred supplier from the panel, the purchasing officer must clearly document the reasons for the selection, and be accountable for that selection. The selection must be approved by a delegated officer; and*

iv. *Individual consultancy arrangements over $100,000 in value are not to be entered into under these preferred supplier arrangements. For such consultancies, an open tender process, as described above, must be followed.*

d) *Documentation and the Role of the Finance Department*

The Finance Department plays the lead role in ensuring [QRL] meets its obligations under the Corporations Act 2001 [and accounting standards etc] through the development and implementation of appropriate accounting policies and controls.

While the Department will work to ensure operational areas within the organisation are meeting their obligations under the purchasing guidelines, senior managers also have a role to play in monitoring the purchasing activities of their staff.

With regard to documentation, all acquisitions need to be supported by evidence that appropriate purchasing principles and guidelines have been followed. In this regard:

i. *All purchases for non-continuous supplies must be accompanied by purchase orders that have been signed-off by a duly delegated officer…; and*

ii. *The delegated officer must be satisfied that [QRL's] purchasing policy has been adhered to, and that appropriate documentation that supports the six key principles (value for money, open and fair competition etc) has been gathered, and is available for audit scrutiny if required. The managers of organisational areas have responsibility for ensuring supporting documentation is maintained and is accessible.*

Enquiries regarding these purchasing principles should be directed to the Chief Operations Manager or Finance Manager.

Meaning of the Policy

3.5.4 The Policy is difficult to understand, and would have always been difficult to apply in practice to the sorts of infrastructure projects undertaken during the relevant period, including because:

- the section of the Policy quoted at 3.5.3(b)(i) above contemplates a preferred supplier as one who has provided good service in the past and can therefore be appointed without *any* competitive process, and the asterisked note suggests that this concept applies throughout the remainder of the document rather than only for contracts under $10,000, but:
  - the very next paragraph, quoted at (b)(ii), contemplates tenders being called from three preferred contractors and their initial selection taking into account the key purchasing principles (including open and fair competition)
  - the part relating to longer-term consultancy arrangements, quoted at (c) above, contemplates the use of a panel of preferred suppliers *after* there has been a competitive process, adhering to the key principles, to select the panel
- the scope of the concepts of *consulting services* and *consultancy arrangements* is not clearly defined, but they do not appear to contemplate, for example, the appointment of construction contractors.

3.5.5 There will be further discussion below of these difficulties. For present purposes, it suffices to summarise the apparent requirements of the Purchasing Policy for the engagement of Contour, and other contractors on infrastructure projects, as follows:

- if a contract was considered a one-off, and was for a known total sum of $10,000 to $100,000, there should at least have been tenders called from three preferred suppliers selected to tender, and with their tenders then evaluated, by reference to the key principles
- if a contract was considered a longer-term arrangement, where the value was less than $100,000 there was required to be a competitive process to select a panel of preferred suppliers from which one would then be selected, by reference to the key principles, for the job
- for all contracts over $100,000, whether one-off or longer-term, there had to be a public or open tender process involving advertising of the opportunity.

3.5.6 Subject to the introduction of the concept of board waiver noted immediately below, there were no changes to the Policy during the relevant period which altered the effect of the requirements summarised above.

Subsequent development and review of the Policy

Version 1.03

3.5.7 At a QRL board meeting on 13 April 2007, the board adopted the version 1.02 draft Policy, with some amendments, as version 1.03. The most significant amendment was to make the requirements for public tender for contracts over $100,000 *subject to board approval*. In light of the minutes it is clear that this contemplated that the board might *waive* the obligation to go to tender for projects over that amount.

3.5.8 Other relevant changes introduced in version 1.03 of the Policy were the addition of two new sections.

3.5.9 The first new section, headed *Preferred Suppliers*:

- encouraged the use of preferred suppliers in circumstances including "where there is an established relationship with a proven record of success"
- outlined the advantages of such use, as being that "it streamlines and simplifies purchasing, reduces administrative costs and promotes cost savings through volume discounts and exclusivity arrangements… [and] minimises costs and risk for suppliers through not being required to regularly prepare and submit quotations"
- said that an "indicative listing" of preferred suppliers was available "from Finance – accounts payable through discussions with management" and "should be considered as a first cut as further work will be required to refine this list to ensure that regular purchases are defined by a supplier".

3.5.10 The second new section, headed *Key Controls*:

- included in the list of such controls: "Three quotes required for amounts >$10,000 where a preferred supplier is not used"
- provided that QRL "should perform an annual supplier analysis to review expenditure to determine that value for money is being achieved".

3.5.11 It may be observed immediately that the key control noted in the first bullet point above was prone to confuse: on the wording of the body of the policy, as previously mentioned, the concept of obtaining three tenders applied only to one-off consulting contracts between $10,000 and $100,000 and, in those cases, there was a requirement first to select the three tenderers taking into account the key purchasing principles. For all contracts over $100,000, an open tender was required (subject to board waiver).

The June 2009 Deloitte report

3.5.12 In June 2009, Deloitte produced an internal audit report for QRL entitled *Purchasing*. Relevantly, it:

- specified key findings including "Use of Panels/Preferred Suppliers" and "Compliance with Purchasing Policy", with the former designated as important and the latter of minor importance
- concluded overall that "nothing has come to our attention to indicate that, in all material respects, internal controls over purchasing are not appropriately designed, and have not operated effectively over the 2008-9 financial year period to date"
- observed in relation to the use of panels/preferred suppliers that:

  > *QRL's Purchasing Policy makes reference to a preferred supplier listing spreadsheet. However, we noted that the spreadsheet did not provide a preferred listing of suppliers. Instead, the spreadsheet listed all suppliers QRL has made purchases from in the current financial year. The spreadsheet also listed contractual agreements QRL have entered into with third parties.*
  >
  > *...*
  >
  > *... compliance with the QRL Purchasing Policy's preferred supplier arrangements is difficult to determine. With no organisation-wide knowledge of preferred suppliers, common purchasing opportunities may not be identified and exploited.*
  >
  > *...*
  >
  > *We recommend that QRL... establish a panels / preferred suppliers listing*
- identified, in terms of compliance with the Purchasing Policy, a particular instance (in the context of information technology equipment purchasing) of non-compliance with the obligation to obtain three quotes, warned that such non-compliance "may have financial implications if QRL did not procure from the supplier that provides the best value for money and purchasing terms", and recommended that purchases above set thresholds be supported by the required number of quotes.

3.5.13 In the minutes of the QRL Audit Committee[25] meeting of 26 June 2009, the following is relevantly recorded:

> *Internal Audit Update – Purchasing*
>
> *Mr Carter advised that I-POS is a significant change in the purchasing process and is a work in progress.*
>
> *The committee discussed the importance of the panel/preferred supplier selection to require:*
>
> - *QRL to be pro-active to the required market*
> - *Based on competitiveness*
>
> *...*
>
> *...The committee NOTED the action on the I-POS implementation and panel/preferred supplier selection will take time.*
>
> *The committee NOTED the Internal Audit Purchasing review with an update of action items to be provided at the September 2009 meeting.*

25 The roles of the Audit Committee and of Deloitte will be addressed further below, under the heading "Explanations for non-compliance".

Follow-Up:-

1. *Continual updates to be provided to the QRL Board due to significance of impact.*
2. *Update of action items to be provided at the September 2009 meeting.*

3.5.14 There was no September meeting of the committee, as had been contemplated on 26 June 2009. There is no reference to the above issues in the minutes of any later meetings of the QRL Audit Committee or subsequently the RQL Audit, Finance and Risk Committee (both of which will be referred to as the Audit Committee) during the relevant period.

3.5.15 A number of *Action Sheets* from RQL board meetings from mid-2010 onwards identified Mr Carter as having the role of drafting a new policy "for expenditures and projects" and putting a preferred suppliers list in place for this purpose. However, there is no evidence in the minutes of the board meetings after the Deloitte report that there were "continual updates" on the matters arising from the report or, indeed, any discussion of the report or its implications at board level.

3.5.16 In Deloitte's March 2010 *Follow-up of Prior Recommendations and Findings,* the need to establish panels/a preferred suppliers listing is noted with the QRL response recorded as "Compliance Accountant is currently determining where QRL needs to establish service level agreements with suppliers".

Version 1.04 (RQL) and subsequently

3.5.17 The next version of the Policy, version 1.04, was adopted by the newly formed RQL board in an informal meeting on 1 July 2010. The only relevant changes from version 1.03 were:

- in relation to the listing of preferred suppliers, it said "The current preferred suppliers list can be obtained from the Finance and Business Manager or accounts payable ap@racingqueensland.com.au or at the following link: [Insert Link to Preferred Supplier Listing which is currently under construction]"
- there was a new section concerning *Internet-Based Purchase Order System* (IPOS), an "online web enabled electronic procurement system", with:
  - stated objectives including "to bring [RQL] in line with best procurement practice through taking advantage of e-commerce, electronic purchase ordering and scanning"
  - a flow-chart purchasing procedure, which contained no reference to how suppliers were to be approved except "Approved Supplier (ie in IPOS/SUN)?" (apparently contemplating that someone is an approved supplier if they are on the accounting system)
  - a reference to IPOS's advantage being that "it enforces [RQL's] purchasing policy in an electronic procurement system", but with the description following suggesting an aim to enforce delegation limits and the formal procedures for purchase orders rather than any attention to procurement methodology.

3.5.18 Another version of the Policy – 1.06 – was approved by the RQL board on 1 July 2011, but with no relevant change as to procurement process.

3.5.19 On 4 November 2011, the board approved a further version – 1.08 – with the insertion of a new section headed *Industry Infrastructure Plan*; it concerned process matters such as the checking of invoices for delegation limits, and said nothing about procurement methodology. That issue was purported to be addressed by the Addendum, discussed separately below.

Delegation limits and other accounting process matters

3.5.20 As will be apparent from the references to delegation limits, each version of the Purchasing Policy also specified related accounting process matters, including delegation limits for authorisations of expenditure by officers of QRL and RQL. The delegation limits, and compliance with them and other accounting process matters, will be considered separately at section 3.10. For present purposes, it should be noted that the board was required to authorise all expenditures over $100,000 in version 1.03 of the Policy and by the final relevant version, 1.07, that figure was $150,000.

3.6 Evidence on compliance with the Purchasing Policy (pre-Addendum)

3.6.1 There is little benefit in seeking to summarise all of the evidence received by the Commission in relation to procurement matters. The following overview of the evidence given initially by statement, and subsequently during the public hearings and supplementary statements, will serve the purposes of the analysis which follows.

Initial accounts

3.6.2 The sense conveyed by the statements initially received by the Commission was that there was, generally, compliance with the Purchasing Policy, although the position was less clear as to Contour.

3.6.3 Mr Bentley said, for example, that he believed there would have been a policy for purchasing. It was under the responsibility of Mr Carter as chief financial officer and subject to internal review by Deloitte reporting to the Audit Committee, so Mr Bentley "assume[d] that any non-compliance would have been picked up by the internal auditors as part of their process."[26] However, he continued:

> *[w]hile Contour carried out a fair amount of design work and project managed some works on behalf of the control body, I do not recall that Contour's own engagement went through any public tender process. But then, I would not expect that would be the case anyway. The control body did not go through a tender process for the purpose of engaging professional consultants such as lawyers, accountants and the like. As far as I can recall, any work that was required to be done by contractors under the supervision of Contour would have been subject to a tender process.*

3.6.4 Mr Carter provided much detail of the purchasing and other policies in place at the relevant entities, and the function of the Audit Committee and Deloitte, but did not squarely address whether or not there was in fact compliance with the procurement methodology aspects of the Purchasing Policy.[27] Mr Tuttle, similarly, did not directly address that compliance issue but explained that Contour, after its initial engagement at Caloundra, remained a trusted consultant to QRL and RQL over the years including because of the need for confidentiality in developing infrastructure plans.[28]

3.6.5 Mr Brennan also emphasised confidentiality and said that, after Contour's initial engagement on the Caloundra synthetic track project:

> *I was advised by the Chairman that the Board's view was that it was more effective, particularly from a financial perspective, to have a locally based project management*

26 Statement of Robert Bentley, 26 July 2013, pages 11-12 paras 38-39. See also, to similar effect: Statement of Anthony Hanmer, 29 July 2013, page 3 paras 7-9.
27 Statement of Adam Carter, 2 August 2013, pages 4-24.
28 Statement of Malcolm Tuttle, 26 July 2013, page 5 para 15.

company but more importantly, it was sensible to continue with a company that had already developed the necessary intellectual property for doing engineering design work for racing facilities. As such, Contour was utilised on future projects requiring engineering and project management services. This included ongoing projects at [Caloundra], and projects in Rockhampton and Toowoomba.

...

Prior to July 2010, QRL engaged external project management specialists as there was no-one, until the appointment of Mark Snowden [sic] in July 2010 with specialist contract management/project management experience in-house.

The specialist project managers/contract managers, such as Contour, were responsible for tender processes and would review any invoicing from contractors on projects and then forward them for approval from [QRL or] RQL. [29]

3.6.6 Mr Thomson of Contour, who was the director principally involved in infrastructure projects for QRL and RQL during the relevant period, stated that he had no knowledge of the Purchasing Policy until about late 2011. He said, however, that in conducting tenders for contractors on infrastructure projects for QRL and RQL, Contour "generally applied the type of tender processes for major construction projects that it would for any private client...".[30] In summary, Contour would:

- prepare tender documents in accordance with Australian Standards
- invite tenders from contractors "who had recently successfully completed similar projects, and/or were considered to hold suitable levels of expertise, resources and capacity"
- assess the tenders against selection criteria and meet with tenderers to confirm details and negotiate further
- then provide a Tender Assessment Report to QRL or RQL to assist them in making an informed decision in selecting a contractor
- when the project was underway, assess all contractors' claims against contracts and issue claim certificates to QRL or RQL together with contractors' invoices for payment.[31]

Evidence during and since the public hearings

3.6.7 Mr Bentley said in oral evidence before the Commission that the Purchasing Policy was made because the board believed it to be good management, but that it was "cumbersome" and "commercially – very hard to operate under" and this was why the board was given a discretion to waive compliance with it.[32] He apparently agreed that if compliance were waived, there would be a reason for the waiver, and it would be recorded in the minutes.[33] He also agreed that there was non-compliance, but said he always considered Contour to be a preferred supplier.[34]

3.6.8 In Mr Bentley's subsequent statement, he states:

In respect of infrastructure projects undertaken by QRL/RQL, the purchasing policy did not adequately deal with the requirements for procurement. That is why the board was given discretion to waive the policy if it considered it appropriate. As such, infrastructure projects were undertaken by QRL/RQL in the following manner:

29 Statement of Paul Brennan, 26 July 2013, page 6 para 14.
30 Statement of Brett Thomson, 27 August 2013, page 4 para 37.
31 Statement of Brett Thomson, 27 August 2013, pages 5-6 paras 41, 43, 46.
32 Transcript, Robert Bentley, 25 September 2013, page 6 line 45, page 12 line 30, page 13 line 15, page 15 line 10.
33 Transcript, Robert Bentley, 25 September 2013, page 19 line 30.
34 Transcript, Robert Bentley, 25 September 2013, page 25 lines 25-40, page 26 lines 25-40.

(a) Contour would be retained, as a preferred supplier, as project and contract managers;

(b) Contour would, on behalf of QRL/RQL, go to tender, although not usually an open tender, for contractors to complete the works required;

(c) Contour would manage the tender and contract processes; and

(d) Contour would evaluate the work done and discuss/manage and mediate any issues arising from works done.

...

I agree that Contour were not engaged in strict compliance with the purchasing policy... However, the reasons for QRL and RQL continuing to use Contour were in my view sound, and I believed actually saved money for the [QRL and RQL]. [35]

3.6.9 Mr Tuttle said in oral evidence that the Policy provided for "a waiver in certain conditions if exercised by the board, and the board exercised that in a number of instances". He explained that the introduction of the option for board waiver in version 1.03 of the Policy was because the board "wanted a high degree of flexibility in terms of the engagement of its contractors". He also said, in effect, that Mr Bentley himself could waive compliance and did so in some instances when he "himself would direct the procurement."[36]

3.6.10 In a supplementary statement, Mr Tuttle explained:

While the engagement of Contour in all but the very first engagement... was not subject to any public tender process as suggested by the part of the policy that dealt with long term consultants, in my mind that requirement was not a mandatory process that had to be adopted in every case. Rather, my view was the Board could accept that consultants would be engaged in a usual manner without formal tender, as the Board always had power to change or amend such internal policies anyway.

...

Apart from later in the relevant period around mid-2011 I had little or no involvement with procurement and in particular procurement of Contour's services or any services procured by Contour.

During the relevant period, officers involved in the procurement of infrastructure services, such as Reid Sanders, Shara Reid, Paul Brennan and Mark Snowden [sic] took instruction from Bob Bentley, not me.

I took no issue with Bob Bentley providing instruction in this regard as he was the Chairman of the Board, had more experience than I did in this area and he knew the outcomes required by the Board and Government.

...

It was always my understanding that the Board retained the discretion not to go to tender on all major projects, as it was reasonable to engage consultants without the need for public tender, or because that would not lead to the best outcome for QRL or RQL [or because the consultants] were considered suitable and reliable.

The ongoing engagement of Contour in relation to the projects they were managing made sense because of their accumulated expertise and knowledge of the nature of the work

35 Statement of Robert Bentley, 21 October 2013, pages 22-24 paras 84, 89.
36 Transcript, Malcolm Tuttle, 1 October 2013, page 62 line 40.

that was required to be undertaken. If a different project manager was selected for each project by public tender, in my view, that would have been a very costly and time-consuming process. Also, each new project manager would have to 're-invent the wheel' whereas Contour had a lot of accumulated knowledge from the [previous work]. Bob Bentley always considered Contour to be a specialist consultant.

In relation to the infrastructure projects... managed by Contour... it was my understanding that Contour would follow its own tendering and contract management process and policies... I don't know if Contour was ever provided with a copy of the QRL/RQL purchasing policy. I would, however, expect that either Bob Bentley or the responsible internal officer would have advised Contour what their expectation was in this regard at the outset of [each] project. [37]

3.6.11 Mr Brennan has stated, to similar effect, that QRL and RQL "effectively outsourced" the procurement processes to Contour as project manager, with some oversight and assistance from Mr Mark Snowdon after his engagement in July 2010. Mr Brennan understood that "the Board, including the Chairman, had the discretion to waive any aspect of the purchasing policy" and that "the selection of preferred specialist suppliers [including Contour] and the waiving of tender requirements for their ongoing engagement, was something determined by the Board, including the Chairman". He continued:[38]

I am unsure whether Contour was provided with a copy of the purchasing policy. I did not supply a copy of the policies to Contour. In my mind it would be unusual for an external consultant to be provided with QRL/RQL's internal documents as the purchasing policy was not for external reference or use. However, I was present when Contour was briefed, by Bob Bentley, in early 2008 as to the procurement expectations of QRL/RQL. The key procurement expectations outlined to Contour were:

(a) Where possible, tenders were to be sought from a minimum of three (3) contractors;

(b) Where possible, a minimum of 1 (one) tender should be sought from a contractor that would be considered 'local' to the project;

(c) Where possible, the same QRL/RQL preferred specialist suppliers/consultants, such as town planners and architects should be utilised for the purpose of consistency and cost efficiencies; and

(d) There was no requirement to utilise the open tender process

...

I believe that Contour complied with the key procurement expectations outlined in 2008. I do not believe, as a result of what I was told in 2008, as outlined above, that Contour specifically complied with the Purchasing Policies themselves.

3.6.12 Other matters arising from the statements and evidence before the Commission will be mentioned as required below.

37 Statement of Malcolm Tuttle, 23 October 2013, pages 15-16 paras 36, 38.
38 Statement of Paul Brennan, 11 October 2013, page 7.

3.7 Non-compliance with the Purchasing Policy

Non-compliance in the engagements of Contour

3.7.1 It is unnecessary to engage in a detailed analysis of the evidence concerning the engagement of Contour itself. The material before the Commission, including that arising from and since the public hearings, makes clear that:

- Contour was initially engaged in June 2007 to provide only civil engineering design services for the purposes of the Caloundra synthetic track project, which was being managed by the company Arben Management Pty Ltd (Arben)
- Arben had sought tenders from three civil engineering firms, including Contour, and recommended Contour for the job on the basis that it submitted the most economical price and understood the required scope of work
- subsequently, Arben's engagement was terminated towards the end of the Caloundra synthetic track project and Contour effectively took over the project management role
- thereafter, Contour was engaged by QRL and RQL to provide engineering design and/or project management and other services for more than 60 separate projects, without ever being subjected to any further competitive selection process, either in accordance with the Purchasing Policy or otherwise.

3.7.2 The first engagement of Contour was a contract of less than $100,000 in value. It seems unlikely that the process followed by Arben met the requirements of the Purchasing Policy for such contracts: there is no reason to think that Arben was aware of the Policy; although Arben did call tenders from three companies, they cannot have been *preferred suppliers* within the meaning of the Policy; and Arben's recommendation to engage Contour was presumably not based on an evaluation taking into account QRL's key purchasing principles. In any event, even if the initial engagement to provide one-off engineering design services (and not project management services) was somehow compliant, that does nothing to justify the continual non-compliance from then until the end of the relevant period.

Non-compliance in the engagement of other contractors

Infrastructure projects

3.7.3 It is not in dispute that, for the infrastructure projects in which Contour performed a management function, it – and not QRL or RQL – undertook the necessary procurement of contractors. There is no basis to find that Contour did not perform the task at least adequately, in accordance with its own usual procedures. However, the question for the Commission is whether there was adherence to the Purchasing Policy; its requirements applied *not to Contour but to QRL and RQL*.

3.7.4 In practical terms, it may be that compliance with the Purchasing Policy could reasonably have been delegated to Contour (or some other external project manager). However, doing so would necessarily involve both communicating the Policy to Contour with a requirement for it to be applied, and monitoring its application in some way. As Contour was never told until late 2011 about the existence or terms of the Purchasing Policy, it is obvious that it could not have even attempted to apply it on QRL's or RQL's behalf before that time. Contour, through no fault of its own, did not undertake procurement in compliance with the Purchasing Policy.

3.7.5 The second stage of the Contour procurement process, as described by Mr Thomson at 3.6.6 overleaf, involved Contour effectively selecting its own preferred suppliers in the sense of inviting tenders from those whom it considered appropriate. This could not be compliant, because:

- In the application of the Purchasing Policy, as explained above, a preferred supplier could be used for a one-off contract between $10,000 and $100,000 but only where three such suppliers were first selected, and their tenders subsequently evaluated, in accordance with QRL/RQL's key purchasing principles. This process was not followed by QRL/RQL or Contour. Further, at least from the adoption of version 1.03 of the Policy on 13 April 2007, it is doubtful whether there could be any preferred suppliers within the terms of the Purchasing Policy because such suppliers were intended to be identifiable from a list maintained for that purpose and *there was no list*. This issue is discussed further below.
- For contracts over $100,000, there was required to be a public tender process including advertising. That did not occur during the relevant period until late 2011,[39] after significant concerns about the need for compliance had been raised from about mid-2011 (as explained at 3.9).

3.7.6 Mr Brennan has given an alternative account, as already mentioned, to the effect that Contour was specifically told to follow certain "key procurement expectations" on which it was briefed by Mr Bentley in early 2008. Mr Bentley and Mr Tuttle were represented before the Commission by the same solicitors and counsel as Mr Brennan. Neither they nor anyone else from within QRL/RQL, or Contour, made reference to such a briefing. The Commission required QACRIB to provide it with any documents evidencing such a briefing; none were located. Mr Tuttle, however, did state that Mr Bentley directed procurements in some instances and he would expect him to have advised Contour of procurement expectations at the start of each project.

3.7.7 Even if the briefing recalled by Mr Brennan was given to Contour, the mandated process would not have complied with the Purchasing Policy because:

- The process merely contemplated seeking tenders from at least three contractors, with no requirement for public tender where the contract value was over $100,000
- The only guidance as to selection of the contractors from whom tenders should be sought was that, "where possible", at least one of them be "local" and, more importantly, "the same QRL/RQL preferred specialist suppliers/consultants... should be utilized for the purpose of consistency and cost efficiencies". This seems to mean something like: *use the same suppliers we usually use*. It involves no attention to the concept of preferred suppliers in the Policy, or to the key purchasing principles; Contour was of course unaware of both.

3.7.8 Appendix E comprises a summary of the projects in which Contour was involved and the process of selection and engagement of key contractors for those projects. There is separate and more detailed discussion later in this Chapter of issues relating to this and another Term of Reference in the context of the synthetic track projects. It is clear, leaving aside the detail for present purposes, that:

- Contour did generally seek three or more tenders for the purposes of high-value contracts, but selected the tenderers itself (albeit occasionally with some input from QRL/RQL) and did not conduct open tender processes
- in each such case, no concerns were raised about the process by QRL or RQL (with very limited exceptions),[40] no decision was made by the board expressly to waive compliance with the Purchasing Policy, and Contour's recommendation as to the successful tenderer was accepted.

39 It appears to have occurred only twice: first in a tender process run by Contour, for construction works relating to a function facility at Mackay, where the tender was advertised in *The Courier-Mail* on 22 November 2011; and second in a tender process run by RQL itself for construction works upgrading the course and other facilities at Cairns, where the tender was advertised in *The Cairns Post* on 7 March 2012.

40 See Appendix E, paras 13.25 and 13.31.

Non-infrastructure procurements

3.7.9 The Purchasing Policy applied to all purchasing activities undertaken by QRL and RQL. For the reasons mentioned in the introduction to this Chapter, the Commission has focused its investigations on activities related to infrastructure projects and not the day to day purchasing which of course occurred throughout the relevant period. It is appropriate, however, to make some brief observations in this regard.

3.7.10 Generally, it may be accepted that there were day to day procurement decisions made in compliance with the Policy. For short-term consulting services contracts under $10,000 in value, the Policy permitted a purchasing officer to use a consultant whom the officer was satisfied had "provided a high quality service in the past, has the necessary expertise, and is available in the appropriate timeframe". It seems that the same was intended for the purchase of capital items (such as office machines) for less than $10,000. Compliance in those respects would have posed no challenge.

3.7.11 However, for capital purchases above $10,000, the policy was essentially the same as for consulting services contracts and, as explained above, thereby contained serious difficulties including as to how preferred suppliers were to be identified in the absence of any listing and the circumstances in which board waiver of public tender processes was appropriate. It may safely be assumed that compliance with the Policy would have caused difficulties in these areas for significant capital purchases. It is likely, although unnecessary positively to find, that there were many instances of non-compliance with the Policy even outside the realm of infrastructure projects; the context in which this comment is made will become clearer below.

3.8 Explanations for non-compliance

Summary

3.8.1 Various explanations and justifications for non-compliance in the engagement of Contour and other contractors have been advanced during public hearings and in subsequent written statements. They may be summarised as follows:

- Contour was a preferred supplier with specialist expertise and experience and a track-record of providing high quality and value services to QRL and RQL
- the Purchasing Policy was not mandatory, in that:
  - it was merely an *internal guide* of lesser significance than any mandatory policy under section 81 of the Act[41] and/or
  - its requirements could be, and were, waived and/or altered by the board or the chairman on behalf of the board
- the Policy was inherently flawed, or poorly adapted to its purpose, in that it was:
  - confusing and cumbersome and difficult to apply on every contract, particularly given that QRL and RQL did not have the "staff, resources and skill" to undertake the processes described in it[42]
  - not suitable for the requirements of infrastructure projects undertaken by QRL and RQL, but "was intended more to address purchasing of general items such as stationery and computers..."[43]

41 Statement of Paul Brennan, 1 October 2013, pages 1-2; Statement of Robert Bentley, 21 October 2013, page 22 para 82.
42 Statement of Paul Brennan, 1 October 2013, pages 1-2; Transcript, Robert Bentley, 25 September 2013, pages 11-12.
43 Statement of Robert Bentley, 21 October 2013, page 22 para 82.

- no significant problems with the adequacy of or adherence to the Policy were identified by:
  - Mr Carter, who was the *owner* of the Policy and thereby responsible for ensuring the Policy was updated to suit the activities of QRL and RQL and that it was adhered to, or that the board was told of any problems with the Policy or compliance
  - Deloitte, who conducted the internal audit of Purchasing previously mentioned
- and finally, despite non-compliance with the Policy, value for money was achieved on QRL and RQL's infrastructure projects.

3.8.2 Consideration of each of these explanations assists in determining the adequacy and integrity of procurement policies and processes, and measures to ensure contracts awarded delivered value for money. It also illuminates some matters relevant to Term of Reference 3(b) concerning management issues at QRL and RQL.

Contour as preferred supplier

3.8.3 It is not correct, in the terms of the Purchasing Policy, to say that Contour was a *preferred supplier*.

3.8.4 First, for contracts between $10,000 and $100,000 in value, the Policy always required some form of competitive selection process to be undertaken before using a preferred supplier; either to identify preferred suppliers from whom tenders would then be called for assessment or (for longer-term arrangements) to appoint a panel from whom a selection could be made.

3.8.5 Second, at least from version 1.03 adopted in April 2007, the wording of the Policy clearly contemplated that any preferred suppliers would be on a list created for that purpose. No list was ever created, despite the need for such a list having been identified in Deloitte's audit report of June 2009 noted in section 3.5 above. Although it has been argued that it is a viable alternative to a preferred supplier list to maintain a complete list of vendors utilised by QRL/RQL, that amounts to saying: when a supplier has been used once, they may be used again, without further consideration, on that basis alone.

3.8.6 Third, for contracts over $100,000 in value, which included many of Contour's engagements after the first, the Policy precluded any preferred supplier arrangements and required a public tender process unless that requirement was waived by the board.

3.8.7 The concept of *preferred supplier* appears to have been understood within QRL and RQL as meaning, essentially, a supplier who had provided good service in the past and had the necessary expertise for the work.[44] Under the Policy, however, such a supplier could only be engaged without any competitive process for one-off contracts of less than $10,000 in value. None of Contour's engagements met that description.

3.8.8 Another aspect of the characterisation of Contour as a preferred supplier was its specialist expertise in racecourse design and construction. Mr Brennan recalls that in early 2008 Mr Reid Sanders and Mr Bentley told him that Contour was a "preferred specialist supplier and a tender process for its engagement was not required".[45] Mr Bentley states that "over a period of time, [Contour] had accumulated significant intellectual property in relation to works required on racecourse infrastructure, especially the drainage and other engineering aspects required for the specific type of synthetic track that had been chosen…".[46]

44 See, for example, Transcript, Malcolm Tuttle, 1 October 2013, page 69 lines 10-25.
45 Statement of Paul Brennan, 11 October 2013, page 2.
46 Statement of Robert Bentley, 26 July 2013, page 6 para 25.

3.8.9 Contour's own evidence makes clear that it did not, initially, have any expertise or experience specific to racecourse design and construction. As Mr Thomson states, "Prior to 2007 neither Contour, nor its directors had any direct or indirect involvement in any facet of the thoroughbred racing industry" and when initially engaged "Contour did not promote itself as having expertise in racecourse related consulting".[47] Indeed, as noted in Appendix E, Contour's terms of engagement until at least December 2008 said "we do not profess to understand the detailed requirements of horses or the horseracing/training industries". Mr Thomson explains that in Contour's initial engagements, involving engineering consultancy and project coordination/management, "any medium sized general civil engineering consultancy" should have been able to perform the roles or coordinate sub-consultants to assist in doing so.[48] However

> *...as Contour's experience and expertise grew in line with its involvement in supplying racing related engineering services to [QRL and RQL]... Contour's depth of knowledge, and contemporary experience placed [it] in an exclusive group of engineering firms in Australia, with a reputation for specialized skills relating to the design of thoroughbred racing infrastructure.*[49]

3.8.10 It may readily be accepted that Contour, during the relevant period, acquired significant expertise in various aspects of racecourse design and construction. It may also be accepted that this provided real advantages to QRL and RQL, by comparison with the use of engineers and project managers without such experience, and that eventually there were few if any competitors – at least in Queensland – with comparable expertise. However, two points should be made in this regard.

3.8.11 First, this was a circumstance of QRL and RQL's own creation: they were the principal (or essentially acted as principal)[50] on nearly all the major racecourse infrastructure works which occurred in Queensland throughout the relevant period; they could at any stage have engaged other engineers and/or project managers, to avoid the concentration of expertise in one company, but did not do so. The problem which arose here, as will be further illustrated in relation to the Addendum below, has been recognised elsewhere:

> *In procurement activities of both buyer and vendor, the level of experience or competence of individuals enacting the processes is frequently the reason claimed for inappropriate conduct or processes. It may simply be that the individuals concerned are not exposed to the broad yet important probity implications of their actions. For example, a technical person with a technical preference for a solution will pursue a sole source option, and in doing so may innocently or otherwise flaw the competitiveness of the supply market. Similarly, a supplier, knowing this flaw, will represent their solution as so unique as to warrant it as the sole source. This is not uncommon in building and construction procurement.* [51]

3.8.12 Second, Contour's development of particular expertise in racecourse design and construction cannot sensibly be treated as justification for their engagement to manage all of the diverse infrastructure projects undertaken by QRL and RQL during the relevant period. It is much less apparent that the expertise was sufficiently important where the projects involved less narrowly specialist works, such as the very extensive stable complex at Caloundra, lighting installation projects at Caloundra and Toowoomba (wherein specialist sports lighting consultants were also engaged), and significant non-track works conducted at Mackay including renovations to the grandstand and function facility.

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47 Statement of Brett Thomson, 27 August 2013, pages 2-3 paras 21, 23.
48 Statement of Brett Thomson, 27 August 2013, page 4 para 32.
49 Statement of Brett Thomson, 27 August 2013, page 4, para 33.
50 Sunshine Coast Racing Pty Ltd formally engaged Contour for the purposes of some projects at the Corbould Park track, but must be taken to have done so for the Sunshine Coast Racing Unit Trust in which QRL was the majority unit holder.
51 Box, J & Forde, M, 2007, *Probity and Managing Procurement: How to Avoid Corrupting the Process*, LexisNexis Butterworths, para 1.21.

3.8.13 A further matter related to the role of Contour as *preferred supplier* should be mentioned. A number of witnesses have told the Commission that Contour's continuing engagement without competitive tender was justified on the grounds of confidentiality. In short, there had been previous infrastructure projects scuttled by adverse publicity and opposition from clubs or other stakeholders and so there was a desire to avoid such problems by developing project plans confidentially; Contour could be trusted to assist in that regard.

3.8.14 This raises the question of whether, in terms of the way QRL and RQL operated as control bodies, it was appropriate in any event to be developing proposals to use industry money while keeping the details of such proposals from the industry. For present purposes, assuming there was a requirement for confidentiality, it is difficult to see it as a justification for not subjecting Contour to competitive tender. There is nothing unusual about the inclusion of confidentiality terms in tender processes and, as to providing general consultancy assistance for the purposes of the IIP, no apparent reason why – if it was indeed sensitive enough – tenders could not have been invited without specifying the intended projects' locations.

The Purchasing Policy was not mandatory

3.8.15 As to the suggestion that the Purchasing Policy was non-mandatory, the question of its status under the Racing Act has been discussed in section 3.4 above. Various versions of the Policy were put formally to the board for approval. It may be that it was only a guide, but it was created because it was thought desirable for good management. If it was to assist in this regard, and in providing transparency, the default position must have been that it would be followed. Tellingly, there has been no suggestion that the delegation limits for payment authorisations, also included in the Policy, were intended to be applied flexibly; indeed, the contrary seems to be assumed.[52]

3.8.16 Further, the language of the Policy was generally mandatory – for example: "...a public tender process **is required**...", "...tenders **are to be** evaluated...", "...contracts over $100,000 **are not to be** entered into under these preferred supplier arrangements [but]... an open tender process... **must** be followed" (emphases added). Employment contracts recorded that each employee's obligations included to "Observe and comply with all policies, procedures, and operational manuals...". The Codes of Conduct of QRL and RQL, similarly, required all officials to comply with all policies. The QRL Financial Management Practice Manual "outline[d] the standards and procedures Queensland Racing use[d] to manage its finances" and contained a number of references out to the Purchasing Policy, including in respect of delegation limits and the existence of procedures to "ensure... competitive procurement arrangements are in place".

3.8.17 The directors of QRL and RQL who have addressed this issue have stated, in effect, that they relied upon the existence of the Policy and assumed it would be brought to their attention if it was not being followed by management.[53] That, presumably, is the point of such a policy: the board establishes the procedures for management to follow and would not then, usually, be involved in any day to day capacity in the application of those procedures unless some difficulty was specifically brought to its attention. Mr Tuttle confirmed before the Commission that this was the fundamental idea of the Purchasing Policy.[54] Mr Lambert has also stated in this regard:

52 See for example: Statement of Paul Brennan, 26 July 2013, page 5 para 6, 11 September 2013, page 4 para 15; Statement of Adam Carter, 2 August 2013, pages 16-17 paras 38-44, page 18 para 50, page 19 para 53; Statement of Malcolm Tuttle, 10 September 2013, page 3 para 15.

53 See for example: Statement of William Andrews, 21 October 2013, page 5 paras 38-39; Statement of Robert Bentley, 26 July 2013, page 11 para 38; Statement of Anthony Hanmer, 29 July 2013, page 3 paras 7-9, 18 October 2013, page 4 para 6; Statement of Robert Lette, 30 July 2013, page 4 para 1.10(a); Submission of Robert Lette, 28 October 2013, page 4 paras 7-9; Statement of Wayne Milner, 19 October 2013, page 3 para 5(f)-(g); Submission of Bradley Ryan, 28 October 2013, pages 4-5 paras 10-14.

54 Transcript, Malcolm Tuttle, 1 October 2013, page 66 lines 10-15.

I have been on the boards of seven organizations and in all cases there was a clear separation between policy and implementation, with the board setting the policy and management being responsible for implementation. That is in fact the universal model in corporate Australia. [55]

3.8.18 This last observation leads conveniently into the next aspect of the proposition that the Policy was not mandatory: that it could be waived and/or altered by the board or the chairman. The first version of the Policy adopted by the QRL board, on 13 April 2007, introduced the possibility of board waiver of the requirement for a public tender process for contracts over $100,000 in value. It did not apply for contracts of lesser value. Nothing was said in the Policy about how such waiver is to be sought, or obtained, and no guidance was provided as to when it might be considered appropriate for the board to grant it.

3.8.19 There are numerous examples, over the relevant period, of the board approving the engagement of a specific contractor, or the engagement of one of several contractors with the precise selection left to management, where there had not been compliance with the Purchasing Policy.[56] In the majority of those instances, the contract value meant that the board had to approve the purchase because of the delegation levels set by the Policy. It seems very likely that those approvals were sought, and provided, for *this* reason and not for the purpose of waiving the need for public tender.

3.8.20 The Commission has not identified a single instance of a board approval where the board minutes record any consideration being given to the existence of the Policy, let alone its terms, or whether compliance with it should be waived. As Mr Bentley accepted in his evidence before the Commission, if there was a board waiver of compliance then there should have been a reason for the waiver recorded in the board minutes.[57] This must be correct: the position described in the Policy was that its express requirements would apply unless the board waived compliance. It could hardly be good management, or likely to achieve accountability, for any such waiver to occur informally, without express record, and without any reference to the default position in the Policy.

3.8.21 Such an approach would, in practical terms, remove procurement decisions from the responsibility of management and put them primarily in the hands of the board. That may be the effect of what occurred, in light of the evidence provided to the Commission during and since the public hearings as set out previously: Mr Tuttle and Mr Brennan certainly saw Mr Bentley as having, and exercising, independent management control over procurement decisions without regard to the requirements of the Policy.[58] Whatever the extent to which that control was exercised, such a perception amongst management personnel was unlikely to foster a culture of adherence to the Policy.

3.8.22 More generally, any exception to a defined process for procurement creates an obvious risk to the ability of the process to achieve its objectives of value for money and accountability or transparency. Such exceptions are recognised as a grey area which create vulnerability "to mismanagement and potentially corruption because of limited competition".[59] Although there is nothing in the material before the Commission to support a finding of any corruption having

55 Statement of Michael Lambert, 19 October 2013, page 3.
56 To take two related examples: the engagements of Contour to project manage the installation of the Caloundra lights, and of Neil T Fallon Services Pty Ltd to undertake the light installation works, approved by the board at its meetings of 9 May and 6 June 2008.
57 Transcript, Robert Bentley, 25 September 2013, page 19 lines 25-32.
58 For example, Mr Tuttle was asked during the public hearings: "So whatever the Policy said, the practice was that if the Chair or the Board said 'do this', 'engage Contour', then it didn't matter what the Policy said?". He answered: "We took it that they waive the provision to go out to competitive tender or to tender, yes." See Transcript, Malcolm Tuttle, 1 October 2013, page 64 lines 7-9.
59 OEDC 2007, *Integrity in Public Procurement: Good Practice from A to Z*, OECD Publishing, 27 April, pages 10-12.

occurred, it seems clear that a culture permitting waiver by the board (or an individual board member, who may or may not seek subsequent board approval), for reasons and by a procedure which are not defined, creates precisely this vulnerability.

The Policy was inherently flawed or poorly adapted to QRL/RQL's activities

3.8.23 It may readily be accepted that the Purchasing Policy fit the above description: it was confusing, cumbersome and would have been difficult to apply, in accordance with its terms, to procurements over $10,000 in value. It was, for example, very difficult to determine the circumstances in which it was intended that preferred suppliers would be used and how they would be identified when there was no available listing of such suppliers.

3.8.24 The Policy appears not to have been understood, even by those applying it on a regular basis. Mr Bentley's initial account to the Commission, noted in section 3.6 above, suggests a belief that it had no application to the engagement of "professional consultants such as lawyers, accountants and the like". This understanding is directly contrary to the wording of the Policy introducing the *Consulting Services* section and the procurement processes there set out:

> *[QRL] uses consulting services in a number of aspects of its operations including legal, information technology, human resource management, financial management, business development, and marketing.*

3.8.25 No one seems ever to have understood the meaning of *preferred suppliers*, including how they were to be selected and the relevance of the intended listing: the understanding was that a preferred supplier was, essentially, any person or company considered, by whoever was selecting a supplier, to have previously provided good service.

3.8.26 Even once attention had started to be paid to compliance from mid-2011 (as explained in more detail under the heading *Addendum*), Mr Snowdon, who apparently had some responsibility for supervising Contour's tendering processes,[60] said in an email to Contour that there would be detailed scrutiny by Treasury and others of every approval process and:

> *This is why the below email... asking for approval for [the appointment of a particular contractor recommended by Contour for work over $10,000 in value] without providing at least 2 quotes is simply not acceptable and I have had to address this several times already.*
>
> *We require a minimum of 2 quotes for any work and a minimum of 1 of the quotes being a local provider where possible. The quotes need to be presented to RQL for consideration with a recommendation...*[61]

3.8.27 Of course, for appointment of contractors for work between $10,000 and $100,000 in value, the Purchasing Policy required tenders to be called from at least *three* preferred contractors selected and evaluated taking into account the key purchasing principles. These matters appear not to have been considered, let alone incorporated in the procurement processes undertaken.

3.8.28 As to QRL not being equipped to undertake the processes described in the Policy, Mr Brennan states that the processes outlined in the Procurement Policy "would require staff, resources and skill that QRL/RQL did not possess internally" so that Contour was engaged to undertake tenders on their behalf.[62] There are various other statements to the same effect. The most obvious difficulty with this explanation is that Contour could at least have been asked to comply

60 Statement of Paul Brennan, 11 October 2013, page 5; Letter from Mark Snowdon to the Commission, 30 October 2013 (response to notified potential adverse findings).
61 Email from Mark Snowdon to Brett Thomson cc: Kate Broadbent, Chris Fulcher, Paul Brennan, Malcolm Tuttle and Warren Williams, 30 September 2011..
62 Statement of Paul Brennan, 11 October 2013, pages 3-4.

with the Purchasing Policy on QRL/RQL's behalf, in consultation with QRL/RQL as to matters such as who were preferred suppliers, but this did not occur. Alternatively, of course, QRL/RQL could have engaged the necessary additional staff to perform the role internally without any, or such extensive, reliance on Contour. Ignoring the Policy, for infrastructure projects, was not an adequate solution.

3.8.29 Mr Snowdon was engaged as a consultant to QRL/RQL from February or March 2010 to June 2011, then was employed by RQL as Project Director of the IIP from July 2011 for the remainder of the relevant period. As noted previously, Mr Brennan's initial statement to the Commission included that there was no one in-house with specialist contract management/ project management experience prior to Mr Snowdon's engagement. Mr Brennan subsequently stated that Mr Snowdon "would oversee the tender process undertaken by Contour, and assist in the selection of the most appropriate consultant/contractor". There is no suggestion in any of the material before the Commission, however, that Mr Snowdon was expected to apply or have Contour apply the Procurement Policy. His own account suggests otherwise and, perhaps consistently with the email quoted above, that he did not know of the existence or at least the contents of the Policy until he was formally employed in mid-2011

> *...during 2010... after reviewing the structure used by RQL on previous projects I advised RQL that the structure of utilising [Contour] for both engineering and project management was not an acceptable arms length management tool for the [IIP projects then undergoing feasibility analysis and planning]. I proposed from an early date that the project management duties be managed in house by RQL for better control of the projects. Whilst the advice was listened to it was not taken on board by management at that time.*
>
> *...*
>
> *In mid 2011... I was engaged as an employee and took on the responsibility of the overall management of the [Mackay IIP] project. As RQL had no systems in place with internal project management [Contour] was engaged in this role against my preference, however I was instructed by management to proceed on that basis.*
>
> *[Contour] was involved with the tendering of contractors for the project under my supervision and I was satisfied that a thorough tender process was undertaken to provide RQL with the best money for value [sic].*
>
> *It was during this time I was made aware by the CFO (Adam Carter) and the Office of Racing that a Purchasing Policy (PP) was to be put in place for the engagement of consultants and contractors....*[63]

3.8.30 Finally on this topic, it may be accepted that the Policy was not properly adapted to use for complex infrastructure projects of the kind in which QRL and RQL engaged during the relevant period. This may reflect that the function of QRL and RQL as control bodies under the Racing Act did not obviously include their undertaking significant construction projects: their function was to manage their codes of racing (section 33) and they were empowered to "make decisions about, and, on conditions [they] consider[ed] appropriate, allocate funding for, venue development and other infrastructure relevant to the code" (section 34(g)). This would appear more consistent with the section of the Purchasing Policy entitled *Capital Works Projects*, which envisages a club-driven approach whereby project budgets and designs would be approved, rather than instigated, by the control body.

63 Letter from Mark Snowdon to the Commission, 30 October 2013.

3.8.31 Allocation of funding on conditions, as contemplated by the Act, may be thought to fall short of a control body itself actually undertaking major works, using government or other essentially public funds, including selecting contractors and managing their work. One might query why, if the legislature intended control bodies to undertake major infrastructure works using public funds, the Act would not have (as it does now) designated them to be statutory bodies and thereby, at least, bound to comply with the State Procurement Policy or prescribed that they must have a policy about procurement under section 81.

3.8.32 As will be discussed, an attempt was purportedly made to adapt the Purchasing Policy for use on infrastructure projects in mid to late 2011 in the development of the Addendum for the purposes of the IIP. The solicitors for Mr Bentley, Mr Tuttle, Mr Brennan and others have said in this regard: "When considering the purchasing policy, its applicability and suitability, it must be borne in mind that until the conception of the [IIP], and thereafter its compilation and implementation, infrastructure projects was not part of the operations of QRL". That is not correct. From the start of 2007 on the synthetic track projects, and throughout the relevant period, infrastructure works were a major and important part of QRL/RQL's activities.

3.8.33 In short, none of the factual premises advanced as to the unsuitability of the Policy provide an adequate justification for QRL and RQL operating, for the entire relevant period, with an inadequate Purchasing Policy. The position seems to be that the Policy was not ever properly considered, and no new and more appropriate version was ever created, largely because there was no attempt to apply it on infrastructure projects in accordance with its terms; doing so may well have drawn attention to its inadequacies.

Problems were never identified

3.8.34 A number of statements are before the Commission to the effect that Mr Carter as chief financial officer and Deloitte as internal auditors did not identify any, or any serious, non-compliance with the Purchasing Policy.

3.8.35 Mr Brennan, for example, emphasises the *Action Sheets* from RQL board meetings previously mentioned, which from mid-2010 onwards identified Mr Carter as having the role of drafting a new policy "for expenditures and projects" and putting a preferred suppliers list in place for this purpose. He says that Mr Carter was requested to draft an appropriate purchasing policy for infrastructure projects but did not do so until the end of 2011.[64] Further, Mr Carter was the *policy owner* and never advised Mr Brennan that it was not being applied appropriately or that there was any issue with the implementation/compliance with the Policy.[65]

3.8.36 Mr Tuttle, similarly, says that the question of compliance with the Purchasing Policy should be taken up with Mr Carter "as it was his area of responsibility"[66] but he did not raise any concerns with Mr Tuttle or the board regarding the effectiveness of or compliance with the Policy. He also emphasises Mr Carter's failure to address the preferred suppliers issue.

3.8.37 Mr Bentley states:

> *The [Purchasing Policy] and its application to the business of QRL/RQL were the responsibility and function of the finance manager, Adam Carter. As a Board member I had directed that the [Policy] was updated by Mr Carter to reflect the understanding of how procurement for infrastructure projects undertaken by QRL/RQL would work. I now know that this has not been done.* [67]

64 Statement of Paul Brennan, 11 September 2013, pages 2-3 paras 8, 12.
65 Statement of Paul Brennan, 11 September 2013, page 2.
66 Statement of Malcolm Tuttle, 23 October 2013, pages 19-20 paras 39, 41-42.
67 Statement of Robert Bentley, 21 October 2013, page 23 para 86.

3.8.38 Mr Hanmer states:

> *There was a policy for purchasing, acquisition and procurement which was under the responsibility of the chief financial officer, Adam Carter. Adam would report to the Audit Committee of which I was a member. Deloittes were also engaged as internal auditor to monitor compliance with company policies. Deloittes would agree with Adam Carter on a range of internal audit subjects, they would report in a written form with a critique of any issues arising, as well as report compliance via a series of colours similar to a traffic light system, indicated the seriousness or otherwise. ... In the period under review, I cannot now recall any instances of non-compliance. ...*
>
> *...*
>
> *I cannot recall any report ever coming to the audit committee from Adam Carter or Deloittes suggesting there was non-compliance in relation to contractual arrangements involving Contour.* [68]

3.8.39 None of these accounts provides a sufficient justification for non-compliance with the Purchasing Policy, and for it not being amended to provide a coherent explanation of the procurement methodology to be followed, throughout the relevant period.

3.8.40 First, there is an inconsistency between saying: on the one hand, that the Policy was not mandatory and could be waived informally by the board or chairman, and that the chairman directed procurements other than in compliance with the Policy; and, on the other hand, complaining that Mr Carter and Deloitte should have raised concerns about non-compliance with the Policy. One might ask: to what end? The accepted position of those who were involved in dealing with Contour, and engaging other contractors on infrastructure projects, was that the Purchasing Policy did not really have to be followed. There was unlikely to be any practical benefit in Mr Carter pointing out that it was not being followed.

3.8.41 Second, although Mr Carter was nominally responsible for the Purchasing Policy and was allocated the task of preparing a preferred suppliers list after the Deloitte report of June 2009, it makes little sense to attribute particular (or higher) responsibility to him. He states that he was not involved in any of the contract negotiations with Contour in relation to infrastructure projects,[69] and there is no suggestion elsewhere that he was involved in such negotiations or in the process of engaging the contractors recommended by Contour. The role of his Finance Department was described in the Purchasing Policy in a way which did not suggest sole responsibility for the procurement processes themselves. The Policy provided, in particular, "While the Department will work to ensure operational areas within the organisation are meeting their obligations under the purchasing guidelines, senior managers also have a role to play in monitoring the purchasing activities of their staff".

3.8.42 Perhaps unsurprisingly for an accountant and financial manager/chief financial officer, Mr Carter's attention appears to have been directed more to matters of process involved in the authorisation of purchase orders and payments for works undertaken by QRL and RQL. He states:

> *As part of the ongoing review of QRL procurement and purchasing policies, in late 2008/ early 2009 I recommended to the [Audit Committee] that a new system be implemented for the purposes of raising online purchase orders with appropriate delegations. The system I recommended was an 'Internet-Based Purchase Order System' (IPOS) which was integrated*

68 Statement of Anthony Hanmer, 29 July 2013, page 3 paras 7, 9.
69 Statement of Adam Carter, 2 August 2013, page 21 para 60.

with the existing 'Sun' accounting system. Part of the reason for recommending this system was to ensure that purchase orders were raised prior to goods being ordered and to allow the automatic authorisation of purchasing with appropriate delegation.

...

However [after the Deloitte report of June 2009 which in part reviewed the use of IPOS], ultimately the full implementation of IPOS was resisted by operational management and put on hold pending the upcoming amalgamation of the three codes.

...

An IPOS system was introduced in January to March 2012, to ensure that there was strict compliance with the RQL Purchasing Policy. The IPOS system was only fully implemented after the executives of RQL resigned on 26 March 2012. [70]

3.8.43 None of the statements of those who meet the description of *operational management* have suggested that Mr Carter's account of the resistance to the use of IPOS is incorrect, except Mr Tuttle; this issue will be further considered in section 3.10. For present purposes, Mr Carter's account seems to be consistent with the general picture of a desire for flexibility in procurement and related processes, and a lack of compliance with the Purchasing Policy in the context of infrastructure projects or even any real attention to its terms. It provides a further reason why no particular individual responsibility can fairly be attributed to Mr Carter for the non-compliance.

3.8.44 However, it should be noted that the relevance of IPOS to the question of compliance with the procurement methodology aspects of the Purchasing Policy is rather limited. A review of the *IPOS System Design* document provided to the Commission by Mr Carter,[71] and of version 1.04 of the Purchasing Policy which introduced the use of IPOS, indicates that it addressed matters of accounting mechanics and not anything of substance relevant to procurement methodology. There is nothing in any of the material to support the idea that it would "ensure that there was strict compliance with" the Purchasing Policy, at least in respect of procurement processes. Mr Carter described it more accurately as follows:

The IPOS required that purchase orders be raised with appropriate delegation, and when invoices were raised they were required to be matched against the appropriate purchase order. A failure to raise a purchase order meant that the invoice could not be processed. [72]

3.8.45 Third, the limitations on the role of Deloitte in this context should be understood. A preferred suppliers listing was never established by QRL or RQL, despite the specific recommendation in Deloitte's June 2009 report, designated "important", that this be done. It is, therefore, somewhat difficult to accept the suggestion that, if Deloitte had identified other problems with the content of or adherence to the Procurement Policy, those matters would have been addressed.

3.8.46 Deloitte's June 2009 report included this conclusion:

Based on our review, which is not an audit, except for the matters noted in Section 2 of this report [including the section on preferred suppliers, some recommendations about the use of IPOS and a finding of non-compliance with policy in relation to IT procurement], nothing has come to our attention to indicate that, in all material respects, internal controls over purchasing are not appropriately designed, and have not operated effectively over the 2008-09 financial year period to date in accordance with the objectives stated in the signed Terms of Reference.

70 Statement of Adam Carter, 2 August 2013, page 7 para 17-19, page 19 para 52.
71 Statement of Adam Carter, 2 August 2013, page 17 para 43-44, exhibit ABC-78.
72 Statement of Adam Carter, 2 August 2013, page 17 para 44.

3.8.47 The terms of reference mentioned are appended to Deloitte's report. They indicate that the purpose and scope was a *strategic review* of matters including purchasing process and policy; the engagement objectives were "Selected controls around purchasing were evaluated taking into consideration whether the controls are adequately designed, communicated, and operational, where appropriate"; the methodology included review of compliance with QRL purchasing policy and procedures. However, it is plain that Deloitte was not purporting to review all procurements; they did not conduct an audit. There is no consideration of the overall coherence or adequacy of the Purchasing Policy. There is no mention of infrastructure projects, or of Contour. The report could not reasonably have been taken as an indication that the Purchasing Policy was generally adequate for infrastructure projects or generally complied with. This was because, at least, the relevant people within QRL knew that it was not being applied by QRL or by Contour.

3.8.48 Deloitte did not have any general role of assessing compliance with the Purchasing Policy, or undertaking any other review: the subject matter and scope of its reviews was set, for each year, by the Audit Committee. Only one review of purchasing, with any attention to compliance with the Policy, was undertaken during the relevant period; that was the review which resulted in the June 2009 Deloitte report. The minutes of the Audit Committee noted the issues it raised concerning the need for a preferred supplier list "based on competiveness", and for implementation of IPOS, but the report was apparently never discussed again by the committee or at board level. As already mentioned, there never was any preferred supplier list created and IPOS was only fully implemented after 26 March 2012.

3.8.49 Fourth, one of the *Key Controls* in the Policy was that QRL "should perform an annual supplier analysis to review expenditure to determine that value for money is being achieved". Nothing in any of the statements or documents provided to the Commission suggests that such an analysis ever occurred. Nothing was produced in response to a request to QACRIB for documents evidencing any such analysis relating to any of the infrastructure projects in which Contour was involved. The Commission is satisfied that no annual supplier analysis, as contemplated by the Policy, was ever done during the relevant period.

3.8.50 The Audit Committee's Charter throughout the relevant period provided, amongst other things, that it shall: review the internal controls, policies, procedures and compliance systems established by management; assess the adequacy of internal control systems for key financial processes and ensure that all employees have an understanding of their roles and responsibilities; review any audit reports to the Committee for significant matters arising from audits and management action taken or planned in response to such matters; review the effectiveness of any systems for monitoring compliance with internal policies and procedures as required from time to time; and ensure that management responds to recommendations by the internal and external auditors. In light of the matters set out above, it cannot be said that the Audit Committee of either QRL or RQL met its responsibilities under the Charter.

Value for money was achieved

3.8.51 Mr Bentley states his belief that the continuing use of Contour, despite it not being subject to the application of the Purchasing Policy or any competitive selection process after their initial engagement (to provide engineering services) in 2007

> *... still gave us value for money because Contour had previously been selected from a tender process and nothing came to my attention to suggest that they materially increased their rates of charge at any time such as to raise any suggestion that they were ripping us off. I note that nothing has come to light in this Inquiry to suggest that Contour was overcharging for their work.* [73]

73 Statement of Robert Bentley, 21 October 2013, page 26 para 95.

3.8.52 It has also been asserted that some positive steps were taken by QRL/RQL to determine that Contour's fees were appropriate, and/or more generally that value for money was achieved on infrastructure projects, by the engagement from February or March 2010 of Mr Snowdon, given his "expert knowledge" of matters including market rates for services being provided;[74] and the use of a quantity surveyor in relation to the stables project at Caloundra.[75]

3.8.53 Mr Snowdon states that he "constantly" voiced concerns about non-compliance with the Purchasing Policy in the engagements of Contour (after mid-2011).[76] Mr Tuttle denies that such concerns were expressed.[77] Whether they were expressed or not, Mr Snowdon's own account suggests that his expert knowledge did not lead him to believe that no competitive selection process was necessary for Contour. The limitations on his involvement before mid-2011 have been addressed previously. It is unlikely that his engagement was a significant enough contribution towards achieving value for money to provide any justification for non-compliance with the Purchasing Policy.

3.8.54 The documents provided to the Commission reveal that the involvement of a quantity surveyor in the Caloundra stables project, during the course of the project, was not an initiative of QRL but a requirement of the bank which was financing the work by a loan to QRL. The quantity surveyor was required to certify progress payments as the work progressed and provide assessments of fees against the project budget and the value of the work undertaken. There is nothing to indicate that the quantity surveyor assessed Contour's own rates or whether its services provided value for money. Even if there were such an assessment, that alone could not provide sufficient assurance that value for money was achieved (or being achieved) in respect of Contour's fees, or project costs overall, on any other project.

3.8.55 It is self-evident that there are risks for any organisation in becoming too reliant on one supplier for any service including, relevantly for present purposes, the service of selecting contractors for infrastructure projects. The lack of competitive testing of the services offered and costs of the primary supplier, and the lack of detailed involvement in the process of selecting other suppliers, must create at least the possibility of inefficiencies and above-market charges for the services provided.

3.8.56 Contour's own rates and services were never competitively tested after their initial engagement. It is therefore impossible now to say whether, if they had been, a better-value service could have been obtained from another supplier.

3.8.57 As to the contractors recommended by Contour for selection by QRL/RQL, Contour conducted some form of competitive tender process for the selection of those to undertake the more substantial work on each project. In each case, although sometimes minimal and sometimes more detailed, some form of selection analysis was provided to support the recommendation.

3.8.58 One example of the more minimal process involved the engagement of a specified turf supplier for the upgrade of the Rockhampton track. At 5.32pm on 16 June 2009, an employee of Contour emailed Mr Brennan recommending the engagement, at an estimated cost of about $380,000. The half-page email attached a "simplified tender analysis", really just comparing costs of supply from two shortlisted tenderers at different farm locations. It included generalist subjective assessments supporting Contour's recommendation, such as that the supplier's "infrastructure, professionalism and quality of growing mediums [were] all considered superior". At 7.46am on 17 June 2009 – the next morning – Mr Brennan replied accepting Contour's recommendation.

74 Statement of Paul Brennan, 11 October 2013, page 12; Transcript, Malcolm Tuttle, 1 October 2013, page 62 lines 5-25.
75 Transcript, Malcolm Tuttle, 1 October 2013, page 62 lines 14-21; Statement of Paul Brennan, 11 October 2013, page 2.
76 Statement of Mark Snowdon, 31 July 2013, page 3 para 8.
77 Statement of Malcolm Tuttle, 10 September 2013, page 11 para 25.

3.8.59 In other instances, Contour's recommendation included much detail and a complex tender evaluation matrix, with weightings for different criteria and scores allocated against each for each tenderer. An example, again from the Rockhampton track upgrade, concerned the engagement of a civil construction contractor for works of approximately $4 million in value. On Friday 20 March 2009, Contour provided a detailed tender analysis matrix, in spreadsheet form, supporting its recommendation.[78] The supporting materials comprised some 23 pages, including a detailed bill of quantities analysis and a weighted scoring matrix which, in summary, led to the tenderer offering the lowest price achieving narrowly the highest score despite a lower score on non-price, and subjective, elements such as "track record/experience". By email on Monday 23 March 2009, Mr Brennan replied accepting Contour's advice to appoint the recommended contractor.[79]

3.8.60 Neither of these examples, or any other of the many tendering processes which the Commission has examined, supports a conclusion that Contour's recommendations were not commercially rational. Nevertheless, in both instances it is clear that subjective elements played a significant role in the selection of competing tenderers and in the recommended outcome and that Contour *could*, either deliberately or subconsciously, have skewed the assessment process to deliver a particular result. It would have been very difficult for QRL/RQL at the time, and is impossible now, to assess whether the recommendation was based on an independent assessment in QRL/RQL's interests or, at least partly, on other factors such as the personal preferences or relationships of employees of Contour with any tenderer.

3.8.61 Mr Bentley is correct to say, as quoted at section 3.8.51 above, that nothing has come to light in this Inquiry to suggest that Contour was overcharging or that it was "ripping [QRL/RQL] off". It may well be that, in fact, value for money was achieved on every infrastructure project in which Contour was involved. However, the tender selection processes used were those of Contour, who was never asked to, and did not, undertake them in compliance with the Purchasing Policy. The point of such a policy must be to establish mechanisms to achieve value for money, usually by competitive means, with transparency and accountability. In the absence of compliance with the Policy, it cannot now be concluded, with any confidence, that value for money was achieved.

3.8.62 Another related issue should be briefly addressed in this context: contract management. As will be apparent, it was essentially outsourced to Contour during the relevant period with limited exceptions. The material before the Commission makes it impossible to draw any firm conclusions, retrospectively, about whether, overall, the contract management processes utilised were adequate. The Commission consulted with an independent quantity surveyor in this regard, whose initial confidential inquiries and consideration of documents from two project files did not support the expenditure of further time and money attempting to conduct any formal audit of the processes actually followed and their results. There is no basis to believe that the project management processes which were followed involved any corruption or other nefarious conduct. However, in the absence of compliance with the Purchasing Policy, including as to undertaking regular audits, it is also impracticable now to assess whether the contract management processes employed were such as to maximise value for money.

3.9 Addendum to the Purchasing Policy

3.9.1 An Addendum to the Purchasing Policy was developed primarily by Mr Ronald Mathofer, RQL senior business analyst, in the lead-up to 25 November 2011, the date of version 1.01. It was evidently intended to replace the existing Purchasing Policy for use on all IIP projects. The background will be discussed further. The Addendum was approved by the board on 19 December 2011 (version 1.02).

78 Letter from Tim Freeman to QRL, 20 March 2009.
79 Email from Paul Brennan to Contour, 23 March 2009.

3.9.2 It is convenient first to consider the provisions of the Addendum, by comparison with the Purchasing Policy proper, and then the way in which the Addendum came to be developed.

Terms of the Addendum

3.9.3 The Addendum replicated the existing terms of the Purchasing Policy about consulting services, as set out in section 3.5 above. It adopted the same key principles, only changing "accountability of outcomes" to "probity and accountability of outcomes". The starting point was thus that it had the same effect as the Policy itself for the engagements of Contour and other contractors on infrastructure projects.

3.9.4 The substantive differences between the Purchasing Policy and the Addendum were, in summary:

- under the heading *Industry Infrastructure Plan*, which otherwise replicates that section in the Purchasing Policy (essentially only dealing with payment processing matters), a new preamble is added:

  [RQL's IIP] procurement policy must adhere to the strictest guidelines of Probity, Accountability and Transparency as the funds for these projects come directly from the QLD Government and as such [our] expenditure of these funds is expected to stand up to rigorous scrutiny

- it is stated, under the heading *Preferred Suppliers Listing*, that such listings for IIP projects

  ...are to be developed by inviting suppliers with experience and expertise in the key areas that make up the projects identified in the [IIP] to tender for projects thereby forming supplier panels.

  These supplier panels could be further refined by way of prequalifying of suppliers lists

- there are three entirely new sections:
  - *Prequalification of Suppliers*, which is "where suppliers of particular goods or services are assessed against pre-determined criteria and then only those suppliers who satisfy the prequalification criteria are invited to tender for projects" followed by an evaluation of tenders/offers before contract award
  - *Outsourcing of Supplier Panel Selection,* which contemplates the use of organisations specialising in procurement processes as an alternative to in-house procurement and cites "Local Buy" as such an organisation which effectively pre-screens suppliers "for compliance with government procurement suitability"
  - *Applications for Sole Supplier*, which is addressed separately below.

3.9.5 The *Applications for Sole Supplier* section provides

In some special circumstances the normal practices as outlined above may need to be set aside. For these instances an exemption from normal policy practice may be applied for.

Reasons for such Exemptions include but are not confined to:

(a) Accessing existing standing offer and/or preferred supplier arrangements

(b) Pursuing subsequent stages of multi-staged procurement processes

(c) A sole supply situation exists whereby a high degree of technical expertise is required

(d) A genuine urgency exists. If this is the case there must at all times be adequate supporting documentation to prove urgency is genuine and not the result of inadequate planning

Unless the above stated exemption criteria is met, or other compelling reason is able to be supported, the current RQL Purchasing Policy with addendum will apply to the procurement of goods and services.

3.9.6 As with the Purchasing Policy itself, the Addendum is difficult to understand and would be difficult to apply in accordance with its terms. For example:

- the *Preferred Suppliers Listing* section refers to inviting experienced suppliers "to tender for projects thereby forming supplier panels", with the word *tender* presumably contemplating some sort of competitive process, but it is not clear whether:
  - the "supplier panels" concept is really the same as that of the "preferred suppliers listing", as perhaps suggested by the reference to refining panels "by prequalifying of suppliers lists", or somehow different
  - there would be a pre-existing list of *preferred suppliers* who would then have to tender to get on a "supplier panel" for a particular project or type of project for which they could then be selected without further competition or whether, instead, some further competitive process is intended even between those already on a panel
- the *Sole Supplier* section:
  - contemplates a "special circumstances" situation where "an exemption from normal policy practice" may be applied for, with no indication of how or to whom such application is to be made
  - refers to setting aside "the normal practices outlined above", which normal practices permit the use of preferred suppliers, for reasons which include "accessing existing standing offer and/or preferred supplier arrangements" – it is not clear what this could be intended to mean
  - does not make clear what is meant by "pursuing subsequent stages of multi-staged procurement processes" and whether, for example, this contemplates the continued use of one existing supplier for subsequent stages or the engagement of a new supplier at any stage during an existing process
  - provides no definition of "sole supply situation" and whether, for example, this means that there is only one supplier presently engaged (who has the necessary expertise) or there is only one potential supplier in the market with the necessary expertise
  - contains the very broad notion of justifying an exemption from normal practice for some "other compelling reason".

3.9.7 Mr Mathofer, who drafted the Addendum, has stated to the Commission in relation to the Sole Supplier section of the Addendum:

> *I can see that each of the reasons for exemption listed as (a) to (d) applied, or arguably applied, to Contour at the time I was drafting the Addendum, in that:*
>
> *(a) Contour was a preferred supplier, in the sense... of being a supplier previously successfully utilised to RQL's satisfaction;*
>
> *(b) Contour was already part of the multi-stage procurement process involved in the IIP and intended projects under the IIP;*
>
> *(c) Contour was considered to have a high degree of technical expertise relevant to developing race tracks, where there are not many suppliers or consultants who have that expertise, and had essentially been operating as a sole supplier in providing project management/consultancy services and engineering services on the IIP projects; and*
>
> *(d) at least in respect of the Mackay project, I understood that there was a genuine urgency because of the state of disrepair of the Mackay track and associated facilities.*

The sole supplier section of the Addendum did apply to Contour to an extent, because it was obviously a known quantity at the time in that it had provided good services to RQL previously.... I can see that Contour could have been treated as the sole supplier pursuant to this part of the Addendum, but I do not know whether this in fact occurred... I did not draft this or any other part of the Addendum with the specific intent of application to Contour. [80]

Development of the Addendum

Background

3.9.8 The development of the revised IIP, and its approval on 7 July 2011, is explained in Chapter 9 of this Report. It was immediately apparent, from this time, that a new and more stringent approach to procurement was expected in relation to projects under the IIP. For example:

- on 14 July 2011, Mr Tuttle sent an email to Messrs Tuttle, Brennan, Carter, Snowdon and Ms Shara Reid, proposing the establishment of an Industry Infrastructure Plan Control Group (IIPCG) and saying that, under the IIP, "compliance is to be a strong suite [sic]"[81]
- the IIPCG - comprising the abovementioned people - met approximately monthly commencing on 21 July 2011, with responsibilities under its Charter including overviewing the contract tender process and approving tenderers on IIP projects
- an email from Mr Tuttle on 21 September 2011 to Mr Bentley and IIPCG members noted recent discussions about "risk and accountability regarding appointment of suppliers and the awarding of contracts in relation to the delivery of the IIP"[82]
- an email from Mr Snowdon to Mr Thomson of Contour on 30 September 2011, referred to previously, said that once business cases for IIP projects were approved "we will be subject to detailed scrutiny by Treasury, our auditors and the RQL audit committee who will examine every transaction and approval process".[83]

3.9.9 It was also well understood within QRL/RQL that there generally had not been compliance with the Procurement Policy prior to July 2011, including in respect of the engagement of Contour. Further, as has been discussed above, there is no doubt that RQL was heavily reliant on Contour and considered it unavoidable that Contour would play a central role in and around the development of business cases to secure government funding for projects under the IIP. As will become apparent, RQL faced a challenge from mid-2011 in seeking to strengthen procurement practices while also maintaining the involvement of Contour without subjecting it to competitive processes.

3.9.10 Mr Thomson of Contour has explained Contour's involvement, from as early as 2009, in site assessments of the facilities at Mackay and Beaudesert for upgrades, then a more general assessment of facilities at other tracks as part of RQL's development of a strategic asset management plan that was the genesis of the IIP. Contour's extensive involvement in the IIP, including master planning and engineering design work, grew out of its previous involvement.[84] That scoping work was already well underway by July 2011, and continuing. The following extracts from Contour's 3 August 2011 letter to RQL, attaching a proposed contract for its provision of consultancy services on the IIP, illustrate Contour's position:

80 Statement of Ronald Mathofer, 5 September 2013, paras 13-14.
81 Email from Malcolm Tuttle to Paul Brennan, Adam Carter, Shara Murray, Mark Snowdon cc: Robert Bentley, 14 July 2011.
82 Email from Malcolm Tuttle to Mark Snowdon cc: Robert Bentley and Adam Carter, 21 September 2011.
83 Email from Mark Snowdon to Brett Thomson cc: Kate Broadbent, Chris Fulcher, Paul Brennan, Malcolm Tuttle and Warren Williams, 30 September 2011.
84 Statement of Brett Thomson, 27 August 2013, pages 11-12 paras 81-90.

Contour are committed to supporting RQL in their efforts to deliver the projects under the [IIP]. Contour have proven their commitment to RQL in all previous dealings. We consider ourselves as partners to RQL.

Contour's knowledge of the development of the Industry Infrastructure Plan is considerable. Our knowledge bank equates to speed of delivery, and hence will equate to cost savings.

Contour have geared a significant proportion of our business to supporting the IIP delivery. We have recently appointed 9 new staff to maintain the levels of service that RQL have come to rely on from Contour. As you understand there is significant costs associated with staff recruitment. This further implies our commitment to RQL as a valued client.

The Fees as proposed consider the long-term/high-utilisation of our staff over the next 2.5 years. In that context, we consider ourselves to effectively be under RQL's retention for those years.[85]

3.9.11 The proposition that an amended or updated version of the Purchasing Policy should be created specifically for the infrastructure projects arose in the IIPCG meeting of 19 September 2011, and was evidently contemplated during the Audit Committee meeting of 10 October, before being specifically allocated as a task for Mr Carter at the IIPCG meeting of 12 October.

3.9.12 On 27 October 2011, Mr Snowdon emailed Mr Tuttle regarding a board paper concerning Contour, saying in effect that there were some issues with the proposed Contour contract for IIP services which needed to be resolved prior to the board signing off on its role but "this will not affect the work progress on the projects". Mr Tuttle suggested that arrangements be made for the board to address the matter as soon as possible and said, "An outsider might form the view that we put ourselves in a position where we left ourselves with no option but to sign a belated contract for services [with Contour]".[86]

3.9.13 The board discussed "RQL's obligations under RQL's purchasing policy and the necessity for RQL processes to be fully compliant and... pass government audit", at its 4 November 2011 meeting. It was noted that the Mackay IIP project had commenced. Mr Snowdon reported that development of business cases was ongoing and "while the Mackay project has been compliant with RQL's purchasing policy, the overall appointment of Contour and the work undertaken for planning had not been formalised as yet". It was agreed that this raised probity issues which needed to be addressed. The board is recorded as having resolved that:

- *Ms Reid and Mr Snowdon organise a meeting with Contour... explaining the probity issues and seek to settle a contract for the work undertaken by Contour at Mackay.*
- *Individual contracts [read: with Contour] will apply for each project.*
- *Independent Project Manager will be appointed.*
- *[A] quantity surveyor should be considered where necessary.*
- *Chairman advised the Government that a contract with Contour... has not at this date been settled, but RQL has undertaken sufficient audit to satisfy itself that the contract rates charged are 'value for money'.*

3.9.14 As to to the fifth bullet point above, the material before the Commission suggests the audit referred to was nothing more than Mr Bentley having "checked out on numerous occasions throughout 2011 off my own bat" that Contour's rates were reasonable.[87] As Mr Tuttle conceded during the public hearings, charging *reasonable rates* is of course only part of any

85 Letter from Brett Thomson to RQL, 3 August 2011.
86 Emails between Mark Snowdon and Malcolm Tuttle cc: Paul Brennan, Shara Reid and Deborah Toohey, 27 October 2011.
87 Transcript, Robert Bentley, 25 September 2013, page 33 lines 1-5.

value for money analysis; to do such an analysis properly, there would also have to be detailed consideration of the service being provided against the rates charged.[88] This is another example of the difficulty of assessing value for money without exposing a provider to the competitive rigours of the market.

3.9.15 Following the board meeting, on 5 November 2011 Mr Bentley emailed Mr Tuttle noting the lack of any formal appointment for Contour of the works underway at Mackay and the preparation of business cases for the IIP generally.[89] He said, perhaps by way of explaining these omissions, that "a decision was made by the board some months ago that the board would step aside from taking on executive functions". He reported that there had been an approach to the Treasurer for "seed funding" of $3.6 million, from the total IIP funding, for completion of the work of developing business cases; the costs for that work had so far been funded by RQL. He concluded:

> *The situation currently can be recovered, but for the awarding of any future contracts the process needs to be strictly in accordance with RQL policies.*
>
> *...*
>
> *WHERE TO FROM HERE*
>
> *... Malcolm [Tuttle] is to address the Boards [sic] concerns on all aspects of the integrity of the process through the IIP Committee with particular emphasis on the following:*
>
> - *A separation of functions (project manager)*
> - *Quantity surveyor function to be included*
> - *...*
> - *Adherence to RQL Policies.*

3.9.16 Subsequent emails exchanged between Mr Tuttle, Mr Hanmer and Mr Snowdon on 5 and 7 November included:

- reference by Mr Tuttle to the need for competitive tender to apply to all engagements – "this is not just a roll over for Contour", to separate disciplines with engagements and to deal with tender processes on a project by project basis[90]
- reference by Mr Hanmer to his "continual concern that we are spending taxpayers [sic] money and that even with a benevolent administration, we must comply not only with our own purchasing policy but with whatever policy the civil administration of the day requires" and a comment that the risk of the board being exposed to criticism in relation to the IIP is high and must be minimised[91]
- Mr Snowdon saying that competitive tender will apply for Contour and otherwise "subject to what response Bob gets on Beaudesert and Cairns... [where] if fast tracked [like Mackay] probity will be compromised"; and, as to separation of disciplines for consultants, that it has been his recommendation to have independent Project Management and that project-by-project tender processes are "being implemented".[92]

88 Transcript, Malcolm Tuttle, 1 October 2013, page 92 lines 25-45.
89 Email from Robert Bentley to Malcolm Tuttle cc: Mark Snowdon, Wayne Milner, Tony Hanmer, Paul Brennan, Shara Murray, William Ludwig, Brad Ryan, 5 November 2011.
90 Email from Malcolm Tuttle to Mark Snowdon cc: RQL Board, Paul Brennan and Shara Murray, 5 November 2011.
91 Email from Anthony Hanmer to Malcolm Tuttle and Mark Snowdon cc: RQL Board, Paul Brennan and Shara Murray, 6 November 2011.
92 Email from Mark Snowdon to Malcolm Tuttle cc: Robert Bentley, Paul Brennan and Shara Murray, 7 November 2011

3.9.17 The need for independent project management was also raised in communications with the State. RQL wrote to Mr Michael Kelly at the Office of Racing on 7 November 2011 saying, in essence, that there had been non-compliance with the Purchasing Policy previously in the appointment of Contour, including for Mackay and the development of the IIP, but value for money had been achieved and "RQL can advise you that the fundamentals of the Purchasing Policy will be implemented on all appointments for these [IIP] projects moving forward once the business cases have been approved and funding is available".[93] Mr Tuttle and Mr Snowdon met Mr Kelly and his colleague Ms Carol Perrett the next day to discuss matters including procurement probity. Ms Perrett's file note of the meeting records a concern that "Contour is overseeing themselves".[94]

3.9.18 Mr Tuttle emailed Mr Kelly and Ms Perrett on 9 November 2011, seeking confirmation of various matters arising from their discussions including that "going forward" tender processes would be required, "project manager role separate from other disciplines", and that RQL would compare the State Procurement Policy with RQL's Purchasing Policy and "provide you with further feedback re, tender levels (dollar value when required), quotation levels and preferred supplier levels…". Ms Perrett replied the following day with the confirmation sought, attaching a link to the State Procurement Policy and stating that in government three quotes are required for provision of services above $10,000; and all future funding agreements between RQL and the State will require open approaches to the market "except where there is demonstrated justification in the significant plan, for use of selective or limited approaches".[95]

3.9.19 Ms Perrett's reference to "significant plan" reflects the wording of the State Procurement Policy of the time requiring agencies to develop Significant Procurement Plans for purchases of high value and/or risk. As previously mentioned at 3.4.3, the State Procurement Policy also provided:

> *Agencies should use open offer processes where possible. Limited and selected offer processes may be used where the Significant Procurement Plan demonstrates that this is the appropriate strategy. Limited and selective offer processes must not be used for the purposes of avoiding competition.*

3.9.20 The minutes of the IIPCG meeting on 10 November 2011 record:

> *Mr Mathofer undertook to work through the RQL purchasing policy and the state purchasing policy, paying particular attention to the points raised by Ms Perrett in her email of November 10. Mr Mathofer and Mr Snowdon undertook to identify any discrepancies in the purchasing policies…. The outcome required is that the procurement document is further developed, meeting both RQL and government standards on value, transparency and probity.*

3.9.21 There were various communications between RQL and Contour at and around this time about Contour's role. Concerns had been expressed that it was engaged as both project manager and design engineer; this was, presumably, encapsulated by Ms Perrett's reference to Contour managing itself. Contour protested, essentially, that it was not a "project manager" properly-so-called but instead a "lead" or "prime" consultant.[96] The resolution of this issue is unnecessary for the purposes of this Report, but is fair to say that the distinction seems somewhat artificial and is contrary to the way projects were managed in practice. Mr Snowdon's email to Mr Tuttle on the issue on 14 November 2011 suggested, apparently correctly, that Contour was concerned that it may lose the role of project manager because of the concerns raised about independence. He noted the development of the IIP-specific Addendum, but said as to Contour:

93 Letter from Robert Bentley to Michael Kelly, 7 November 2011.
94 Carol Perrett, File Note, 8 November 2011.
95 Email from Malcolm Tuttle to Michael Kelly cc: Carol Perrett, 9 November 2011; Email from Carol Perrett to Malcolm Tuttle and Michael Kelly, 10 November 2011.
96 Email from Brett Thomson to Mark Snowdon, Malcolm Tuttle, Paul Brennan, Robert Bentley, Shara Murray and Chris Fulcher, 11 November 2011.

I have no issue with their role as PMs in relation to managing the contractor and the authorities, and can accept them managing the consultants as long as they are working in the best interests of the client. [97]

3.9.22 On 21 November 2011, Mr Snowdon emailed Mr Tuttle foreshadowing the finance department's provision of the draft Addendum shortly and saying "it will be most likely that any work above $10,000 will require 3 quotes from our preferred supplier list, which will mean that Contour will be required to price their work along with other candidates".[98] He recommended that RQL engage in-house project management. It appears that there was then a meeting on 23 November 2011 between Contour and RQL, for which Contour produced its own preparatory note indicating that "State Purchasing Policy allows consultants to be selected in different ways (due to expertise, time, cost, lack of alternatives)" and urging reasons why requiring tendering for consulting services would not be in RQL's interests

we... hold concerns regarding how RQL could develop a scope and brief that could convey all the idiosyncracies of how RQL operate and their expectations regarding priority and time. As other consultants would not understand the full extent of the expectations and risk. This would no doubt revert to an adversarial client/consultant relationship...

Inclusion of *sole supplier* provisions

3.9.23 On 1 December 2011, Mr Mathofer emailed documents including a draft Addendum to the IIPCG members. The draft Addendum did not include the sole supplier provisions noted previously.

3.9.24 On 12 December 2011, Mr Thomson (of Contour) emailed Mr Brennan and Mr Snowdon, copying Mr Bentley and Mr Tuttle, in response to an email from Mr Brennan referring to the release of funds being "contingent upon RQL meeting all Government probity requirements [so] it is imperative that RQL has government approval if there is to be any deviation from agreed protocols".[99] Mr Thomson:

- said that the situation "falls well within the auspices of the 'SOLE SUPPLIER' criteria of the State Government Procurement Policy, especially in the context of the 'critical' nature of the sub-project, the relationship between customer and supplier and the 3 Foundation Concepts of the State Procurement Policy and the limited risk and relatively low cost of this component of this sub-project"
- attached documents describing a *sole supplier* application process "that may be used to introduce the concept to the Board", with information said to have generally been taken from the State government website, and example applications to government for sole supplier approval for Cairns.

3.9.25 A sole supplier section, to the same effect as that provided by Contour, was then duly included in the Addendum by the time it was sent by Mr Mathofer to Ms Perrett of the Office of Racing on 13 December 2011.[100] In the same form, it was approved by the RQL board at its meeting on 19 December. The board paper by which the Addendum was introduced:

- informed the board that the Addendum had been produced to "address the need for additional policy controls" in relation to the IIP and that additional policy items had been introduced "in order to better align the RQL Purchasing Policy with the Queensland Government Procurement Policy"

97 Email from Mark Snowdon to Malcolm Tuttle cc: Robert Bentley and Paul Brennan, 14 November 2011.
98 Email from Mark Snowdon to Malcolm Tuttle cc: Robert Bentley, Paul Brennan, Shara Reid and Adam Carter, 21 November 2011.
99 Email from Brett Thomson to Paul Brennan and Chris Fulcher cc: Mark Snowdon, Malcolm Tuttle, Shara Murray, Robert Bentley, Russell Thompson and Kate Broadbent, 12 December 2011.
100 Email from Ronald Mathofer to Carol Perrett, 13 December 2011.

- emphasised that the Addendum met a need for "tight" and "strict" controls in all procurements relating to the IIP, so as to "ensure the Queensland Government has sufficient comfort that RQL will conduct all procurement processes relating [to] the projects in accordance with strict policy guidelines".

3.9.26 In addition to recording the board's approval of the Addendum, the minutes of 19 December 2011 also notably include the following:

> *To appoint contractors for the development of the Business Cases*
>
> *Mr Snowdon sought the Board's approval for the appointment of Contractors in order to prepare the required information to be included in the business cases for the [IIP] projects.*
>
> *The Board confirmed their approval of the Chairman's actions in progressing the business cases and approved the costs incurred to date in developing the business cases for Treasury approval.*
>
> *...*
>
> *Appointment of Contractor for the Mackay Project*
>
> *Mr Snowdon advised the Board that a contractor's appointment had not been ratified to date and sought approval for the appointment of a contractor for the Mackay project.*
>
> *The Board APPROVED Mr Snowdon's recommendation.*

3.9.27 The "Contractors" whose appointment the board approved was Contour, in both instances. That is obvious in the first case, where Contour was the contractor working on preparing information for the IIP business cases. As to the second case, the RQL contracts register records the contract appointing Contour for this project as 19 December 2011. Any doubt that Contour was the "Contractor" referred to is dispelled by Mr Snowdon's board paper for the 19 December meeting:

> *Decision: Appointment of contractor for the Mackay project*
>
> *Upon the announcement of the IIP in July RQL was required by government to commence the Mackay project as a matter of urgency due to the pressing workplace health and safety issues at the facility. In order to facilitate this requirement RQL undertook the appointment of Contour... for the disciplines of Lead Consultant, Conceptual Engineering, Civil Engineering, Environment Engineering, Architecture, Structural Engineering, Hydraulic Engineering and Flooding Drainage.*
>
> *This appointment did not follow the normal procedure detailed in the RQL Purchasing Policy – Infrastructure Plan which would have involved a competitive pricing of all disciplines. The appointment was made under 'Sole Supplier' status which is allowed for within the policy under certain circumstances such as urgency of the work required... .*

Discussion

3.9.28 As mentioned above, Mr Mathofer's account is that he did not intend, in drafting the Addendum, for the sole supplier provisions to apply specifically to Contour. There is no reason to doubt that is correct; he does not appear to have been involved in the communications within RQL and between RQL and Contour in the lead-up to production of the Addendum, nor in RQL's procurement activities. He cannot now recall precisely where he got the content for the sole supplier section of the Addendum.

3.9.29 Although he has produced a different document to the Commission as the potential source of the sole supplier section from a folder he maintained during the drafting process, it may be concluded with some confidence – in light of the events summarised above – that the source

of the section was Contour itself. To adapt Mr Tuttle's words,[101] RQL had put itself in a position where it had no practical option but to continue its engagement of Contour for the purposes of the IIP. As Mr Bentley agreed during the public hearings, the chosen solution to RQL's problem – of simultaneously trying to tighten compliance and also maintain Contour in its crucial ongoing role without subjecting it to any competitive process – was to change the policy "so we become compliant in the future... and pick up the mess that's been done before".[102]

3.9.30 Contour cannot be criticised for urging its continued maximum involvement in work for RQL, as it was plainly doing. That was consistent with its commercial objectives. However, the inclusion of the sole supplier section in the Addendum resulted in a procurement policy for the IIP which was inherently inadequate and lacking in integrity. It presented to the government a detailed process which was purported to align closely with the State Procurement Policy and to be more stringent than the pre-existing RQL Policy. It did neither, because:

- The State Procurement Policy did not at the time include a sole supplier section. It emphasised competition. The sole supplier section may well have been based on another State document, but the document produced by Mr Mathofer as the section's source, and the documents to similar effect provided to RQL by Contour, put heavy emphasis on competitive processes being the usual course. They also make clear that, if there is to be an exemption from the usual course, there must be a written application in a prescribed form with a detailed explanation to be considered and approved by four levels of management within the relevant department. There is no hint of any such process in RQL's Addendum.
- As to stringency, the vagueness of the concepts on which the sole supplier provisions could be activated has already been noted. They were, plainly, intended to permit the continuing engagement of Contour without undertaking any competitive process. It is difficult to imagine many engagements which could not, at least arguably, come within one of the limbs of the sole supplier section. Far from being stringent, or in some way tightening the existing Policy, the Addendum in truth adopted the same basic provisions – which already included the possibility of board waiver – and added further readily-satisfied bases for exemption.

3.9.31 The way in which the Addendum in fact operated was revealed in the very same board meeting at which it was approved: the board also approved retrospectively the appointment of Contour to assist in the preparation of IIP business cases and to provide project management, design engineering and various other services for the Mackay project. There is nothing in the material before the Commission to suggest that the approval process was any tighter than, or even any different from, the various ad hoc appointment approvals by the board prior to the introduction of the Addendum. The sole supplier concept appears to have been advanced by Mr Snowdon as having been used to engage Contour *before the Addendum was approved* by the board. The sole supplier concept was also used to justify requests to the State for amendments to the Funding Deeds for both the Mackay and Beaudesert IIP projects which, on the purported basis of urgency, removed any obligation to conduct open tenders.[103]

3.9.32 At a meeting of the IIPCG on 8 December 2011, Mr Tuttle is recorded as having suggested an internal review of processes including purchasing under the Addendum. The IIPCG minutes of 8 March 2012 record the distribution of a draft[104] "for noting" of the suggested review, which had been undertaken primarily by then project/compliance accountant Mr Jeff Zeppa and was signed by Mr Carter. The internal audit review includes, insofar as it bears on procurement methodology, the following:

101 See 3.9.12 above
102 Transcript, Robert Bentley, 25 September 2013, page 45 line 10, page 49 lines 15, 40.
103 See in this regard an email from Mark Snowdon to Carol Perrett, 1 February 2012.
104 There is no record of a final version having ever been produced.

Preferred Suppliers are being used. If not preferred supplier then 3 quotes were obtained

Where applicable, tenders were undertaken

PREFERRED SUPPLIER

If creditors on system before IIPLN started based on Mackay approval of 15/7/11 are preferred supplier [with exceptions then specified for certain projects]

In regards to the review of quotes the Project Director and Contour... either used existing suppliers and there was not strict adherence to the purchasing policy.

Status since the review the following controls have been/and/or are being implemented:-

...

5. *Preferred Supplier forms have been developed and have been approved by the IIPCG and have been sent out to potential suppliers of the projects which will be reviewed for compliance on return*
6. *Quotes will now be obtained from all non-preferred suppliers for goods and services over $10,000...*

3.9.33 At the 8 March 2012 IIPCG meeting, Mr Carter explained that the purpose of the review was "to note any shortfalls..., so they could be investigated and explained prior to an external audit by Deloitte". On the face of the review report, it could not have achieved this aim in relation to procurement methodology: it seems to say on the one hand that preferred suppliers are "any creditors on the system" as at 15 July 2011 and, on the other, that preferred suppliers are to be identified by a selection process that is underway; it suggests that a "control" being implemented is to require "quotes" from non-preferred suppliers for contracts over $10,000, which does not reflect the requirements of the Purchasing Policy or Addendum; and it contains the apparently meaningless statement that the Project Director and Contour "*either used existing suppliers and there was not strict adherence to the purchasing policy*" (perhaps the "and" should be "or", but this would indicate a belief that merely using existing suppliers comprised strict adherence).

3.9.34 A draft[105] audit by Deloitte of *Purchasing & Infrastructure Planning* was provided to RQL on 13 April 2012. Its purpose was stated to be to examine controls around purchasing and infrastructure planning, including "procurement policy and framework", "use of panel arrangements" and compliance with RQL policies and procedures in these respects. It noted the existence of the Addendum "that sets out the criteria that need to be followed when purchases are required" and suggested that there be a dedicated Procurement Officer to provide oversight of purchasing processes and ensure compliance with the Purchasing Policy/Addendum. A moderate risk was identified in relation to the clarity of aspects of the Purchasing Policy, including:

Exception to the standard tender/quote process: The Purchasing Policy states that three quotes are required for purchases between $10,000 and $100,000 and three tenders are required for purchases over $100,000. However, the Purchasing Policy does not address the process that has to be followed when there are only limited (i.e. less than three) industry specialists who can provide the required goods/services.

3.9.35 The draft Deloitte report does not make clear whether it is referring to the Purchasing Policy proper or the Addendum in this context, but in either case the quoted passage suggests some

105 There is, again, no record of a final version having been produced; it may be that it was overtaken by the process leading to the Deloitte report of 29 April 2013.

misunderstandings. First, it is an oversimplification to say that three quotes were required for purchases between $10,000 and $100,000; tenders had to be called from at least three preferred suppliers who were selected, and their proposals then evaluated, in accordance with the key principles. Secondly, it is incorrect to say that three tenders were required for purchases over $100,000 and apparently ignores the requirement for an open or public tender in this category without the use of preferred suppliers. More generally, for reasons explained previously, there were a number of significant areas in which the Purchasing Policy and Addendum lacked clarity. None are mentioned by Deloitte.

3.9.36 The preceding comments are not intended to imply a failing by Deloitte in the performance of its work. The report was only ever a draft. The Commission has not investigated what restrictions may have arisen from the circumstances in which Deloitte undertook this task, including what material and instructions were provided. However, it might be thought rather alarming that in April 2012, five years after version 1.03 of the Purchasing Policy was adopted by the QRL board, both the internal considerations of the Policy and Addendum and those undertaken externally do not suggest any real attempt to understand its provisions and how they should be applied in practice on infrastructure projects.

3.10 Contract management, payment and financial accountability

Approach to these aspects of the Term of Reference

3.10.1 To a large extent, the preceding sections of this Chapter address the important issues which the Commission has identified as arising out of this Term of Reference: the adequacy and integrity of, and adherence to, procurement policies, processes and measures to ensure value for money in infrastructure projects. In that context, the preceding sections have also addressed the question of the financial accountability of QRL and RQL's procurement processes.

3.10.2 For this reason, it is appropriate to keep this section of the Report relatively brief. There is another reason to do so: although the Commission has investigated aspects of contract management, payment policies and financial accountability in some detail whilst focusing on procurement, there has been no credible allegation of fraud, corruption or serious financial irregularities and the Commission has not identified any evidence of such matters in all of the documents it has reviewed. Deloitte's April 2013 report, including detailed review of QRL/RQL documents relating to infrastructure projects, also did not identify such matters. Making further attempts to locate such evidence would have required the Commission to engage forensic auditors for a comprehensive accounting analysis of historical transactions, in the mere hope that something may come to light.

3.10.3 As a result, taking the approach previously mentioned of assessing the value of further investigations in any area in light of the likely or potential benefit to those involved in future contractual activities in the racing industry, it is impossible to justify expenditure of further time and public money in attempting a detailed recitation of all facts and considerations within these broad aspects of this Term of Reference. The observations set out below will, instead, suffice to address the issues raised.

Requirements of the policies and processes

3.10.4 There was no QRL or RQL policy, prescribed process or guideline which applied to the way in which any projects, including infrastructure projects, should be managed in terms of the relationship between QRL/RQL and those actually performing the day to day work or coordination of the work. That is not surprising, given that – as explained above – the project management work during the relevant period was primarily done by Contour. Although the multi-faceted and variable process of contract management may be thought difficult to describe in useful policy or guideline form, there has been a comprehensive government process established since 2007 in the form of the *Project Assurance Framework*.[106]

3.10.5 QRL had in place, from well before the relevant period, a *Financial Management Practice Manual*. It was apparently last amended in May 2007 and Mr Carter has explained[107] that, after that date, individual policies were updated rather than the Manual as a whole. He is the only witness who has referred to the Manual as a policy, process or guideline relevant to procurement, contract management and financial accountability. The Commission has not identified any substantive reference to it in correspondence relating to those matters. There is no suggestion that it was ever adopted by RQL. For those reasons, and because on examination it essentially sets out day to day accounting procedures which are not the subject of examination in this Inquiry, there will be no further discussion of the Manual.

3.10.6 The Purchasing Policy itself contained matters relevant to payment policies and processes and financial accountability. It prescribed monetary delegation limits for different management positions, and contained various mechanical requirements for documenting acquisitions, handling GST, and the method by which payments should be made in different circumstances.

3.10.7 By reference to version 1.03 of the Policy approved in April 2007, the following aspects of the delegation section may be noted:

- it contained a table detailing limits for different management positions in respect of specified activities, with:
  - overall limits including $10,000 for Mr Brennan as Racing Services Manager and Mr Carter as Finance Manager, and $100,000 for Mr Tuttle as Chief Operations Manager, with everything above $100,000 having to go to the board
  - the same monetary limits specified in respect of "Capital Expenditure Purchase Orders and Request Forms", except that for Mr Brennan and Mr Carter it was contemplated that this limit did not apply "if satisfied COM [Mr Tuttle] has previously approved the project" and that Mr Tuttle's $100,000 limit remained but he could only approve capital expenditure orders "where included in approved annual budget"
- below the table, these words appeared:

  The same delegations above apply to the payment of invoices with one exception:

  An invoice can be approved by a person with a lesser delegation provided the original purchase order was approved appropriately and the invoice does not exceed an amount that exceeds 10% of the original purchase order.

  It should be noted that as a business rule, staff are not allowed to circumvent their delegation by raising multiple orders to purchase a good or service for an amount that exceeds their delegation limit

106 The current version can be found at http://www.treasury.qld.gov.au/projects-queensland/policy-framework/project-assurance-framework/index.shtml.

107 Statement of Adam Carter, 2 August 2013, page 6 para 13.

- then, under the heading *Delegations*, it was said "All expenditures for goods and services are to be authorised by a duly delegated officer. These delegations are as follows" – relevantly, they are the same limits as set out at the first bullet point above.

3.10.8 As to the mechanical requirements, the Policy relevantly required that "all purchases for non-continuous supplies must be accompanied by purchase orders... signed off by a duly delegated officer".

3.10.9 In the section *Summary of Key Controls*, in addition to aspects previously noted as relevant to procurement process, the Policy specified:

- *Invoices are only paid after the prior approval of a purchase order... and after goods have been received*
- *Established delegation limits with a 10% tolerance up to a limit of $100.*

3.10.10 There were changes to the monetary delegation limits in subsequent versions of the Policy approved during the relevant period, which need not be set out here. Other relevant changes have been summarised above in section 3.5: the insertion in version 1.04 (July 2010) of a section outlining the use of the electronic purchasing system IPOS and a flow-chart setting out the mechanical aspects of the purchasing procedure; and the addition in version 1.08 (November 2011) of a new IIP-specific section which provided:

> *Policy in relation to the approval of supplier payments specifically related to the [IIP] is as follows;*
>
> - *All invoices must be checked and signed by the Project Director even if outside of delegation limit. The Project Director is to obtain the approval of the CEO or Board if over his delegation limit.*
> - *All delegations are to be in line with the RQL purchasing policy.*
> - *All items outside of the approved budget with a tolerance level of greater than either 1% or $200K of the project value will require Board approval.*

3.10.11 It can readily be observed that, as it was in relation to the procurement methodology aspects addressed previously, the Policy would have been difficult to understand and to apply according to its terms in respect of delegation limits including because:

- there is no definition of what is the "Capital Expenditure" to which the delegation limits for Purchase Orders and Request Forms applied – for example, did it include expenditure on "Consulting Services" such as the work of Contour?
- it is not stated what is meant by the requirement for Mr Brennan to be "satisfied... [Mr Tuttle] has previously approved the project", with the effect that Mr Brennan's normal delegation limits for Capital Expenditure would then not apply
- there is a lack of clarity in the expression of the exception to the delegations, as to when an invoice "*does not exceed an amount that exceeds 10% of the original purchase order*"
- the concept of a "10% tolerance up to a limit of $100" appears only in the Key Controls section of the Policy, and it is not clear how the tolerance fits with the exception mentioned immediately above or whether it is really intended that the limit, even where a person has a delegation limit of $100,000, should be only $100
- the new IIP-specific section introduced in November 2011 said, on the one hand, that delegations were in accordance with the Policy (presumably meaning, in its prior state) and, on the other, that board approval for any expenditure was apparently only required if the sum involved exceeded the approved budget for a project by either 1 per cent of the approved budget or $200,000.

3.10.12 The Addendum approved by the board on 19 December 2011 replicated the bullet points set out at 3.10.10 above as to delegations for the purposes of the IIP, except that the final point was altered to say that "[a]ll items outside of the approved budget with an aggregate tolerance level of greater than either 1% or $200,000 of the project value will require Board approval"; the addition of the underlined word does not appear to assist in understanding the intended operation of this provision. Under the heading *Delegations*, the Addendum provided that "all expenditures for goods and services are to be authorised by a duly delegated officer and are to be in line with budget". The delegations then specified were: up to $50,000 for Mr Carter, Mr Brennan and (as project director) Mr Snowdon; up to $150,000 for Mr Tuttle; and anything above that was for the board.

3.10.13 There was also a document called *Infrastructure Plan – Internal Financial Process*, developed at the same time as the Addendum and approved by the IIPCG only and not the board. Several aspects of the Internal Financial Process should be mentioned:

- it contained the same words as the Addendum, quoted in the paragraph immediately above, concerning the "aggregate tolerance level"
- as to Purchase Orders, it assumed that IPOS was not operational and that therefore manual purchase orders would need to be prepared and "all purchasing must be in accordance with the RQL Purchasing Policy"
- under the heading *Delegations*, it stated

> *All invoices must be checked and signed by the Project Director even if outside of delegation limit. The Project Director is to obtain the approval of the CEO or Board if over his delegation limit.*
>
> *All delegations are to be in line with the RQL purchasing policy [with the limits then set out as $50,000 for Messrs Carter, Brennan and Snowdon; for Mr Tuttle,"All invoices over $50K"; and for the Board "Initial Budget or project variations outside of tolerance level"]*
>
> *Any line item where the % increase to that line item is above the % project contingency requires approval in accord with the approved expenditure limits. Should a substantial line item be considerably over budget, whether in excess of the contingency % or not, it is the project managers responsibility to bring this to the attention of the IIPCG. Approval of all expenditure must be in accord with agreed policies and procedures and it is the responsibility of the project manager [perhaps intended to read "Project Director"] to ensure this is the case and to report on and manage expenditure in accord with approved budgets.*

A table then listed the value of each IIP Project and stated, for each, that there was a tolerance level of zero per cent. This appears to have been intended to mean, in context, that any project variations would be subject to board approval.

3.10.14 Finally in relation to contract management, payment and financial accountability processes, version 1.09 of the Purchasing Policy was approved by the board on 19 March 2012. Under the heading *Industry Infrastructure Plan*, it provided as follows (with the additions from version 1.08 highlighted):

> *Policy in relation to the approval of supplier payments specifically related to the [IIP] is as follows;*
>
> - ***Once the Business Case and Project Funding Deeds have been approved and the budget has been approved by the RQL Board***
> - *All invoices must be checked and signed by the Project Director even if outside of delegation limit. The Project Director is to obtain the approval of the CEO if over his delegation limit.*

- *All delegations are to be in line with the RQL purchasing policy.*
- ***The CEO can sign and approve all items with in the project budget and this includes amounts above $150,000.***
- *All items outside of the approved budget with a tolerance of greater than either 1% or $200K of the project value will require Board approval.*

3.10.15 Version 1.09 otherwise made clear that Mr Tuttle's delegation authority as Chief Executive Officer was unlimited if the expenditure in question was "in line with budget" for the project in question. In the previous versions since 1.04 of July 2010, it seems clear that his limit was $150,000 and any authorisation also had to be in line with budget.

Application of the policies and processes

April 2013 Deloitte report

3.10.16 A convenient starting point for discussion of the application of the policies and processes is the April 2013 Deloitte report. Deloitte's summary of its findings included that:

- *Contour received a large volume of work from RQL while Mr Tuttle and Mr Brennan were in senior management roles. We identified a number of process and procedure breaches in relation to appropriate delegation approvals that were not properly applied in relation to Mr Brennan and Mr Tuttle.*
- *Our review did identify gaps in the documentation and application to associated procurement processes, particularly as this applies to Contour. However, these gaps were not isolated to Contour and were also evident across other contract and arrangements examined which we understand from RQL is due, in part, to the merging of three racing bodies and RQL now having the responsibility to update historical gaps in information that was originally held by other racing bodies.*

3.10.17 Deloitte also relevantly recorded these "key observations":

- *All of the projects reviewed did not contain any reporting addressing the outcomes of the project, including cost to budget, quality of product and timeliness, although some discussions were identified in board meeting minutes.*
- *Many of the transactions reviewed only contained payment documentation such as invoices. There were a limited number of purchase orders or contracts to verify if payments and approvals were in line with original agreements.*
- *The contracts register is currently incomplete according to the Acting RQL Legal Counsel, with documents missing... primarily due to the merging of the three codes in 2010, which required a single source register to be created. RQL subsequently inherited registers that were incomplete and/or missing documentation. The issue was further compounded with changes in management....*

Delegations

3.10.18 Mr Tuttle and Mr Brennan both disputed, in their evidence to the Commission, that they did not comply with the delegation limits in the Purchasing Policy.

3.10.19 It is not proposed to examine each instance referred to by Deloitte as comprising non-compliance; there is no basis for any finding that the payment approvals in question were somehow improper and would not have been made if a different process were followed. It also may be accepted, particularly in light of the difficulties in comprehending the Policy noted above, that there would have been instances of non-compliance by personnel other than Mr Tuttle and Mr Brennan.

3.10.20 However, brief attention to their responses to the alleged non-compliance will assist to illustrate the difficulties in practice of applying the Policy in this area. For this purpose, it is relevant to note that all invoices found by Deloitte to have been approved by Mr Tuttle and Mr Brennan outside their delegation limits were approved prior to November 2011.

3.10.21 Mr Tuttle refutes the Deloitte findings of non-compliance by him with the delegation limits on the basis of the exception noted at 3.10.7 above permitting approvals "by a person with a lesser delegation provided the original purchase order was approved appropriately and the invoice does not exceed an amount that exceeds 10% of the original purchase order". Mr Tuttle states:

> *It was my understanding of this exception that, provided the original purchase order was appropriately approved, I could approve the payment of invoices up to 10% above of the original purchase order amount. ...*
>
> *Based on the exception..., it was standard practice, particularly for infrastructure projects, for a progress claim to be signed off for payment in the manner referred to in paragraph 11 herein as well as the process described in the statement of Sharon Drew dated 16 August 2013.*
>
> *Infrastructure projects would quite often not have a purchase order allocated, as it would be impracticable to issue a purchase order for a project that would be paid through multiple progress claims occurring at different times. The 'purchase order' for infrastructure projects would be either a contract or fee proposal which set out the budget and scope for the project.*
>
> *In light of the exemption in the purchasing policy, it would often be the case that, particularly in infrastructure projects, an interim invoice would be checked and approved by a person with knowledge of the work carried out covered by the invoice even though the amount of the invoice was above their delegated authority.*[108]

3.10.22 Mr Tuttle then addresses the specific non-compliant approvals identified in the Deloitte report, explaining that in each instance, although the sum of the invoices approved was substantially over his delegation limit, the expenditure in question was "within the budget" for the project.

3.10.23 Mr Brennan provides a similar account[109] to that of Mr Tuttle, albeit without any reference to the "exception". He says that "[t]he undertaking of infrastructure projects by RQL and the associated procedures and policies developed over time". It appears that the tenor of his explanation, for the various non-compliant approvals identified in the Deloitte report, is that he was a "person with knowledge of the work carried out" who would usually be asked to check invoices even where above his delegated authority so that his signing of the invoices was not really an "approval". He considered it to be a matter for the finance department to ensure that approval was obtained from someone with the appropriate authority.

3.10.24 There is no reason to doubt that Mr Tuttle and Mr Brennan understood the delegation policies to operate in the way they describe. However, it is difficult to reconcile their understanding with the wording of the Purchasing Policy. The following observations will adequately illustrate the difficulties.

3.10.25 First, Mr Tuttle's understanding of the "exception" has the effect that anyone – no matter what their delegation limit – was authorised to approve any invoice so long as it was for an amount not greater than the overall contract price for the works to which the invoice related plus 10 per cent. Why would there be a delegation limit set for Mr Brennan – for example – of $50,000, and

108 Statement of Malcolm Tuttle, 10 September 2013, pages 4-5 para 15(b)(i)-(v).
109 Statement of Paul Brennan, 11 September 2013, pages 4-5 para 15(b)(i)-(iv).

at the same time an exception permitting him to approve a payment which might vastly exceed that sum? If there were a large civil construction contract worth $6 million, he (or anyone else) could approve a payment of $6.6 million – $600,000 over the contract price – without any other necessary process.

3.10.26 Mr Brennan's lack of reliance on the exception suggests that he did not understand it to operate in this way. The intent suggested by the wording of the Addendum seems to have been that any variation to a project's cost would require board approval. Further, it was not until version 1.09 of the Purchasing Policy, in March 2012, that Mr Tuttle was expressly authorised to sign and approve invoices above his delegation limit so long as they were within the project budget; it was then made clear that the leeway provided was limited to one per cent of the project value or $200,000 (presumably, whichever was the least). No one else was given a similar authorisation.

3.10.27 Second, although one can understand the sense of having a person with knowledge of the work done sign an approval form, it is not clear on what basis Mr Brennan assumed that it was a matter for the finance department to ensure an approval was subsequently obtained from someone with the necessary delegation. There is nothing in the Policy to that effect, until version 1.08 (November 2011) introduced the concept of all invoices being checked by the "Project Director" – Mr Snowdon – even if outside his delegation limit. It was then required that it was *Mr Snowdon's* responsibility to obtain the appropriate approvals.

3.10.28 It may be accepted that, as Mr Brennan says, the processes used for infrastructure projects "developed over time". However, as observed previously in relation to procurement methods, QRL was undertaking substantial infrastructure projects from the start of the relevant period and this continued for RQL. The Purchasing Policy was not adequately adapted to such projects in respect of delegation limits but, instead of those implementing it taking steps to improve and clarify it, the approach taken seems to have been to ignore the delegation requirements where it was convenient to do so. That was not an approach tending to produce transparent and accountable results.

Other accounting process matters

3.10.29 Deloitte identified substantial gaps in the documentation kept by QRL/RQL relating to the procurement, payment and contract management processes they undertook. None of the statements provided to the Commission, including those which address other aspects of the Deloitte report, suggest that there were not such gaps. It may be accepted that there were.

3.10.30 The Commission has had the benefit of assessing infrastructure project documentation with the aid of Contour's files. It has not identified any reason, in light of the documents reviewed or any statements provided, to believe that the gaps in QRL/RQL's records are reflective of anything approaching corruption or any intention to avoid creation of a comprehensive record. No doubt, as Deloitte reported, the gaps may be partly explained by the process of having merged the three codes' control bodies, and their records, into one in mid-2010. However, consistently with the prior conclusions in relation to procurement methodology and delegations, it is clear that the culture within QRL/RQL was not one of striving for precision in matters of accounting process. Two examples should sufficiently illustrate this conclusion.

3.10.31 First, as Deloitte found in its April 2013 report, the contracts register was incomplete. The requirement for the maintenance of the register was not apparently mandated by any policy or written guideline, but Mr Carter has explained[110] that it was the practice for third party contract details to be entered into the register and obviously (since the register does exist) there was such a practice. Maintenance of such records is, self-evidently, an important aspect of any business.

110 Statement of Adam Carter, 2 August 2013, page 22 para 66.

3.10.32 The failure to maintain the contracts register was not, however, a problem which arose only after the amalgamation of the three codes in July 2010. A draft report produced by Deloitte in February 2010, entitled *Third-Party Agreements Review*,[111] found that the register was incomplete and not properly monitored and maintained. The "Key findings and recommendations" were as follows:

> *The engagement identified the following major risks:*
>
> - ***Reconciliation between the Security Document Register and Payment System*** – *A periodic review is not performed to ensure that contractual agreements exist and are maintained by QRL's legal department for key third-party suppliers set-up in QRL's payment system...*
> - ***Monitoring and Maintenance of Contractual Agreements*** – *Limited reviews are performed to assess whether RQL and the third-party are complying with the contractual agreement. In addition, contracts with no expiry dates are not reviewed on a periodic basis to assess whether the services are still required by QRL...*
> - ***Process to renew contracts requires formalisation*** – *QRL has limited controls to ensure that current agreements exist for suppliers that provide services to QRL. QRL has been operating with an expired contract for one supplier. Expired or terminated third-party agreements are archived on an ad-hoc basis by the legal department.*

3.10.33 There is no record of any consideration of this draft report by the Audit Committee, around the time of its delivery or subsequently, or of any attempt to address Deloitte's conclusions or implement the recommendations made for that purpose. It appears clear, from the fact that the contracts register remained substantially incomplete after the end of the relevant period, that this did not occur.

3.10.34 A second example of the culture at QRL/RQL is their slowness in implementing the electronic "internet-based purchase order system" IPOS.

3.10.35 Mr Carter has explained the background to the initial implementation of IPOS at QRL in around March 2009 in some detail. He says, in short, that there was a manual process involving finance staff receiving invoices and then seeking to match them with the appropriate supporting documents such as purchase orders; in the absence of such documents, manual approval of invoices had to be sought; the whole process was inefficient, and led to difficulties keeping track of whether delegation limits were being complied with and maintaining an accurate record for accounting and audit purposes.

3.10.36 Deloitte's June 2009 report noted a number of instances where purchase transactions were not entered, approved and processed through IPOS. Deloitte recommended the education of all employees as to "the importance of using IPOS for all purchase transactions, to ensure coherent understanding across the organisation...". There has been reference in section 3.5 above to the subsequent Audit Committee discussion concerning the difficulty of implementing IPOS, and the introduction of reference to it in version 1.04 of the Purchasing Policy in July 2010.

3.10.37 As discussed in section 3.8 above, Mr Carter's account is that "the full implementation of IPOS was resisted by operational management and put on hold pending the [in June 2009] upcoming amalgamation of the three codes" and then only reintroduced in 2012. Mr Tuttle has responded to the suggestion of resistance as follows:

> *I refute any allegation that I resisted or sought to obstruct the implementation of financial systems of QRL and RQL. From my recollection IPOS was decommissioned during the merger in 2010 as it was too difficult for the finance department to merge three different*

111 Statement of Adam Carter, 2 August 2013, page 14 para 33(b)(G); exhibit ABC-74.

codes payment systems. The decision to cease using the IPOS system was a matter within the control of the finance department.[112]

3.10.38 It is unnecessary to seek to resolve the difference in the recollections of Mr Carter and Mr Tuttle on this point or, indeed, to determine whether the silence of other members of *operational management* on the point indicates their agreement that the implementation of IPOS was resisted. No one suggests that the advantages of implementing IPOS, referred to by Mr Carter and Deloitte, were illusory. It has been illustrated that there were difficulties in the application of the Purchasing Policy as to delegation limits for approvals, which was one area IPOS was apparently designed to address by enforcing compliance with a process around the limits.

3.10.39 Whatever in truth were the reasons for the delay in implementing IPOS, it properly may be concluded that the culture within QRL and RQL during the relevant period did not encourage such implementation.

3.11 Synthetic tracks

3.11.1 The synthetic track projects, summarised in section 3.2, are considered separately here because they raise issues about government oversight as well as about procurement methodology. They are most conveniently addressed in the context of procurement. Although the Commission has explored the facts surrounding these projects in detail, the discussion below will be kept as brief as necessary to illustrate the issues raised.

Selection of Cushion Track

3.11.2 Towards the end of 2006, QRL invited various synthetic track suppliers to provide expressions of interest to design, engineer, supply and construct synthetic tracks at each of the Caloundra, Toowoomba and Gold Coast racetracks. Separate expressions of interest were invited, and received from a number of suppliers (called tenderers below for convenience), for each of the three locations.

3.11.3 A comprehensive evaluation process was undertaken in order to choose between the tenderers, including a trip to the United Kingdom in September 2006 to inspect various synthetic surfaces by Messrs Bentley, Hanmer, Ludwig, Reid Sanders (QRL Chief Stipendiary Steward) and Murray Weeding (Sunshine Coast Turf Club Track Manager), at a total cost of some $73,000. Although this and other aspects of the process have been criticised, it may be accepted that QRL expended considerable effort to select the most suitable surface and no adverse finding can be properly made about the choice of Equestrian Surfaces International (ESI), whose product was Cushion Track, to supply the first of the three intended tracks (at Caloundra).

3.11.4 There is, however, an aspect of the process which appears to have been unsatisfactory, lacking in integrity and unlikely to produce value for money for QRL. The circumstances were as follows.

3.11.5 There were, as noted, separate expressions of interest sought, and received in early 2007, for synthetic tracks at three locations. There was no suggestion, in the invitations, that one tenderer was to be selected for all three tracks.[113] One of the tenderers recalls being told that QRL would appoint a supplier for one track, then provide time for trialing and industry familiarisation with it before deciding whether to proceed with the next track and choosing a supplier for it.[114] Whether or not the others have similar recollections (which the Commission did not explore), there was apparently nothing to suggest to tenderers that they were really bidding to be selected for all three tracks.

112 Statement of Malcolm Tuttle, 14 November 2013, page 1 para 4.
113 See exhibits KE-3, KE-4 and KE-5 to the statement of Kim Elliott, 30 September 2013.
114 Statement of Kim Elliott, 30 September 2013, page 6; para 21.

3.11.6 It seems clear that QRL did decide upon ESI as the supplier for all three tracks from the start. When writing to one of the unsuccessful suppliers on 14 June 2007, QRL said:

> *Following an extensive investigation process [QRL] has considered your Expression of Interest to supply synthetic tracks to the Sunshine Coast, Toowoomba and Gold Coast racing facilities.*
>
> *We wish to advise that your company has been unsuccessful with its expression of interest.*
>
> *[QRL] has agreed to terms with [ESI] to supply the synthetic surface for the Sunshine Coast racing facility only at this stage.* [115]

3.11.7 Despite the last sentence above, Mr Bentley agreed, during the public hearings, that there was a commitment to use Cushion Track for all three locations.[116] ESI offered "Multiple Contract" pricing before their selection was confirmed[117] and later correspondence also reveals pricing on a multi-track basis.[118] It is unnecessary to set out the various other indications in the evidence that, whatever the formal contractual arrangements, Cushion Track was essentially selected for all three tracks and no consideration was subsequently given to the possibility of engaging, or negotiating with, other tenderers for subsequent tracks.

3.11.8 It would not be appropriate in this Report to draw conclusions about whether any of the tenderers might have a civil cause of action against QRL based on the notion of a *process contract* including a term, express or implied, that each project would be considered and awarded separately. It may nevertheless safely be observed that the process utilised was unlikely to maximise the prospects of QRL achieving value for money where expressions of interest were invited and received on the basis that there were three separate 'competitions' when, in truth, there was one competition for three (or at least two) tracks. Such a process, self-evidently, lacks integrity. It would also be unfair, if one tenderer understood the true nature of the process and the others did not.

3.11.9 The prospects of achieving value for money from a process of this kind would be at least potentially reduced because of the effect on the formulation of suppliers' expressions of interest, including – most obviously – pricing aspects where economies of scale may come into play for multiple but not separate individual projects. It is not possible to conclude, on the material before the Commission, that the benefit of tenderers taking such economies of scale into account was in fact lost in this instance. However, there were other consequences of QRL's commitment to using ESI/Cushion Track for all three intended tracks which illustrate the inadequacy of proceeding in this way.

3.11.10 The Cushion Track installed at Toowoomba was the first time in the world that this surface had been used for a primary race track.[119] Whether they were valid or not, there were concerns about the suitability of Cushion Track from at least mid-2007, including in particular as to whether there was excessive *kick back* (material being kicked into the air) during its use and whether it did in fact require only very minimal water in its maintenance;[120] the supposed lack of any need for watering was a major impetus for the synthetic track project. The Toowoomba Turf Club raised these concerns, and others including an apparent loss of the wax component of the Cushion Track surface at the Hollywood Park track in California, from 19 June 2007.[121] Mr Bentley's response in summary was that the allegations "if correct would make the Cushion Track entirely unsuitable" but the Caloundra track would be installed and undergo vigorous evaluation before any offers to install it at other clubs; there would be no installation against the wishes of a club.[122]

115 Statement of Kim Elliott, 30 September 2013, exhibit KE-7.
116 Transcript, Robert Bentley, 25 September 2013, page 58 line 25-28.
117 Email from ESI to QRL, 26 May 2007.
118 Correspondence between QRL and Cushion Track, 10 September to 6 October 2008.
119 Transcript, Robert Bentley, 25 September 2013, page 58 line 45.
120 Email from Malcolm Tuttle to Reid Sanders cc: Robert Bentley, 18 June 2007.
121 Facsimile from Gavin McEvoy (Toowoomba Turf Club), 19 June 2007.
122 Letter from Robert Bentley to Neville Stewart of the Toowoomba Turf Club, 22 June 2007.

3.11.11 Some inquiries were made of Hollywood Park, including a brief trip there by Mr Bentley and Mr Sanders when there was an inspection and an agreement was signed with ESI, for the installation of Cushion Track at Caloundra, on 26 June 2007. Mr Bentley and Mr Sanders reported, on the basis of the inspection and discussions at Hollywood Park, that any problems which had arisen there were the result of maintenance problems and the performance of the track was at least satisfactory.[123] However, there is reason to think that the decision to proceed with Cushion Track was made before the inspection: emails to ESI before the trip anticipated the *finalisation* of a contract while Mr Bentley and Mr Sanders were in California.[124] That is what occurred. Further, when Mr Sanders made subsequent inquiries of the person responsible for maintenance at Hollywood Park he received a reply on 7 July 2007 to the effect that the standard maintenance requirements included daily watering and that, in hot weather, it may be necessary to water *between races*. There was at least room for doubt, and caution, about whether the surface would meet the desired ends.

3.11.12 A Cushion Track was installed at Caloundra and remains in place. Unlike Caloundra, however, the intention at Toowoomba was for Cushion Track to be installed in place of the main grass track. Unsurprisingly, this was controversial. However, despite the Toowoomba Turf Club expressing concerns from the start as noted above, and Mr Bentley's assurance that there would be no installation against any club's wishes, there was a perception at the Club that QRL was imposing an "ultimatum… to accept the decision made unilaterally by QRL without consultation and without the opportunity for any meaningful input" from the Club.[125] The material before the Commission supports that assessment, and indicates that QRL's commitment to installing Cushion Track at Toowoomba was inflexible. For example:

- in June 2007, Mr Bentley complained about the Club "attempting to influence the decision of [QRL] to install cushion tracks" and making independent inquiries about the surface[126]
- in March 2008, Mr Bentley wrote to Mr Michael Kelly of the Office of Racing, in response to an article in *The Courier-Mail* criticising the choice of Cushion Track and suggesting that an alternative supplier may have been preferable, saying that the alternative "could not guarantee that they could replicate the same surface for a second track"[127]
- at a QRL board meeting on 9 May 2008, Mr Bentley reported that the costs of Cushion Track had risen considerably in the preceding six months, so the total cost of installation at the Club would be much more than anticipated, but there is no suggestion of any thought to check whether an alternative supplier might offer more favourable prices; it is clear instead that QRL ordered the Cushion Track material intended for Toowoomba before the end of May, despite there not even having been a formal offer to the Club to install it there, let alone any agreement in that regard or any formal contract in place with ESI for Toowoomba[128]
- correspondence from the Club on 12 May 2008 referred to its own ongoing research into Cushion Track and asked for "any media releases or other information QRL may have relating to how Cushion Tracks are racing and being received in America at the moment"; Mr Bentley replied on 19 May to the effect that there are varying opinions about the surface's performance but said "QRL have not received any media releases or other information about how synthetic tracks are racing and/or being received in America"[129]

123 Minutes of meeting of Sunshine Coast Racing Pty Ltd on 3 July 2007, page 4.
124 Emails between Shara Reid, Malcolm Tuttle, Reid Sanders and ESI on 20 and 21 June 2007.
125 Letter from Neville Stewart to Robert Bentley, 3 July 2007.
126 Letter from Robert Bentley to Neville Stewart, 20 June 2007.
127 Letter from Robert Bentley to Michael Kelly, 10 March 2008.
128 Transcript, Robert Bentley, 25 September 2013, page 68 lines 35-40.
129 Letter from Gavin McEvoy to Robert Bentley, 12 May 2008; Letter from Robert Bentley to Neville Stewart, 19 May 2008.

- there was agreement by the Club's Committee in June 2008 to installation of Cushion Track, but substantial dissent within the ranks of the members then led eventually to the issue being put to a special general meeting on 16 February 2009; a resolution to install Cushion Track was only narrowly passed (121 votes to 110), despite a letter sent by Mr Bentley to the members on 30 January 2009 noting that the issue "had been bitterly debated" and strongly urging a positive vote; he contrasted the $10 million funding which would follow that outcome against a long list of adverse consequences arising from a negative vote including the loss of TAB race meetings for the Club and various unfavourable financial results
- Mr Bentley's letter, however, did not reveal to the Club members that, by at least the start of December 2008, QRL had been complaining to ESI about various aspects of the performance of Cushion Track at Caloundra: the surface was softening unacceptably in hot weather, which was "having a huge impact on the confidence of the punters and stakeholders" and the surface's performance generally was "receiving mixed reviews from all concerned";[130] there is no indication that these matters were otherwise communicated to the Club
- the approach of QRL is also illustrated by an exchange of emails on 5 and 10 February 2009: the race secretary of the Club emailed Mr Brennan requesting a fact sheet, for distribution at the upcoming special general meeting, "containing the statistics you quoted at the last members meeting on bleeders [meaning horses bleeding from the lungs, a condition associated with kickback] and horses breaking down on other Queensland tracks in comparison to the Sunshine Coast cushion track"; Mr Brennan forwarded it to Mr Bentley, saying "I don't think that we should provide the information as we then permit it to be construed in many ways without our influence, the figures don't look that good..."; Mr Bentley replied, "Correct in your thoughts on handleing [sic] this matter", then subsequently provided some general statistics to Mr Brennan and concluded "Catastrophic injury that has occurred in the last 12 months has not been due to the tracks at Caloundra. This statement should be verbal not written".[131]

3.11.13 These events are aspects of a management culture at QRL and later RQL which tended to avoid, or minimise as far as possible, genuine consultation with industry stakeholders. That aspect of QRL and RQL's operations is also discussed elsewhere in this Report. In the procurement context, the events may be seen as consequences of a process which was inadequate, and lacking in integrity. The result was that QRL was committed to the installation of its chosen surface at the Toowoomba track, when a different process could have allowed further, and genuine, consideration of whether Cushion Track was the appropriate surface and whether, indeed, a synthetic track should have replaced the course proper at Toowoomba in any event. As Mr Bentley subsequently acknowledged, when it comes to synthetic tracks: "...one size does not fit all".[132]

Government oversight

3.11.14 On 19 June 2007, Minister Fraser[133] wrote to Mr Bentley referring to the recent announcement of a budget allocation of $12 million in funding for the synthetic track projects.

130 Letter from Reid Sanders to ESI on 4 December 2008; email from Reid Sanders to ESI cc: Paul Brennan, Malcolm Tuttle, msullivan@sctc.com.au, Robert Bentley, 10 December 2008; email from Reid Sanders to ESI cc: Robert Bentley and Paul Brennan, 12 December 2008; email from Reid Sanders to ESI cc: Robert Bentley, Paul Brennan and Malcolm Tuttle, 24 December 2008.

131 Email from Leah Meir to Paul Brennan, 5 February 2009; email from Paul Brennan to Robert Bentley, 9 February 2009; email from Robert Bentley to Paul Brennan, 9 February 2009; email from Robert Bentley to Shara Reid, 10 February 2009.

132 Draft "briefing note" from Robert Bentley to Minister Lawlor, *An objective look at the cushion track*, 6 May 2009.

133 Mr Fraser's Ministerial appointments are in Chapter 6 at 6.3.11

3.11.15 Unsurprisingly, the government sought to ensure it could retain some oversight and at least potential control of the expenditure of substantial public funds on the projects. The Minister's letter said that there would need to be a funding agreement entered before the money was advanced and a business case provided and endorsed prior to any expenditure. It concluded:

> *Once the agreement has been executed and the funding paid to QRL, the Department will retain an oversight role to ensure the project is delivered in a timely and efficient manner and in accordance with the funding agreement.*

3.11.16 The funding agreement for the synthetic tracks, entered between QRL and the State in late June 2007, relevantly provided that:

- QRL "must undertake open tender processes to appoint contractors to supply and lay the racetracks, whereby the achievement of a value for money price can be demonstrated, to the satisfaction of the State" (clause 4.18)
- if requested, QRL must provide to the State a copy of its tender assessment and/or a copy of the successful tender and contract documentation (clauses 4.19 and 4.20).

3.11.17 Despite the above, when one of the unsuccessful tenderers complained to the Minister about the selection process and asserted that QRL had proposed laying and trying one track before deciding upon the others, he was advised by a briefing note to respond – as he did – to the effect that the government had no role in such matters. As Mr Fraser now agrees, with the benefit of hindsight, that was incorrect

> *...[w]hile the selection of contractors and the entry into of contracts... were matters for QRL under the agreement, the State had the contractual power to review those selections and contracts should it have wished to do so and, further, had the ultimate right to refuse to approve any draw down of funds should that be considered appropriate.*[134]

3.11.18 QRL did not use open tender processes as required by the funding agreement: ESI/Cushion Track had been selected before the funding agreement was entered and, although a contract with ESI had been entered only for Caloundra, there was no further process of selection for Toowoomba. There was no open tender process undertaken, by QRL or otherwise, for the selection of the main civil contractor for either the Caloundra or Toowoomba tracks. Various inconsistent accounts of the procurement process used were given to government by QRL over time, without attracting serious attention. Concerns about the performance and suitability of Cushion Track, or at least potential concerns, were brought to the government's attention from mid-2007.[135] They were catalogued in a letter from the Honourable William Carter QC to the Treasurer[136] on 30 January 2009 as including risk of injury, reluctance of owners and trainers to use the track at Caloundra and "the failure to first undertake the required research and in particular to consider a temporary synthetic track for the purposes only of experimentation and research as to its long term suitability for local climatic conditions". Mr Carter QC continued, in urging the Treasurer to intervene in Toowoomba

> *...[This] multiplicity of concerns... by respected industry participants both here and in the US is to be contrasted with the seemingly intransigent mind of QRL and in particular its Chairman, who... appears unequivocally committed to the installation of synthetic surfaces at key Queensland racing and training centres... . [The] division of opinion, surely, is a matter which must concern you, particularly in light of the fact that the Government... has committed substantial public monies in accordance with what, many argue, is the flawed advice of QRL.*

134 Statement of Andrew Fraser, 12 October 2013, page 5 para 9(e).
135 The inconsistencies and concerns are conveniently summarised in the abovementioned statement of Mr Fraser
136 Mr Fraser was appointed Treasurer on 13 September 2007 and retained responsibility for racing until 26 March 2009.

3.11.19 Despite all of the above, there was apparently never any suggestion within government that it might exercise its powers to ensure the process was being conducted correctly. Far from there being any intervention in relation to Toowoomba, there was a reply to Mr Carter's letter by Minister Lawlor (having taken over the portfolio) only on 1 May 2009; he said, in effect, that the installation of a synthetic track at Toowoomba was a matter only for QRL. As Mr Fraser has agreed, again with the benefit of hindsight:

> *So far as the executive government and chief executive are concerned, after a review of the material that exists with respect to this issue..., it is readily apparent that there was insufficient oversight with respect to the operations of QRL in respect of the installation of synthetic tracks and, particularly, the installation at Toowoomba. Information was received regarding the selection process and the choice of surface that should have been investigated or, at least, investigated more thoroughly.*
>
> ...
>
> *The developments revealed... [in relation to synthetic tracks and particularly Toowoomba] ...shortcomings in the model of oversight of QRL as a control body or, at least, in the application of that model in practice.* [137]

3.11.20 The sufficiency and appropriateness of government oversight of QRL and RQL is addressed in detail in Chapter 6 of this Report. For present purposes, it is enough to observe that it seems appropriate for government to retain a degree of supervision and at least potential control over any entity expending substantial public funds for essentially public purposes; control of the release of funding is an important means of doing so. There is, however, little point in such control if no real consideration is given to its use even where serious concerns are raised.

3.12 Conclusions

Overall conclusions

3.12.1 The Purchasing Policy and the Addendum were not adequate, either in terms of their internal coherence or their appropriateness for the significant infrastructure projects being undertaken, or to be undertaken, by QRL and RQL during the relevant period. The Addendum, in particular, also lacked integrity for the reasons explained above.

3.12.2 The Policy and Addendum were not adhered to, at least in respect of the infrastructure projects. Although there is insufficient basis to find that they were also not adhered to consistently in other day to day procurement activities of QRL and RQL, the culture of non-compliance and the difficulties of understanding the Policy make this likely.

3.12.3 The contractual arrangements of QRL and RQL with Contour itself were not underpinned by sound procurement practices: Contour was not subject to any competitive procurement after its initial engagement in a limited role at Caloundra in 2007. Other contracts resulting from the appointment of Contour to manage procurement processes on behalf of QRL and RQL – that is, contracts with other contractors and suppliers who were selected by Contour on QRL or RQL's behalf – also cannot be said to have been underpinned by sound procurement practices, in circumstances where QRL and RQL were reliant on Contour to select the method, select the contractors from whom tenders would be sought, perform an analysis of the tenders and make a recommendation which QRL and RQL invariably accepted.

137 Statement of Andrew Fraser, 12 October 2013, pages 18–19 paras 16(b), 18.

3.12.4 It is impossible now to determine, retrospectively, whether value for money was achieved in the infrastructure projects undertaken during the relevant period; that is a consequence of non-adherence to the Policy, which should have been a mechanism to maximise the chances of obtaining value at the time the projects were being developed and undertaken. The position is similar when it comes to contract management: it was substantially outsourced to Contour, without any attendant auditing or other process for ascertaining whether value for money was being achieved.

3.12.5 As to payment policies/processes and financial accountability, it has been explained previously that there was obscurity in the operation of delegation authority limits for different management positions, the exceptions to those limits and who bore ultimate responsibility for compliance in this regard. There were various other gaps in accounting process, and delay in the implementation of systems intended to improve accountability and compliance, which are all consistent with a culture within QRL and RQL which did not encourage precision in such matters.

Future racing industry procurement

3.12.6 There is an extensive body of analysis, at an academic and practical level, about the most desirable methodologies for procurement and the alternative approaches which may be appropriate for different activities and by different types of organisation. There are various views about the nature of the approach which is desirable in any given context. It is beyond the sensible scope of this Report to attempt to make recommendations as to the methodologies which would be appropriate for future procurement by racing control bodies.

3.12.7 The reasons for this are partly illuminated by the following passage from a 2007 OECD text on Integrity in Public Procurement:

> *Transparency and accountability have been recognised as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources – 'administrative efficiency' – or providing guarantees for fair competition. In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity... while pursuing other aims of public procurement.*[138]

3.12.8 Any recommendations could also only assist by reference to the statutory form and function of the control body, at any particular time, and the extent to which it is involved in undertaking public procurement or procurements which should be subject to similar considerations. These are, of course, policy questions including as to the degree of control which the government considers appropriate over the commercial activities of any racing control body. Those considerations are addressed elsewhere in this Report.

3.12.9 Finally, it is clear that there have already been many changes to the procurement and related accounting processes used within QACRIB in response to Deloitte's April 2013 report.[139] It appears that ongoing consideration is being given to these matters. It is suggested that consideration of the analysis of past events, as set out above, will assist in this process.

3.12.10 Consideration should be given to ensuring that the Purchasing Policy is made and published under section 81 of the Racing Act.

138 OEDC 2007, *Integrity in Public Procurement: Good Practice from A to Z*, OECD Publishing, 27 April.
139 See the submission on behalf of QACRIB provided to the Commission on 22 October 2013.

Chapter 4

Management and Culture – Term of Reference 3(b)

"[T]he adequacy and integrity of, and adherence to, management policies, processes and guidelines and the workplace culture and practices of the relevant entities, in particular RQL, and the appropriateness of the involvement of the Boards of those relevant entities in the exercise of functions by the executive management team and other key management personnel, including the officer holding the position of company secretary and those involved in integrity matters..."

4.1 Introduction

4.1.1 This Term of Reference directs inquiry about:

- the adequacy and integrity of, and adherence to "management policies, processes and guidelines", and the workplace culture and practices of the relevant entities, in particular Racing Queensland Limited (RQL)
- the appropriateness of board involvement in executive management functions.

4.1.2 These matters for inquiry necessarily involve the principles of corporate governance. The corporate governance arrangements of RQL in particular, and compliance by that company and its officers with legislative duties in the *Corporations Act 2001* (Cth), are the subject of Term of Reference 3(c). There is, therefore, an element of overlap in themes between Terms of Reference 3(b) and 3(c). Insofar as an assessment of the matters in this Term of Reference is informed by corporate governance principles, it is proper that regard be had to those principles in this Chapter.

4.1.3 The evidence provided to the Commission directed the focus of inquiries to the management and workplace culture of Queensland Racing Limited (QRL) and RQL in particular. These entities were, in terms of management structure, the most sophisticated of the relevant entities and had a significantly greater number of employees. With one exception addressed below in paragraphs 4.3.25 to 4.3.34, no substantive issues about management or workplace culture in relation to the other relevant entities emerged from the evidence examined by the Commission. Accordingly, the focus of this Chapter is on the management policies, processes and guidelines and the workplace culture and practices of QRL and RQL.

4.1.4 It must be observed at the outset that the Commission's inquiries support a conclusion that throughout the relevant period the relevant entities, including QRL and RQL, conducted the majority of their control body-related management functions competently. As explained below, as at amalgamation on 1 July 2010 RQL had nearly 150 officers and employees performing a variety of roles in different departments. The management and other difficulties that have arisen for the Commission's consideration are largely *systemic* rather than attributable to individual failings.

4.1.5 As will be demonstrated, notwithstanding the existence of hierarchical management structures and policies, QRL and RQL were, in practice, managed by "flat"[1] management structures. The most significant feature was the involvement of the chairman, Mr Robert Bentley, whose dominant personality and management style percolated through the executive management functions down to the day to day affairs of the companies. Mr Bentley acted not just as the chairman of the board, but as an executive chairman. The nature of the board, organisational structure and workplace culture meant there was no real mechanism for oversight of his actions. Indeed, such oversight did not exist in practice.

4.1.6 When the control body functions across the three codes were amalgamated in July 2010, a particular feature of RQL's workplace culture was the marginalising of staff who had previously worked for Greyhounds Queensland Limited (GQL) and Queensland Harness Racing Limited (QHRL). This may be explained by other features, such as the requirement for conformity and unity behind the RQL board's decision-making. This included high expectations from the board for secrecy and confidentiality of information, especially about industry infrastructure plans.

1 Statement of Ronald Mathofer, 9 August 2013, page 6 para 24; Statement of Kevin Dixon, 2 August 2013, page 5 para 9.

4.1.7 While it is accepted that discussions among directors were "robust"[2] inside the boardroom, there was very little tolerance for differences of opinion from that of Mr Bentley about the direction and management of QRL and RQL.

4.2 Organisational and management structure

4.2.1 Across the relevant period, QRL and RQL maintained a management structure comprised of a chairman and board of directors, a company secretary who was also corporate counsel, a chief operations manager then chief executive officer, six senior executive management personnel, a larger band of middle management, and another larger band of other employees.

The board of directors

4.2.2 The QRL constitution provided that the board would consist of not less than five but no more than seven directors.[3]

4.2.3 The RQL constitution provided that the board would consist of seven directors.[4] The constitution allowed for but did not require representation of the three codes on the board of directors.

4.2.4 The QRL and RQL constitutions set out, in broad terms, the powers of the board, including delegating functions to sub-committees. Both constitutions provided that:

- *The management of the Company is the responsibility of the Board and the Board may exercise all powers of the Company as are not, by the Corporations Act or by this Constitution, required to be exercised by the Company in general meeting.*[5]
- *The Board may delegate any of its powers and/or functions to one or more [sub-] committees consisting of such of the Directors as the Board thinks fit and the Board may also appoint the Chairman of any such [sub-]committee.*[6]
- *Each [sub-]committee must keep proper minutes of its meetings and the provisions regulating proceedings of the Board apply to the proceedings of [sub-]committees also. A [sub-]committee may meet and adjourn as the members of it think proper.*[7]
- *Committees are appointed by the Board only and may only make recommendations to the Board. No decision of a committee is binding on the Company unless it is ratified by the Board.*[8]

4.2.5 The QRL and RQL Codes of Conduct, which are discussed in more detail below, also set out responsibilities of the board. The QRL Code provided that the board (and the chief operations manager), must:

- *provide clear direction and ensure that performance is managed to achieve sustainable results*
- *encourage and reward contributions made by others*
- *lead by example in observing this Code*
- *ensure that the high standards conveyed through this Code are evident through the organisation, contributing to an integrity-based culture.*[9]

2 Statement of Wayne Milner, 26 July 2013, page 3 para 9.
3 Queensland Racing Limited (QRL) 2006, *Constitution*, 26 April, clause 15.1, lodged with ASIC 10 May 2006.
4 Racing Queensland Limited (RQL) 2010, *Constitution*, undated, clause 12.1, lodged with ASIC 14 July 2010.
5 QRL 2006, *Constitution*, clause 18.1; RQL 2010, *Constitution*, clause 16.1.
6 QRL 2006, *Constitution*, clause 19.8; RQL 2010, *Constitution*, clause 17.9.
7 QRL 2006, *Constitution*, clauses 19.9 & 19.10; RQL 2010, *Constitution*, clauses 17.10 & 17.11.
8 QRL 2006, *Constitution*, clause 19.11; RQL 2010, *Constitution*, clause 17.12.
9 QRL, *Code of Conduct*, clause 2.3.

4.2.6 The RQL Code of Conduct provided that the board was responsible for determining the strategic direction of RQL and ensuring compliance with statutory obligations. Board members were required to "act independently and not in the interests of any sectional interests", and to be "impartial in judgement and actions and to take all reasonable steps to be satisfied as to the soundness of all decisions to be taken by the Board".[10]

4.2.7 The RQL Code of Conduct expressly described the roles of the board chair and deputy chair. The chair "plays an important leadership role in ensuring Racing Queensland works effectively", with responsibilities to ensure:

- *the board reviews the method by which the senior management team undertakes day to day management of Racing Queensland*
- *all relevant issues are included on the agenda for the Board's meetings and that Board members receive timely and relevant information on agenda items*
- *members of the Board comply with their statutory obligations and with the provisions of the Code.* [11]

4.2.8 The deputy chair's role was to act as the chair during a vacancy in the office of the chair, and during all periods when the chair was absent or for another reason could not perform the functions of the office.[12]

4.2.9 At the beginning of the relevant period in January 2007, the QRL board consisted of five members: Mr Bentley (the chairman), Mr Anthony Hanmer, Mr William Andrews, Mr Michael Lambert and Mr William Ludwig. Mr Andrews and Mr Lambert ceased to be directors in December 2009. At that time, Mr Wayne Milner and Mr Bradley Ryan were appointed as directors.

4.2.10 When RQL commenced as the control body for all three codes in July 2010, its board was constituted by seven directors. These were the five former QRL directors (Messrs Bentley, Hanmer, Ludwig, Milner and Ryan), as well as the chairs of the control bodies of the other two codes, Mr Robert Lette (QHRL) and Ms Kerry Watson (GQL).

4.2.11 At a meeting of the chairs of the three codes on 23 December 2009, discussion included the composition of the proposed RQL board and appointment of a chairman. The meeting minutes indicate Mr Bentley was nominated as chairman of the new board. Mr Bentley subsequently acted as chairman of the informal board meetings of RQL prior to 1 July 2010. Mr Bentley was also named as chairman in the constitution of RQL[13] which was approved by Minister Lawlor, who assumed responsibility for racing on 26 March 2009, in June 2010.[14]

4.2.12 In accordance with the constitutional provisions enabling delegation of board powers and functions, both entities adopted sub-committee structures.[15] At the commencement of the relevant period, two QRL board committees were operational: the Audit Committee and the Human Resources and Remuneration Committee. At amalgamation in July 2010, the RQL board established three board committees: the Audit Finance and Risk Committee, the Remuneration and Nomination Committee, and the Marketing Committee.[16] The board adopted a charter for each committee and appointed directors as members.[17]

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10 RQL, *Code of Conduct*, clause 3.2.
11 RQL, *Code of Conduct*, clause 3.2.1.
12 RQL, *Code of Conduct*, clause 3.2.2.
13 RQL 2010, *Constitution*, clause 13.1.
14 *Racing Act 2002,* pursuant to section 11(1)(c) & section 27; Statement of Peter Lawlor, 23 August 2013, page 1 para 6.
15 QRL 2006, *Constitution*, clause 19.8; RQL 2010, *Constitution*, clause 17.9.
16 On the evidence provided to the Commission the Marketing Committee did not perform any functions or make any decisions which relate to the matters for inquiry under the Terms of Reference. It is unnecessary to consider the committee any further.
17 RQL, Board Meeting Minutes, 1 July 2010, pages 13-14.

4.2.13 The RQL board also established a Licensing Committee, Evidence Evaluation Committee, First Level Appeals Committee and Country Racing Committee. Nothing in the Terms of Reference, the documents or statements received by the Commission, directed the Commission to inquire further about the management of these committees.

Company secretary and corporate counsel

4.2.14 Throughout the relevant period, the position of QRL and RQL company secretary was held by Ms Shara Reid. Ms Reid concurrently held the position of corporate counsel.[18]

4.2.15 The QRL and RQL constitutions set out the functions of the company secretary. These included maintaining minutes of all meetings of the company and of the board and of any committee constituted by the board. The secretary was otherwise to hold office on the terms decided by the directors and in accordance with the Corporations Act.[19]

4.2.16 Section 188 of the Corporations Act requires a company secretary, under penalty, to ensure the company complies with a range of statutory obligations which generally require the company to demonstrate its own existence and to provide information about the company for the benefit of the public.[20] The essential function of the company secretary is compliance. The duties described in the documents below demonstrate Ms Reid was well aware of her functions.

4.2.17 As regulation and compliance requirements imposed on companies have grown, it has become more common for company secretary positions not just to be filled by people with legal qualifications or background, but also to be merged with the corporate counsel role.[21]

4.2.18 Ms Reid's employment contract imposed reporting responsibilities on her in her dual capacities. In the corporate counsel capacity she was to report to the CEO, and in company secretary capacity to the chairman.[22]

4.2.19 Company secretaries are officers of the company and accordingly owe duties of care and diligence, good faith, avoidance of improper use of position and improper use of information. In assessing the required standard of care and diligence owed by any officer, both objective and subjective factors are relevant. Relevant subjective circumstances include particular responsibilities the officer holds within the company and any special skills the officer possesses. The roles of corporate counsel and company secretary are indivisible. The standard of care owed by a company secretary who is also legal counsel will be informed by the responsibilities of the latter role.[23]

4.2.20 The *role profile* attached to Ms Reid's original employment agreement (which covered the QRL period from 1 January 2007 to 30 June 2010) listed the following duties for the position of *legal compliance counsel*:

1. *Manage matters of a legal nature both internally and externally related*
2. *Provide legal advice to the Chief Operations Manager and the Board*
3. *Develop sound work practices and procedures to ensure overall Board compliance*
4. *Manage appeals to the Racing Appeals Authority and as required represent the Board at appeals*

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18 Corporate counsel at QRL; senior corporate counsel at RQL.
19 QRL 2006, *Constitution*, clause 23; RQL 2010, Constitution, clause 21.
20 Austin, RP & Ramsay, IM 2013, *Ford's Principles of Corporations Law*, Lexis Nexis, Butterworths, Australia, 15th edition, [13.100] page 910.
21 Kiel, G, Nicholson, G, Tunny, JA, & Beck J 2012, *Directors at Work: A Practical Guide for Boards*, Thomson Reuters, Australia, [4.17] 'The Company Secretary' pages 242-243.
22 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 1 July 2010, clause 2.2; RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, clause 2.2.
23 See *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 286 ALR 612 at [11], [34]-[35]; and *Austin & Ramsay, Ford's Principles of Corporations Law*, [8.305] 'The standard of skill' page 472.

5. *Manage the appeals process ensuring cost effective delivery of the first level appeals system*
6. *Actively contribute as part of the management team within the organisation*
7. *Undertake other duties as an officer as required, which may include, Harassment, FOI and Rehabilitation.*[24]

4.2.21 Ms Reid's primary functions remained the same throughout the relevant period. After amalgamation her workload and responsibilities increased. In a self-review for her 2010-2011 performance, Ms Reid listed her main responsibilities as senior corporate counsel and company secretary, to include the following:

- *Manage the Legal and Compliance Department*
- *Provide legal advice to the CEO and the RQL Board*
- *Ensure Board compliance*
- *Manage WorkCover insurance and rehabilitation for RQL employees, jockeys and drivers*
- *Ensure compliance with the Constitution, statutory requirements etc*
- *Rehabilitation and Return to Work Coordinator*
- *Senior Harassment and Discrimination Referral Officer*
- *Privacy Officer*
- *Public Officer*
- *CMC Liaison Officer*
- *Manage the First Level Appeals*
- *Manage Queensland Race Information*
- *Manage Club & Venue Licensing*
- *Company Secretary for: Racing Queensland Limited, Sunshine Coast Racing Pty Ltd, Rockhampton Racing Pty Ltd, Racing Queensland Venue Management Pty Ltd.*[25]

4.2.22 Clearly, Ms Reid occupied a central role at both QRL and RQL. Her position as company secretary exposed her to the inner processes and decision-making of the board, and the corporate counsel role required her leadership and involvement in the day to day management of the companies.

4.2.23 As indicated, she was required to ensure that compliance was observed by all officers of the company.

Executive management and departments

4.2.24 During the QRL period, the chief operations manager (Mr Malcolm Tuttle) and the director of integrity operations (Mr Andrew Hedges, then Mr Jamie Orchard) reported directly to the board of directors. The department structure was made up of Racing Services (Mr Paul Brennan), Information and Communications (Mr David Rowan), Finance (Mr Adam Carter), Legal and Compliance (Ms Reid), and Licensing and Training (Mr Peter Smith). The executive managers of the departments reported to Mr Tuttle.[26]

4.2.25 The 2010 amalgamation saw staff from QHRL and GQL absorbed into the existing QRL organisational structure, with additional roles being created for harness and greyhound racing managers and teams, in addition to the TAB and non-TAB thoroughbred racing functions.

24 Shara Reid, Queensland Thoroughbred Racing Board Terms of Employment, 'Role Profile', updated 14 July 2006.
25 Shara Reid, Racing Queensland Limited Performance Agreement and Appraisal, 30 June 2011.
26 QRL 2008, *Annual Report 2007-08*, pages 8-9.

4.2.26 According to an organisational chart which was adopted by the RQL board on 1 July 2010 (see the partial reproduction in Appendix D[27]), RQL remunerated/employed approximately 150 people. This included the chairman, six directors, CEO, six executive managers, and approximately 130 departmental employees.[28]

4.3 Adherence to management policies, processes and guidelines

Background

4.3.1 QRL and RQL each had a catalogue of management policies, processes and guidelines which applied to directors, senior executive managers, and employees.

4.3.2 Formal management policies were treated as *internal* and distinct from the policies made for *good management* of the codes of racing pursuant to section 80(1)(b) and as mandated by section 81 of the *Racing Act 2002* (Qld), particularly in the way they were created and published.[29]

4.3.3 The internal policies were separated into two groups: financial management and human resources.[30] The adequacy, integrity of, and adherence to, the financial policies relating specifically to procurement, contract management and financial accountability have been investigated in Chapter 3 of the Report in response to Term of Reference 3(a). There were various other QRL and RQL financial management policies, processes and guidelines, covering such matters as expense reimbursement, credit, cash management and investment. Nothing has come to the Commission's attention to justify consideration of their forms or whether they were complied with. There is no suggestion of any difficulties in these areas.

4.3.4 The subjects of the human resources policies included: code of conduct, induction, recruitment and selection, remuneration, study assistance, workplace health and safety, relocation, personal presentation, confidentiality and intellectual property, parental leave, payroll, performance agreement and appraisal, performance counselling, termination of employment, working hours, workplace smoking drug and alcohol, travel, privacy and leave.[31]

4.3.5 Board oversight was another layer to the management process and was carried out by the board committees referred to at 4.2.12 and 4.2.13 above. The committees were constituted by board members and assisted by executives and other management personnel. The conduct and functions of the committees were to be guided by a committee charter. The adequacy and integrity of and adherence to the charter guidelines of those committees are assessed below at 'Management oversight – board committees' beginning at 4.3.196.

4.3.6 The QRL human resources policies were reviewed by audit processes in 2008 and 2009. While these audits identified some deficiencies in management policies and some serious deficiencies in management processes, the management structures and frameworks across QRL and RQL were not themselves considered inadequate.

4.3.7 The Commission's inquiries have been directed to focus on the implementation of and adherence to policies, processes and guidelines by QRL and RQL directors and senior executives.

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27 The version of the organisational chart at Appendix D does not include employee names. Another version of the chart with names was provided to the Commission, which demonstrated the total number of staff was approximately 145.

28 'Proposed Three Code Organisational Structure (Names)' chart, attached to email from Shara Reid to Cooper Grace Ward lawyers on 5 July 2010. The Organisational Chart was adopted at the 1 July 2010 RQL board meeting: RQL Board Meeting Minutes, 1 July 2010, page 8.

29 The policies made under the legislation were subject to legislative requirements for consultation and public publication. Under section 79 *Racing Act 2002*, those policies were statutory instruments. The internal management policies were not put out to consultation and were provided only to staff, via the company intranet. The Financial Management and Procedures Manual for Clubs was an exception to this and was published on the QRL/RQL website.

30 RQL, Board Meeting Minutes, 1 July 2010 & 6 August 2010, refer to "Financial policies" and "HR policies".

31 RQL, Board Meeting Minutes, 6 August 2010, page 2.

The Code of Conduct

4.3.8 The overarching management policy for QRL and RQL was their respective Codes of Conduct.[32] The QRL and RQL Codes summarised the company's standards for conduct and defined the expectations of employees to support behaviour consistent with company values.

4.3.9 Every employee was required to act in accordance with the Code of Conduct, their employment contract, QRL/RQL policies and statutory obligations, and to act with the highest standards of professionalism, honesty, diligence and integrity.[33] The Code applied to all employees and board members.[34]

4.3.10 The QRL Code of Conduct was based on four overarching principles: integrity, respect, safety and high-performance.[35] The RQL Code was expressly modelled on the principles of the *Public Sector Ethics Act 1994* (Qld) in force at the time: respect for the law and system of government, respect for persons, integrity, diligence, economy and efficiency.[36] The content of each was largely mirrored between the Codes of Conduct, with some variations in form and structure.

4.3.11 The RQL Code of Conduct contained more specific provisions as to the role of the chairman and deputy chairman, role of the board, and disciplinary action for breach by a director.

4.3.12 Both the QRL and RQL Codes of Conduct had an introductory message signed by Mr Bentley in the following terms:

> *[QRL/RQL] plays a crucial role in the [thoroughbred] racing industry in Queensland. [QRL/RQL] is committed to the efficient administration of the industry and acknowledges that its decision making impacts on all participants in the industry.*
>
> *Public confidence in the [thoroughbred] racing industry depends upon [QRL/RQL] managing the industry in a fair and transparent manner according to the highest standards of probity and integrity.*
>
> *The Code of Conduct applies to all [QRL/RQL] officials, including Board members, in the performance of their functions and duties. [QRL/RQL] officials are expected to maintain the highest standards in professional and business ethics and, through their work, performance and behaviour, ensure that confidence in the integrity of [QRL/RQL] is justified and maintained. [QRL/RQL] is committed to fostering a working environment that relies on personal integrity, quality management and a high level of service. To this end, [QRL/RQL] has produced this Code of Conduct which details the expected levels of behaviour required of all [QRL/RQL] officials. The Board of [QRL/RQL] is committed to ensuring compliance with the provisions of this Code at all times.*[37]

4.3.13 One of the objectives recorded in both Codes of Conduct was the commitment "to fairness, impartiality and transparency in its decision making".[38] Each Code required every official to act in accordance with it and with its policies; acting "with the highest standards of professionalism, probity, diligence and integrity". [39] The Codes required the board to "lead by example in observing this code", and dictated that all officials "must treat all industry participants with courtesy, honesty and fairness with proper regard for their rights and obligations in accordance with the principles of natural justice".[40]

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32 QRL *Code of Conduct* adopted by the board on 13 April 2007; RQL *Code of Conduct* adopted by the board on 1 July 2010.
33 RQL, *Code of Conduct*, page 3; QRL, *Code of Conduct*, page 4.
34 Referred to as "officials" in the QRL *Code of Conduct*.
35 QRL, *Code of Conduct*, page 5.
36 *Public Sector Ethics Act 1994*, Reprint 5F, reprinted as in force on 1 July 2010; RQL, *Code of Conduct*, Part 4.
37 RQL, *Code of Conduct*, page 2; QRL, *Code of Conduct*, page 2.
38 RQL, *Code of Conduct*, page 3; QRL, *Code of Conduct*, page 4.
39 QRL, *Code of Conduct*, Part 1; see similarly RQL, *Code of Conduct*, Part 1..
40 QRL, *Code of Conduct*, clause 4.1.1; see similarly RQL, *Code of Conduct*, clause 4.2.

4.3.14 Further, the Codes of Conduct required all officials to comply with all QRL/RQL procedures, policies and statutory obligations. That compliance was defined in the QRL Code to mean "observing the letter and spirit of the law, policy, procedure or lawful request as well as managing your activities in a manner consistent with QRL as a 'good corporate citizen' ".[41]

4.3.15 In a section, "Why have a code of conduct?", the RQL Code provided that all employees of RQL were "public officials" within the meaning of the Public Sector Ethics Act and were required to comply with that Act's provisions.[42]

4.3.16 The earlier QRL Code of Conduct did not include the reference to the Act. Before the Code was adopted by the QRL board on 13 April 2007, it had been reviewed by Mr Hedges, then director of integrity operations, "as a result of QRL becoming a control body and removing itself from some of the public sector governance mechanisms".[43] Mr Hedges presented the Code to the board on 2 March 2007. Mr Lambert, a director, reviewed the policy and provided some changes which were included in the version adopted by the board on 13 April 2007.[44]

4.3.17 The Public Sector Ethics Act regulates public sector ethics and conduct. Section 4 of the Act declares certain ethical principles fundamental to good public administration. During part of the relevant period, namely between 1 January 2007 and 31 October 2010, the principles were: respect for the law and the system of government, respect for persons, integrity, diligence, economy and efficiency.[45] On 1 November 2010 those principles were amended to be: integrity and impartiality, promoting the public good, commitment to the system of government, and accountability and transparency.[46] The Act dictates that these values apply, relevantly, to "public sector entities" and "public officials".[47]

4.3.18 *Public sector entity* is defined in the Act to include an entity established under an Act or under state or local government authorisation for a public, state or local government purpose. *Public official* for a public sector entity is defined as an officer, employee or constituent member of the entity. Section 15 requires the chief executive officer of a public sector entity to ensure that a Code of Conduct is prepared for the entity. Section 18 requires public officials of the entity to comply with the standards of conduct stated in the entity's Code of Conduct.

4.3.19 It was submitted for some of the QRL/RQL directors and senior executives that the Public Sector Ethics Act was not applicable to RQL.[48] This submission is correct. However, for reasons explained below, whether or not the Act applied did not materially change the obligations officers owed under the Code of Conduct. It is nonetheless instructive to consider the Act's application.

4.3.20 The relevant entities were companies established and registered in accordance with the requirements set out in the Corporations Act. The entities exercised control body functions, which involved acting in the public interest. Those powers were conferred on the existing entities only after an application and appointment process made pursuant to the Racing Act.[49] Therefore,

41 QRL, *Code of Conduct*, clause 4.1.2; see similarly RQL, *Code of Conduct*, clause 4.1.
42 RQL, *Code of Conduct*, page 3.
43 QRL, Board Meeting Minutes, 2 March 2007, page 6.
44 QRL, Board Meeting Minutes, 13 April 2007, page 7.
45 *Public Sector Ethics Act 1994*, Reprint 5F, effective 1 July 2010 and Reprint 4A, effective 30 October 2006. The Codes of Conduct for GQL, QHRL and RQL were each modelled from these principles.
46 *Public Sector Ethics Act 1994*, Reprint 6, effective 1 November 2010, section 4.
47 *Public Sector Ethics Act 1994*, section 5.
48 Submission of Rodgers Barnes & Green (on behalf of Messrs Bentley, Hanmer, Ludwig, Milner, Orchard, Tuttle, Brennan, and Ms Reid), 30 October 2013, Part 5 pages 5-8 para 40; Submission of Robert Lette, 28 October 2013, page 16 para 44.
49 Section 11(c) of the *Public Sector Ethics Act 1994* was inserted during the relevant period in November 2010. It provides that a code of conduct for a public service agency may apply to other persons who are not public officials of a public service agency, who have a contract or other agreement with the agency. It could be argued that the control body approval constituted an agreement between RQL and the Office of Racing or the department, however there has been no suggestion during the course of the Commission that either RQL or the State government considered this to be the case.

while the relevant entities exercised powers conferred by an Act or by government authorisation, for public purposes, they could not be said to have been *established* under an Act or under State government authorisation. They were, therefore, not "public sector entities" and not subject to the Public Sector Ethics Act.

4.3.21 The RQL Code of Conduct, according to its revision history, was drafted by HR Business Solutions, a human resources consulting firm which QRL and RQL engaged to provide advice on human resources policies and practices. The Code was adopted by the RQL board on 1 July 2010, together with a multitude of other policies and resolutions relevant to the amalgamation process. Mr Lambert and Mr Hedges identified in 2007 that QRL was removed from some public sector governance mechanisms.[50] In these circumstances, it appears likely that the external drafter of the RQL Code misapprehended the nature of the entity and erroneously considered that the Public Sector Ethics Act applied. In the flurry of activity which preoccupied the board and executive management at the time of the amalgamation, the mistake was not picked up.

4.3.22 That the Public Sector Ethics Act did not apply to the relevant entities makes no material difference to the obligations of directors and officers. The Act only imposes an obligation to comply with an entity's code of conduct.[51] This obligation was already imposed on directors and employees of QRL/RQL by the terms of the Codes of Conduct, and additionally on employees by their employment contracts. Therefore, while there was no statutory obligation to comply with the Codes, compliance was nonetheless an enforceable condition of QRL/RQL directors' appointments and employees' contractual engagements.

4.3.23 As to disciplinary action for non-compliance, where internal disciplinary processes exist, the Act requires that those processes be applied rather than external processes.[52] Such processes were set out in the QRL and RQL Codes of Conduct. Therefore, even if the Act had applied, it would not have provided any additional disciplinary action.

4.3.24 The bodies which performed control body functions prior to QRL, GQL, QHRL and RQL were plainly statutory bodies, established under an earlier version of the Racing Act. Their officers were therefore bound by the Public Sector Ethics Act. Similarly, the current QACRIB is expressly established by section 9AA of the current Racing Act. The legal nature of the entities exercising powers and performing functions under the Racing Act has thus changed. The public purpose of the entities' powers and functions has remained constant.

Adherence to the Code of Conduct

The Russ Hinze Grandstand demolition

4.3.25 There is only one matter of which the Commission is aware, concerning any relevant entity other than QRL and RQL, which requires any attention in this Chapter. It concerns the appointment of Watpac Limited to demolish the Russ Hinze Grandstand at Albion Park in late 2008. Mr Kevin Seymour and Mr Lette were then directors both of QHRL and of Watpac.

4.3.26 The question raised for the Commission's consideration is whether their conflicts of interest and duty were properly managed in relation to Watpac's appointment. The QHRL Code of Conduct, like those of QRL and RQL, contained provisions as to the disclosure and management of conflicts. It is sufficient to note that the QHRL Code required all officers and employees to disclose any interest which may impact on the performance of their duties and take action to resolve any conflict in favour of QHRL's interests.

50 See 4.3.16.
51 *Public Sector Ethics Act 1994*, section 18.
52 *Public Sector Ethics Act 1994*, section 24.

4.3.27 Mr Seymour's initial statement to the Commission said, in summary, that there was no conflict of interest because the appointment was made by the Albion Park Trust, not QHRL, and he had no involvement in the appointment.[53] The former is essentially correct, albeit that the decision to appoint Watpac was made for the Trust by the Albion Park Raceway Management Committee. However, it is not correct that Mr Seymour had no involvement in the appointment.

4.3.28 Documents before the Commission reveal that Mr Seymour was at a management committee meeting on 10 September 2008, when there was consideration of an engineer's report setting out various options to deal with structural problems with the grandstand; the options ranged from renovation to demolition. There were concerns about the safety of the structure. The management committee considered all options except demolition to be too expensive to be financially viable, so resolved upon demolition at a cost which the engineer estimated at $2.5 million. The minutes then record that:

> *Kevin Seymour offered to the meeting that he would be prepared to have Watpac... investigate and explore a cost of less than $2.5million for the... demolition and that written advice on this offer would be provided back to the [Committee] for consideration.*

4.3.29 Watpac duly submitted a tender for the demolition on 29 September 2008 in the sum of $1,646,965 (excl GST). Of the total, $1.35 million was for *demolition* by, it appears, a subcontractor at that price. The Watpac tender was noted at a meeting of QHRL on 30 September, attended by Mr Lette and Mr Seymour. It was then again considered by the management committee on 8 October, where a General Manager's Report explained that it had been referred to the engineer "for analysis, assessment and comment and for inclusion in a fully costed demolition project proposal". The committee's minutes record that some concerns were expressed, including as to exclusions itemised in Watpac's tender letter – "the costs of these excluded works... would need to be determined and added to the sum quoted by Watpac". Mr Lette told the committee that Watpac had received quotes from five demolition subcontractors and that the $1.35 million included in the tender was the lowest.

4.3.30 It appears that there was some delay in reaching agreement between QHRL and GQL, as the users of Albion Park, as to the best solution to the dilapidation of the grandstand. However, the minutes of a management committee meeting on 12 November 2008, again attended by Mr Seymour, record that there was agreement to proceed with the demolition. On 27 November, the management committee wrote to Watpac to confirm the acceptance of its tender.

4.3.31 The Commission provided documents evidencing the above matters to Mr Seymour and he has provided a supplementary statement addressing them.[54] Although he does not specifically recall attending the meetings in question, he accepts that he did. He states that his directorship and shareholding in Watpac were declared and well-known to the other directors; there is no reason to doubt this is correct. It is less clear, on the documents, whether he is correct to say that he would not have participated in any discussion or decision about whether to accept the Watpac tender.

4.3.32 It appears that no other tenders were sought, so that the tender price was compared only against an engineer's estimate. The selection of Watpac for this work, no matter how favourable to QHRL and RQL it was, risked creating a perception that the demolition may have been achievable for a lower cost if put to competitive tender and an allied doubt about whether Mr Seymour and Mr Lette correctly managed their conflicts. It may be observed that it would have been preferable for some process to have occurred to test the Watpac price against the market and/or to expressly raise the conflict at the committee meetings and seek a resolution to address it.

53 Statement of Kevin Seymour, 26 November 2013, page 3 para 3(d).
54 Statement of Kevin Seymour, 26 November 2013.

4.3.33 However, Mr Seymour and Mr Lette had disclosed their conflicts to QHRL in accordance with the Code of Conduct and it is impossible to conclude that they did not resolve the conflicts in the interests of QHRL. As noted above, it appears that more than 80 per cent of the tender price was payable to the subcontractor actually carrying out the demolition. There is no reason to doubt Mr Lette's report that the subcontractor was selected by a tender process. Mr Seymour explains that he sought to get Watpac to provide a tender "for less than the $2.5 million proposed by [the engineer]... because [he] was concerned to save as much money as possible for QHRL and GQL, while at the same time wanting to see that the demolition work was carried out as a matter of urgency for absolute safety reasons". He requested "the lowest price that Watpac could do" and arranged for Watpac to provide its tender very quickly. Nothing before the Commission suggests that there was any other motivation.

4.3.34 In the above circumstances, no adverse finding is made on this issue against Mr Seymour or Mr Lette.

The *Hydroxycamphor* issue

4.3.35 The Commission's attention was drawn to a matter which potentially raised an important integrity concern. Until February 2009 horses were routinely tested for the presence of the substance *Hydroxycamphor*. In February 2009 Mr Jamie Orchard, director of integrity at QRL, prepared a paper for the board recommending that this practice be discontinued.

4.3.36 The board accepted his recommendation and on 6 February 2009 resolved that Mr Orchard advise the Racing Science Centre (RSC) that it was no longer a requirement to test for *Hydroxycamphor* as part of its standard testing. Specific testing could be undertaken in circumstances where a trainer was suspected of administering the substance.

4.3.37 Mr Wade Birch, chairman of stewards for the present control body, who was acting chief steward for QRL in February 2009, received an email from Mr Orchard after the QRL board meeting on 6 February in which Mr Orchard proposed that testing a sample for *Hydroxycamphor* then lodged with the RSC should be discontinued. Mr Orchard wrote:

> *I also mentioned [to the board] the fact that we had an outstanding discrepancy at the lab in respect of camphor. I said that as we had now adopted the policy that we were not pursuing positives for camphor (in light of not testing/reporting discrepancies) it seemed inappropriate to pursue the current discrepancy through to confirmation testing. The Board agreed with this approach. Would you advise the lab of that decision re the discrepancy?*

4.3.38 Mr Birch in his statement to the Commission said Mr Orchard "directed that the investigation of [name] by the stewards was not to proceed". It does, however, seem clear from the language used by Mr Orchard that it was a request not a direction and Mr Birch could have raised integrity concerns but he did not have any.

4.3.39 The matter concerned a trainer who trained his horses in the vicinity of a large stand of camphor laurel trees in Toowoomba. As Mr Orchard's board paper revealed, it was the ingestion of leaves, berries and bark by horses from camphor laurel trees near the Toowoomba racecourse and the disproportionately high number of horses from that area which had tested positive for *Hydroxycamphor* since 2004 (nine out of 11) which had prompted the Australian Trainers Association (Queensland branch) to approach QRL.

4.3.40 Queensland was the only State in which *Hydroxycamphor* was the subject of testing. Mr Orchard had received advice from the RSC that it had never made a considered decision to commence testing for it. When the broad spectrum testing was introduced that substance was one additional substance identified. Since it had an effect on a horse's respiratory system its presence was routinely reported to QRL. Other States used different testing methods which did not identify *Hydroxycamphor*.

4.3.41 *Hydroxycamphor* is a chemical rubefacient and a mild analgesic and also has an expectorant action on the respiratory system. It has been used in the past, internally, as a respiratory and cardiovascular stimulant by veterinarians. A substance which has an effect on, for example, the respiratory or cardiovascular systems is prohibited in accordance with the Rules of Australian Racing (AR) 178B. Any person in charge of a horse which tests positive to such a substance is subject to being punished. Furthermore, under AR 177 where a prohibited substance is detected in any sample the horse must be disqualified from any race.

4.3.42 The Commission has concluded that there was nothing untoward in the decision to discontinue testing for the presence of *Hydroxycamphor* generally or in the particular case. Mr Orchard had offered three possible solutions to the board noting that none was entirely satisfactory. Apart from removing the trees from the Toowoomba Turf Club there was no way of avoiding the consequences of a horse ingesting product from the trees. Disqualification was mandatory not discretionary if a positive result was returned. The decision, which brought Queensland into line with other States, was unremarkable. As a matter of fairness it was appropriate to discontinue as the trainer under investigation came from the Downs area.

4.3.43 The Commission has concluded that no integrity issue arose in those circumstances.

Two circumstances of non-adherence

4.3.44 The evidence provided to the Commission highlighted two significant matters of non-compliance with the QRL Code of Conduct. The first concerned the actions of Mr Bentley, Mr Ludwig and Ms Reid in relation to an alleged misuse of a proxy vote at a QRL meeting in 2008 and their subsequent conduct in respect of this issue. The second focused on the actions of Mr Bentley and Ms Reid during the recruitment process for replacement of two QRL directors in 2009 as required by the company constitution. They are addressed separately below.

The proxy issue

Introduction

4.3.45 This aspect of the Commission's inquiries arose out of complaints made in 2008 that members of the Queensland Country Racing Committee (QCRC) were denied a right to vote. This vote concerned amendments to the constitution of QRL which were advanced by the board at that time.

4.3.46 However, the circumstances surrounding that voting process were only one aspect of the focus of the Commission's inquiries. The other concern was the response of QRL to these events and the representations made by Mr Bentley to the Minister and government in response to complaints made against officers of QRL.

4.3.47 In May 2009, Mr Bentley as chairman of QRL sought a commitment from the Queensland government to redirect a portion of wagering tax, to go back to the Queensland racing industry for infrastructure improvements. Mr Bentley initiated a document titled the *Queensland Racing Industry Issues Paper* (the Issues Paper) for the consideration of government and, in particular, Minister Lawlor.

4.3.48 Part of the proposal, advanced in the Issues Paper, sought the approval of the Minister in relation to amendments to the constitution of QRL. One ground advanced by Mr Bentley for change was that "unfounded allegations", in relation to the process for amendments of the constitution in the previous year, had caused the Minister not to endorse amendments resolved upon for the constitution.[55] The Issues Paper contained the following:

55 Pursuant to sections 26 and 27 of the *Racing Act 2002*, reprint No. 2A, the approval of QRL as the thoroughbred control body was subject to conditions. These conditions included QRL obtaining (written) ratification of the Minister before implementing any amendment to its constitution. See: Letter from Barry Dunphy to Carol Perrett, 15 September 2008, section 2.0.

Outcome

Following initial complaints by a QTC committeeman, Mr David Dawson, and a follow up by Mr Bill Carter, the election process of QRL was referred to ASIC, the Crime and Misconduct Commission, and the Queensland Police (Fraud and Corporate Crime Group) for investigation.

- ***All three agencies cleared the conduct of QRL, its directors and executive officers.***
- *Prior approval by ASIC was received for the changes and the procedures carried out*
- *The most pre-eminent constitutional lawyer Mr David Jackson QC advised on the entire process ...*

Issues

*As a result of the **unfounded allegations**, the Minister did not endorse the Constitutional changes that were supported 14 votes to 1 and widely supported by the industry.*

The board will be in ongoing election mode.

Industry funds are used to engage a recruitment agency.[56]

(emphasis added)

4.3.49 On 10 August 2009, another letter was sent by Mr Bentley to Minister Lawlor in response to allegations made by the Honourable William Carter QC regarding the director selection process in 2009 (see "2009 directors' selection process" below at 4.3.124). The letter also contained the following comments relating to these events in 2008:

Bill Carter accuses the Qld Racing Board of improper voting practices in seeking changes to the QRL constitution.

There was no ground for complaint a simple explanation was all that was required.

The industry and government I am sure is still counting the cost of the last Bill Carter vindictive fishing expedition on the QRL constitution changes...

It is worth noting the outcomes, the CMC passed it back in under a week as they do not have jurisdiction, it is an ASIC matter. The complaint was a [sic] passed to ASIC who passed it back again with no action and noting that they had previously given approval for the procedure and clearing the director involved. Not to be deterred Bill Carter had the matter referred to the police. The police engaged 6 officers for 4 months, tied up the staff at QRL for the full duration...

Result – full clearance

Cost – $1.2 million[57]

(emphasis added)

4.3.50 Evidence produced to the Commission raised questions about the conduct of Mr Ludwig and Ms Reid on this proxy issue and whether it accorded with the Code of Conduct and the constitution of QRL.

4.3.51 As indicated, questions also arose about the representations made by Mr Bentley to the Minister and to government on this issue, namely, whether these representations were based on fact. If they were not, Mr Bentley may have acted without integrity and in breach of the Code of Conduct.

56 QRL, *Queensland Racing Industry Issues Paper*, May 2009, pages 40-41.
57 Letter from Robert Bentley to Peter Lawlor cc: David Grace, 10 August 2009.

4.3.52 In the end, the Commission's inquiries demonstrated that the fairness, impartiality and transparency required by the Code of Conduct, and expected particularly of the chairman Mr Bentley, were not achieved.

4.3.53 Indeed, as will be seen, Mr Bentley, Mr Ludwig and Ms Reid all acted without integrity, such that confidence in QRL must have been damaged in the minds of stakeholders in the racing industry, and particularly in country Queensland.

Background

4.3.54 On 6 August 2008, the following separate meetings took place for the purpose of addressing proposed constitutional changes:

- a general meeting of QRL
- a meeting of Class A members of QRL
- a meeting of Class B members of QRL.

4.3.55 The meetings were called for a vote to be taken on a special resolution to amend the constitution of QRL. The resolution was purportedly passed to make the following important amendments:

- an extension of the initial term of the founding directors from three to six years (before retirement by rotation process)
- removal of the requirement for an independent recruitment consultant to prepare a shortlist of applications for director positions
- the restructure of the director selection committee of QRL
- clarification of the method by which the board of QRL could appoint directors.[58]

4.3.56 At the meeting of Class A members, the resolution was carried by 14 votes to one to support the appointment of a representative to attend the general meeting (on behalf of the Class A members) and vote in favour of the motion.

4.3.57 Class A members included various racing clubs, committees and associations including the QCRC.[59]

4.3.58 Mr Ludwig purported to vote in favour of the resolution as proxy for the QCRC.

4.3.59 However, the validity of that vote was later challenged by the members of the QCRC on the basis that Mr Ludwig was not authorised to act as proxy and was not authorised to cast the vote in favour of the motion.

4.3.60 The process authorising a proxy to vote required compliance with the constitution of QRL and provisions of the Racing Act (regarding the prescribed processes of the QCRC).

4.3.61 These processes were not followed.[60]

Allegations and investigations against Mr Ludwig

4.3.62 On 11 August 2008, Mr Gary Peoples, a QCRC member and elected Class A representative, wrote to the Treasurer and Minister responsible for racing, the Honourable Andrew Fraser

> *...the reason for my concern is that Noel Brosnan and myself, as the elected Class A Members representing the Country Racing committee, never got the chance to vote on this change to the constitution... Bill Ludwig was not elected to take that vote forward but he did and the way he voted was totally opposite to the views of the Country Racing Committee...*[61]

58 Letter from Barry Dunphy to Carol Perrett, 15 September 2008, section 2.0.
59 QRL 2006, *Constitution*, clause 1.1; RQL 2010, *Constitution*, clause 16.1.
60 Letter from Barry Dunphy to Carol Perrett, 15 September 2008, section 3.2.
61 Letter from Gary Peoples to Andrew Fraser, 11 August 2008.

4.3.63 On 19 August 2008, Mr Carter QC wrote to the Treasurer:

> *I am informed that at the Class A Meeting Mr Ludwig, a Director of QRL and a Class B Member of the company, purported to exercise a proxy on behalf of the Country Racing Committee (CRC) in favour of the resolution. The circumstances in which this occurred, if correctly reported, raise serious doubts as to the validity of this proxy...*[62]

4.3.64 The challenge to the validity of the vote purportedly made by Mr Ludwig was brought to the notice of the Treasurer at a time when he was being asked by Mr Bentley to approve the proposed amendments to the constitution.

4.3.65 The Treasurer referred the matter to the Crime and Misconduct Commission (CMC) for investigation on 23 August 2008.[63]

4.3.66 By letter dated 25 August 2008 the chair of the CMC wrote to Mr Gerard Bradley, under treasurer at Queensland Treasury:

> *Having considered section 59 of the Racing Act 2002 and the material provided, I am of the opinion that this matter is not within the jurisdiction of the Crime and Misconduct Commission (CMC). ...*
>
> *In that regard I note that QRL is an 'eligible corporation' registered under the Corporations Act, which is within the jurisdiction of the Australian Securities and Investment Commission (ASIC). I also note there are provisions under the Racing Act for the chief executive to investigate the suitability of a control body to continue to manage its code of racing.*[64]

4.3.67 The matter was then referred to Australian Securities and Investments Commission (ASIC) on 26 August 2008.[65]

4.3.68 On 9 October 2008, the Opposition spokesperson for racing, Mr Mike Horan MP, raised allegations concerning the QCRC proxy vote in Parliament:

> *It is now over six weeks since the Treasurer and minister for racing referred allegations against Queensland Racing Ltd to ASIC. ... There is serious concern in racing circles that after six weeks still no-one from the Queensland Country Racing Committee has been interviewed or contacted...*[66]

4.3.69 On 17 October 2008 Mr Bentley wrote to the Treasurer responding to the statement made by Mr Horan:

> ***Mr Horan said "Members of the Queensland Country Racing Committee were not advised that the special general meeting was on, were not advised of its content and were not advised of the change in the proxy arrangements."***
>
> *This statement is completely incorrect; it is false and designed to mislead the Queensland Racing industry.*
>
> *The Queensland Country Racing Committee (QCRC) was provided with full notice of the General Meeting in accordance with the constitution and indeed member representatives of that Committee, Mr Brosnan on one occasion, and Mr Peoples on numerous occasions, had telephone conversations with Ms Shara [Reid], QRL's Legal Compliance Counsel/Company Secretary about the nature of the meeting prior to it occurring. ...*

62 Letter from William Carter QC to Andrew Fraser, 19 August 2008.
63 Letter from Gerard Bradley to Robert Needham, 23 August 2008.
64 Letter from Robert Needham to Gerard Bradley, 25 August 2008.
65 Letter from Maree Blake to Gerard Bradley, 22 October 2008.
66 Queensland Parliament, *Hansard*, 9 October 2008, page 3089.

Mr Horan said "They (Queensland Country Racing Committee) had not made a decision about how they wanted to vote. They had not made a decision about where their proxy vote should go."

QRL provided full notice to the QCRC, and delegates of the QCRC were provided with ample time to make a decision and request a meeting and seek details as to how to exercise their vote.

... Mr Horan said "... a number of the organisations making up the shareholding group that had to vote did not have formal meetings at which to decide which way they would vote and if they were going to have a proxy who they would give it to. It appears individuals took it upon themselves to do that."

QRL's role was to ensure that those proxies that were received were properly executed.

QRL was not, and cannot be, responsible for policing the internal constitutional requirements of the various shareholders.[67]

(underlining added)

4.3.70 By letter dated 22 October 2008, ASIC informed Mr Bradley

... there are several aspects of the conduct identified in the material that do not fall within ASIC's jurisdiction. ...

ASIC's decision not to commence a formal investigation should not be interpreted as a conclusion that no misconduct can be made out or that ASIC has in some way approved the conduct ...

As you will be aware, QCRC is a committee established pursuant to section 66 of the Racing Act 2002... The operation, functioning and management of QCRC are not matters that fall within the laws that ASIC regulate. As such, ASIC does not have jurisdiction to consider alleged misconduct of persons acting in their capacity as QCRC members. ...[68]

4.3.71 The chief executive with the necessary powers under the Racing Act did not thereafter undertake any investigation of these complaints, as was suggested by the CMC's letter of 25 August 2008. This issue is discussed separately in this Report at Chapter 6.

4.3.72 Finally, in a media release on 13 February 2009, the Queensland Police Service (QPS) announced that its investigation "found insufficient evidence to pursue charges against anyone involved."[69]

4.3.73 It is apparent from the above that no investigation was ever undertaken which could justify a statement that the conduct of the officers of QRL had been fully cleared and that there was no ground for complaint. Indeed, both the CMC and ASIC had concluded that they did not have jurisdiction to undertake an investigation. In respect of QPS, the allegations were investigated only to assess whether sufficient evidence existed to "support criminal prosecution". There was no clearance.

4.3.74 Mr Bentley misrepresented the outcome of the investigation conducted by the CMC, ASIC and the QPS. He advised the Minister that the investigation had cleared the conduct of the directors of QRL. As it was the conduct of Mr Ludwig and Mr Bentley that had been called into question, their actions are considered below.

67 Letter from Robert Bentley to Andrew Fraser, 17 October 2008.
68 Letter from Maree Blake to Gerard Bradley, 22 October 2008.
69 QPS, Media Release, 13 February 2009, "Result of investigation into alleged voting anomalies at Queensland Racing Limited".

Mr Ludwig

4.3.75 Mr Ludwig signed a document on 30 July 2008 purporting to be the proxy for QCRC. The document contained the following:

> *QUEENSLAND RACING LIMITED*
>
> *The Queensland Country Racing Committee, Brisbane, being a Class "A" member of the Company, appoint Mr William Ludwig or, in his absence, Shara [Reid] of Kallangur, as the proxy to vote for The Queensland Country Racing Committee, Brisbane at the* ***General Meeting of the Company*** *to be held on 6 August 2008 and at any adjournment of that meeting.*
>
> *This form is to be used "in favour of"/"~~against~~" the resolution.*
>
> *Signed this 30th day of July 2008*
>
> (emphasis added)

4.3.76 The proxy was invalid for a number of reasons. First, it purported to authorise the proxy to attend *the general meeting of the company*. QCRC had no entitlement to attend such a meeting. Its role was to attend the meeting of the Class A members for the purpose of appointing a representative for those members to attend the general meeting. Second, Mr Ludwig appears to have signed the document on behalf of QCRC. Yet, to do so validly, under the constitution of QRL, it was necessary for him to be authorised in writing.[70] He had no written authority to sign a proxy.[71]

4.3.77 It is accepted, as submitted on behalf of Mr Ludwig and Ms Reid, that Mr Ludwig relied upon the directions and advice of Ms Reid in relation to the need for the proxy and the contents of the proxy document.[72] But the concerns relating to the conduct of Mr Ludwig are not just technical.

4.3.78 Mr Ludwig's legal representatives submitted that he was not bound by the QRL Code of Conduct when acting as the chairman of the QCRC.[73] This submission is difficult to accept for the reasons set out below.

4.3.79 Mr Ludwig was chairman of the QCRC, as he had been nominated by QRL in accordance with section 68(1)(b) and section 68(4) of the Racing Act. It was his position as a director of QRL that entitled the board of QRL to appoint him to be chairman of the QCRC. His conduct as chairman therefore required him to conduct himself according to the standards required of a director of that control body. Hence, the Code of Conduct applied as did the provisions of the Racing Act.[74]

4.3.80 The other members of the committee were eight persons who had been appointed in accordance with the Act.[75] They were:

- Mr Noel Brosnan
- Mr Gary Peoples
- Mr Leon Roberts
- Mr Kevin McDonald
- Mr Peter Flynn
- Mr Peter Webster
- Mr Clifford Fitchett
- Mr Donald Slatter.

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70 QRL 2006, *Constitution*, clause 14(a).
71 Transcript, William Ludwig, 27 September 2013, page 8 lines 18-23.
72 Transcript, William Ludwig, 27 September 2013, page 17 lines 12-23, page 20 lines 1-7; Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-30 para 130.
73 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-35 para 152.
74 *Racing Act 2002*, reprint No. 2A, sections 61 to 79.
75 *Racing Act 2002*, section 68(1)(a).

4.3.81 Mr Colin Truscott was employed by QRL as the country racing liaison officer. He was the point of contact for all country clubs in Queensland and attended QCRC meetings by invitation.[76]

4.3.82 All eight members of the QCRC provided statements to the Commission. All statements were made available to the public by means of the Commission's website. However, Mr Ludwig's legal representatives made submissions that only seven of the QCRC member provided statements to the Commission.[77] This assertion is incorrect; it overlooks the statement of Mr Slatter.[78]

4.3.83 Pursuant to the Racing Act, the QCRC could only validly resolve to appoint a proxy and to direct the proxy how to vote at the meeting if each committee member first received notice of a meeting and then a quorum was present which voted in favour of the motion at that meeting.[79] Each member was entitled to a vote on each question to be decided at the meeting.[80] In relation to this issue, they would relevantly have included:

- whether to vote in favour or against the proposed changes to the QRL constitution
- whether to appoint a proxy for the Class A members meeting and, if so, whom.

4.3.84 It is not in dispute that no meeting of the QCRC took place to appoint Mr Ludwig as proxy. Mr Ludwig does not suggest that he attended any such meeting or that the committee voted on resolutions as to the proposed amendments to the constitution.[81] The QCRC had not resolved to vote in favour of the amendments and had not resolved upon a representative to attend the meetings to vote.[82]

4.3.85 Yet, Mr Ludwig signed the proxy form, produced by Ms Reid.[83] As such, Mr Ludwig is responsible for signing the document which plainly represented that he had the authority of the committee to act for them. He knew that no meeting of the committee had taken place.

4.3.86 Further, he purported to attend the meeting of Class A members as proxy and voted in favour of the resolution to amend the QRL constitution.[84] Those amendments had the effect of extending the term of Mr Ludwig and other directors, thereby avoiding election for the extended term.

4.3.87 Mr Ludwig's legal representatives made the submission that the members of the QCRC had notice of impending meetings of QRL and had the opportunity to consider the proposed constitutional changes as Mr Ludwig had discussed these issues during a tour of country racing regions in the months leading up to the vote.[85] They also submitted that, in any event, nothing turned on the exercise of the QCRC vote at the meeting.[86]

4.3.88 The submission pays no regard to section 73 of the Racing Act which provided that it is the chairman who is obliged to give each member notice of each meeting and those meetings are to be held at times and places that the chairman decides.[87] The chairman is obliged to call the meetings as often as is necessary for the committee to perform its functions, which must include resolving upon a position as to the proposed QRL constitutional amendments.

76 Statement of Colin Truscott, 8 August 2013, pages 1-3 paras A and 9; Queensland Police Statement of Robert Bentley, 15 December 2008, para 23.
77 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-33 para 141.
78 Mr Donald Slatter's statement was made available for legal representatives on 20 August 2013 (in the Data Room) and published on the Commission website on 28 August 2013.
79 *Racing Act 2002*, reprint No. 2A, sections 73(4) and 74.
80 *Racing Act 2002*, reprint No. 2A section 76(2).
81 Transcript, William Ludwig, 27 September 2013, page 14 lines 10-37.
82 Transcript, William Ludwig, 27 September 2013, page 14 lines 24-27.
83 Transcript, William Ludwig, 27 September 2013, page 20 lines 5-8.
84 Statement of William Ludwig, 11 September 2013, page 3 paras 13-14.
85 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-31 para 136.
86 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-35 para 151.
87 *Racing Act 2002*, reprint No. 2A, section 73.

4.3.89 Further, the submission and the statements in support do not consider section 76 of the Racing Act relating to the conduct of meetings,[88] and the significant issue that the QCRC, as a committee, did not resolve to appoint Mr Ludwig as proxy to vote in favour of the amendments at the general meeting of QRL. The fact that he may have discussed issues with people is of no assistance to Mr Ludwig's position, particularly when those people are not identified with any particularity, and where the committee members deny being given an opportunity to vote on the issue.

4.3.90 Mr Ludwig could not recall what he explained to those involved in the discussions but said he "didn't go into any great detail with them".[89]

4.3.91 There is no other evidence before the Commission to demonstrate in any reasonably precise terms:

- the information given by Mr Ludwig to these people (with whom he had discussions) in the lead up to the meeting of QRL
- the identity of the *country racing persons* with whom these discussions occurred.

Plainly these discussions, such as they were, held in regional areas prior to the vote, are therefore irrelevant.

4.3.92 Mr Ludwig failed to inform QCRC members of the proposed changes to the constitution at any meeting, and no determination was made about the vote to be cast by the committee members. Many QCRC members gave evidence on oath to the Commission that they were not given notice of the meeting of 6 August 2008 to consider changes to QRL's constitution or any other meeting about constitutional change.[90] All eight members gave evidence on oath that they did not appoint Mr Ludwig as proxy.[91] Some of the evidence suggests members of the committee would have voted against the motion to amend the constitution and against Mr Ludwig acting as proxy.[92]

4.3.93 Mr Ludwig gave evidence that as chairman of the QCRC he could not be instructed how to vote.[93] This in itself demonstrates his cavalier approach to the members' rights in relation to the business of QRL. He stated that it was not his responsibility to call a committee meeting but that he would have done so had he been asked to.[94] This is nonsensical: how were the members supposed to assess whether or not there was a need for a meeting without notice of the issues under consideration? Mr Ludwig also gave evidence that he relied upon Mr Truscott to organise the meetings of the QCRC (and then inform him) even though he was chairman of the committee.[95] Mr Ludwig's evidence demonstrates his lack of concern as to what was required of him by the legislation and the QRL constitution.

4.3.94 Mr Ludwig paid no attention to the rights of the members of QCRC. Even during public hearings, he exhibited no appreciation of his failings[96] and certainly no regret.

4.3.95 Mr Ludwig acted in breach of the Code of Conduct in that he did not act transparently, fairly or with probity and integrity.

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88 *Racing Act 2002*, reprint No. 2A, section 76.
89 Transcript, William Ludwig, 27 September 2013, page 18 lines 1-24.
90 Statement of Noel Brosnan, 15 August 2013, page 2 paras 10, 14; Statement of Peter Flynn, 23 August 2013, page 2 para 15; Statement of Leon Roberts, 15 August 2013, page 1 paras 1-3; Statement of Peter Webster, 26 August 2013, page 1 paras 1-2; Statement of Donald Slatter, 15 August 2013, page 1 paras 2-3.
91 Statement of Noel Brosnan, 15 August 2013, page 2 paras 13-14; Statement of Peter Flynn, 23 August 2013, page 2 para 15; Statement of Leon Roberts, 15 August 2013, page 1 para 4; Statement of Donald Slatter, 15 August 2013, page 1 para 4; Statement of Kevin McDonald, 26 August 2013; Statement of Clifford Fitchett, 26 August 2013, page 1 para 3; Statement of Gary Peoples, 20 August 2013, page 1 paras 2, 5; Statement of Peter Webster, 26 August 2013, page 1 para 1.
92 Letter from Gary Peoples to Andrew Fraser, 11 August 2008.
93 Transcript, William Ludwig, 27 September 2013, page 15 lines 1-10, 33-45.
94 Transcript, William Ludwig, 27 September 2013, page 15 lines 24-31.
95 Transcript, William Ludwig, 27 September 2013, page 19 lines 8-29.
96 Transcript, William Ludwig, 27 September 2013, page 19 lines 44-47.

Mr Bentley

4.3.96 Mr Bentley's conduct in relation to the events and subsequent complaints was also investigated by the Commission.

4.3.97 During its investigation, the QPS took statements from Ms Reid and Mr Bentley. These were provided to the Commission.

4.3.98 It is clear from the statement of Ms Reid that all members of the QCRC were not served with notice of the meeting, exactly as they had alleged in their complaints made to Mr Bentley. Yet, he described their assertions as unfounded.

4.3.99 Ms Reid's statement, which is unsigned, reads:

> *With the QCRC, I normally send material to the Chairman Bill Ludwig and Country Liaison officer Col Truscott. For this second meeting I arranged for these two people to receive the notice of meeting. ...*
>
> *I expected [Mr Truscott] would pass on the notice to members of the QCRC and I faxed the documents to him as the Committee.*[97]

4.3.100 In the statement sworn by Mr Bentley on 15 December 2008, he stated:

> *47. I have not personally viewed the proxy vote of the QCRC. I do not know the circumstances behind Mr Ludwig being appointed the proxy holder for the QCRC I assume if no meeting was called by members, then he would presume that he has the authority to vote ...*
>
> *55. After the 6th August meeting I received a letter from Tim Ferrier the solicitor acting for QCRC in relation to the 8 members not receiving notification in relation to the class A stakeholders to vote and elect a proxy in relation to the special resolution to amend the constitution. ...*
>
> *After receiving notification from Shara Murray to the effect that the members had received notification I then replied to Tim Ferrier that his assertion was incorrect. ...*
>
> *57. After information in relation to the meetings was sent to QCRC representatives Bill Ludwig and Col Truscott, I stated to the interviewer that I was extremely surprised. [I have since discovered from legal counsel that the correct distribution was carried out and the required recipitents [sic] were in fact Ludwig and Truscott].*[98]

4.3.101 In this statement, Mr Bentley records that Ms Reid informed him that the members did receive notice of the meeting, despite their assertions to the contrary. However, he seems to indicate that he was subsequently informed by Ms Reid that only Mr Ludwig and Mr Truscott had been served.

4.3.102 Ms Reid apparently stated to the QPS that she arranged for a notice of meeting to be sent to Mr Ludwig and Mr Truscott. She "expected" that Mr Truscott would pass the notice on to the QCRC committee members.[99]

4.3.103 Notwithstanding these facts, Mr Bentley was prepared to represent as underlined below:

> ***Mr Horan said "Members of the Queensland Country Racing Committee were not advised that the special general meeting was on, were not advised of its content and were not advised of the change in the proxy arrangements."***

97 Queensland Police Statement of Shara Reid, 11 December 2008, page 11 paras 46 and 47; The Commission does not have a signed copy of this statement. However, a handwritten note on the top of the statement reads "sgd copy 12/12/08" indicating that Ms Reid subsequently signed her statement.

98 Queensland Police Statement of Robert Bentley, 15 December 2008, pages 11, 13, 14 paras 47, 55, 57.

99 Queensland Police Statement of Shara Reid, 11 December 2008, page 11 para 47.

This statement is completely incorrect; it is false and designed to mislead the Queensland racing industry.[100]

4.3.104 Further, Mr Bentley represented to the Minister that the allegations in relation to the conduct of Mr Ludwig had been investigated and he was cleared.[101] However, he accepted in his evidence before the Commission that these representations were untrue.[102]

4.3.105 It is difficult to fathom how Mr Bentley could have considered that it was appropriate to reject the complaints, without proper investigation, as to whether appropriate notice was given to the members of QCRC particularly in light of complaints made on their behalf that they were denied their right to vote. Further, given Mr Bentley's expression of the importance of compliance for all officers of QRL with the principles set out in the Code of Conduct (transparency, integrity and compliance with the law)[103] why did he not seek to investigate whether Mr Ludwig and Ms Reid had done so? Why did he not accept that the QCRC members were telling the truth?

4.3.106 In particular, before rejecting the challenges from the QCRC members, it would have been simple to ask the members whether they had been given notice and whether they had authorised the proxy. When asked by the Commission, each member swore that they did not authorise Mr Ludwig to have their proxy and to vote as he did.[104] Many members also swore that they did not receive notice of the meeting.[105] Mr Bentley accepted in his evidence that he did not make any inquiries[106] and that the committee's members should have been contacted.[107]

4.3.107 In fact, Mr Bentley was contacted by Mr Peoples on 7 August 2008. During the conversation, Mr Peoples raised his concerns about the meeting on 6 August 2008[108] and requested that a meeting of the QCRC be called without Mr Ludwig being present. Mr Bentley advised Mr Peoples that

...as Chairman of QRL, I do not have the authority nor am I willing to call a meeting on the verbal request of a single member of the QCRC who feels aggrieved.[109]

4.3.108 A simple inquiry of Mr Ludwig might well have revealed that he did not attend a meeting either.

4.3.109 If Mr Bentley had considered Ms Reid's assertion that the QCRC members had been served in a more balanced way in light of the denials of those members that they had not been served, and had made appropriate enquiries of Mr Colin Truscott, he would have learnt that no notice as required by section 73(4) of the Racing Act had been given. Mr Ludwig did not contend that so far as he was concerned notice had been given. He left all matters of process to others.

4.3.110 Mr Bentley took a position which suggested that the members' complaints were misrepresentations and were unfounded. Mr Bentley defended the actions of QRL rather than investigating what had occurred. In his correspondence with Mr Ferrier, the legal representative of the members of the QCRC, he rebutted their assertions.[110]

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100 Letter from Robert Bentley to Andrew Fraser, 17 October 2009.
101 QRL, *Queensland Racing Industry Issues Paper*, May 2009, pages 40-42.
102 Transcript, Robert Bentley, 23 September 2013, page 101 lines 1-27.
103 See section 4.3.9 above.
104 Although some QCRC members did not give evidence to the Commission as to how they would have voted on the proposed amendments, this is irrelevant as all members provided evidence that they did not have a meeting to discuss these issues and did not appoint a proxy. See: Statement of Noel Brosnan, 15 August 2013, page 2 paras 13-14; Statement of Peter Flynn, 23 August 2013, page 2 para 15; Statement of Leon Roberts, 15 August 2013, page 1 para 4; Statement of Donald Slatter, 15 August 2013, page 1 para 4; Statement of Kevin McDonald, 26 August 2013; Statement of Clifford Fitchett, 26 August 2013, page 1 para 3; Statement of Gary Peoples, 20 August 2013, page 1 paras 2, 5; Statement of Peter Webster, 26 August 2013, page 1 para 1.
105 Statement of Noel Brosnan, 15 August 2013, page 2 paras 10, 14; Statement of Peter Flynn, 23 August 2013, page 2 para 15; Statement of Leon Roberts, 15 August 2013, page 1 paras 1-3; Statement of Peter Webster, 26 August 2013, page 1 paras 1-2; Statement of Donald Slatter, 15 August 2013, page 1 paras 2-3.
106 Transcript, Robert Bentley, 23 September 2013, page 95 lines 26-33.
107 Transcript, Robert Bentley, 23 September 2013, page 95 lines 35-47.
108 Letter from Robert Bentley to Tim Ferrier (ClarkeKann), 19 August 2008.
109 Letter from Robert Bentley to Tim Ferrier (ClarkeKann), 19 August 2008.
110 Letter from Robert Bentley to Tim Ferrier, 19 August 2008.

4.3.111 Finally, Mr Bentley recommended to the board of QRL that QRL should fund Mr Ludwig's legal costs "to assist in his interviews and outcomes of the inquiry into QCRC Constitution Vote".[111] He was supported in the motion, it may be inferred on the basis that the accusations were unfounded. Their conclusion now appears to have been reached on no credible evidence.

4.3.112 This does not reflect well on him and was a breach of the Code of Conduct.

4.3.113 Mr Bentley lacked integrity in his approach to the concerns raised by the country members of QCRC, who were entitled to expect that their complaints would receive due consideration.

4.3.114 Mr Bentley not only failed to respond to the complaints of the members of the QCRC. He also proceeded to make false statements about their complaints, including to government. This conduct was fraudulent in the sense that he did not care whether his representations were true or not.

Ms Reid

4.3.115 On 1 August 2008, a solicitor from the firm Cooper Grace Ward (CGW) sent Ms Reid the following email:

> *Shara*
>
> *Some of the proxy forms are only signed by one person.* ***We confirm your advice that you have spoken to representatives of each of the following bodies:***
>
> ***1. Queensland Country Racing Committee***
>
> *2. SCTC*
>
> *3. Queensland Jockey's Association; and*
>
> *4. Australian Trainer's Association*
>
> ***and have their confirmation that the person signing the proxy form has authority to do so.*** [112]
>
> (emphasis added)

4.3.116 This email indicates that Ms Reid informed QRL's legal representatives, who were providing advice and overseeing the constitutional vote in August 2008, that she had confirmation from QCRC "representatives" as to the authority of Mr Ludwig to sign the proxy.

4.3.117 Mr David Grace, of CGW, also spoke to Ms Reid on 1 August 2008. She confirmed to him that the people (including Mr Ludwig) signing the proxy forms for the entities referred to in the above email had authority to do so.[113] This raises questions as to how Ms Reid reached this conclusion. As legal counsel responsible for compliance, she could have had no regard to the QRL constitution which required the authority to be in writing.

4.3.118 The legal representatives for Mr Ludwig and Ms Reid submitted that the email mentioned above from CGW was, most likely, referring to a conversation between Ms Reid and Mr Ludwig.[114] However, Ms Reid's police statement does not support the submission. It indicates that she did not confirm with Mr Ludwig that he had the authority to vote on behalf of the QCRC. In her statement she says:

> *41. My understanding is that the hand of the appointer who could sign off on a proxy would either be the Chairman, the CEO, or whoever is stated under the model rules, or under the Constitution. For the QCRC, I assume this would be the Chairman. I don't believe it's written anywhere. ...*

111 QRL, Board Meeting Minutes, 5 December 2008, page 10: The Commission has received two unsigned versions of these minutes, one version of which has omitted all reference to the proposed constitutional changes, the QPS investigation and Mr Ludwig.

112 Email from Carly Cameron (CGW) to Shara Reid cc: Robert Bentley, David Grace, 1 August 2008, 4.02pm.

113 Email from Carly Cameron to Shara Reid cc: Robert Bentley, 1 August 2008, 4.02pm, which refers to a conversation. Also, see; Queensland Police Statement of David Grace (CGW), 8 December 2008, page 5 para 28.

114 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-37 para 159(e).

54. *My understanding is that when Bill Ludwig gave me the proxy he was voting according to the views of the Queensland Country Racing Committee and that he had obtained that view from going through the two week, eleven forums and had spoken to what he felt was a greater variety of people in terms of Country Racing.*[115]

4.3.119 Although she may have spoken to Mr Ludwig, she did not confirm that he had the authority to sign the proxy. At best, her statement indicates that she was informed that he believed he was voting in accordance with the committee members' views. In any event, to investigate whether Mr Ludwig had authority of the committee, for the purpose of answering the lawyers, it would have been prudent to ask Mr Ludwig this question, rather than asking what had occurred at forums and what had been said by a variety of people to him. The members of QRL were entitled to expect more from legal counsel. A simple query of the members of QCRC, or even some of them, would have sufficed.

4.3.120 Ms Reid's police statement says that she arranged for a notice of meeting to be sent to Mr Ludwig and Mr Truscott. She "expected" that Mr Truscott would pass the notice on to the QCRC committee members.[116] As such, it seems apparent that Ms Reid did not make inquiries of the members of QCRC as to any of the issues raised by their complaints. How was it that she informed Mr Bentley (who told police that he had received notification from Ms Reid) that the members had received notification?[117]

4.3.121 Either Mr Bentley or Ms Reid did not make proper investigations or were willing to make statements that were not true.

4.3.122 These inconsistencies question Ms Reid's integrity and reflect a breach of her responsibilities under the Code of Conduct. Her evidence could not be tested in the public hearings: she was unavailable as a result of health issues.

4.3.123 Representatives for Ms Reid submitted that her understanding of how the proxy should be signed was the result of an error and not motivated by dishonesty or disregard for the members of the committee.[118] Ms Reid's actions demonstrate, at best for her, serious ineptitude compounded by her misleading representations to QRL's legal representatives and her failure to undertake necessary and legitimate inquiries after complaints had been made by members of the QCRC. Ms Reid did not act "with the highest standards of professionalism" required under the Code of Conduct.

The 2009 directors' selection process

Introduction

4.3.124 Under Term of Reference 3(f), the Commission investigated the events concerning the arrangements between Queensland Race Product Co (Product Co) and TattsBet. The results of that investigation are set out in Chapter 8 of this Report. This has involved consideration of the response of Product Co and the control bodies in 2008 and 2009 to the introduction of race fields legislation both interstate and in Queensland.

4.3.125 The directors of QRL and Product Co responded in different ways to this issue. Two directors, Mr Lambert and Mr Andrews, agitated for action in respect of the letter of advice from Mr Grace dated 18 November 2008. Their efforts to convince the other directors of Product Co, and Mr Bentley, were unsuccessful.

115 Queensland Police Statement of Shara Reid, 11 December 2008, pages 10, 12 paras 41, 54..
116 Queensland Police Statement of Shara Reid, 11 December 2008, page 11 paras 46-47.
117 Queensland Police Statement of Robert Bentley, 15 December 2008, page 13 para 55.
118 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-38 para 159(f).

4.3.126 By the annual general meeting of QRL held on 21 December 2009,[119] Mr Lambert's and Mr Andrews' directorships had come to an end.

4.3.127 Mr Bentley played a role in each outcome.

4.3.128 The Commission has examined whether Mr Bentley acted honestly and in the best interests of QRL and adhered to the Code of Conduct in his participation in these outcomes.

4.3.129 One hypothesis which was tested was whether Mr Bentley was influenced, in the role he played in the departure of Mr Lambert and Mr Andrews, by his interest in the Tatts Group Limited (Tatts Group) or the duty owed to the Tatts Group. In the end, this hypothesis is rejected. The reasons are explored below.

4.3.130 Even so, the inquiries made by the Commission revealed that Mr Bentley's actions raised questions as to his integrity.

Constitution of QRL

4.3.131 The QRL constitution provided that the "Founding Directors" were to be Messrs Bentley, Hanmer, Lambert, Ludwig and Andrews who would hold office for the "Initial Term" which was to be not less than three years. This term expired in July 2009.[120] At the end of the "Initial Term", the constitution required two directors to retire at the AGM.[121] The constitution required the longest serving director to retire; but as between directors who had been in office an equal length of time, in default of agreement between them, those to retire would to be determined by the chairman.[122]

4.3.132 The constitution permitted the retiring directors to reapply for selection.[123] The process for selection of new directors to replace those retiring was set out in clause 17 of the constitution. The "director selection process" involved the candidates responding to an advertised notice. These applicants were reduced to "a Shortlist of the applications received in response to the Advertising Notice."[124] The shortlist would be prepared by an *independent recruitment consultant*.

4.3.133 The independent recruitment consultant would prepare the shortlist by reference to the selection criteria defined in Appendix A to the constitution. Appendix A provided as follows:

> ***Directors Selection Criteria***
>
> *It is a* ***mandatory*** *requirement for any two or more of the following to apply:*
>
> 1. *Five or more years experience as a director or senior manager of a Large Proprietary Company, a Public Company or a public sector entity;*
> 2. *Five or more years experience in a senior administrative role;*
> 3. *Five or more years experience at a senior level in the fields of finance, law, marketing or commerce; or*
> 4. *Five or more years experience as a non executive director in a Large Proprietary Company or a Public Company.*
> 5. *Knowledge of the Thoroughbred Racing Code...*[125]

4.3.134 The shortlist was to be *no less* than the number of director positions vacant, plus two.[126]

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119 The QRL AGM was held on 17 November 2009 and adjourned until 21 December 2009 due to the *Andrews* litigation.
120 QRL 2006, *Constitution*, clause 15; *Andrews v Queensland Racing Limited* [2009] QSC 338 at [5].
121 QRL 2006, *Constitution*, clause 1.1, 15.5.
122 QRL 2006, *Constitution*, clause 15.5.
123 QRL 2006, *Constitution*, clause 15.7.
124 QRL 2006, *Constitution*, clause 17.2.
125 QRL 2006, *Constitution*, Appendix A.
126 QRL 2006, *Constitution*, clause 17.3.

Selection for retirement

4.3.135 On 5 December 2008, at the board meeting of QRL, discussion occurred in relation to the re-election of directors.[127] The minutes record the following:

> ***9.3 Re-election of Directors under Queensland Racing Constitution***
>
> *At the 7 November 2008 meeting, the Chairman sought clarification over Board elections. Mr. Andrews nominated to stand for re-election.*
>
> *One of the three remaining directors, Mssr [sic] Ludwig, Hanmer or Lambert, have to stand down under the terms of the QRL Constitution. These 3 directors have all indicated that they would like to remain until their allocated term which expires at the QRL AGM 2010.*
>
> *The Chairman nominated Mr. Hanmer to speak to Mr Ludwig and Mr Lambert in an attempt to break this impasse. Mr Hanmer subsequently spoke to Mr Ludwig who re-affirmed his intention to remain until 2010. It is Mr Hanmer's intention to do the same.*
>
> *Mr Hanmer spoke to Mr Lambert during a scheduled break at the TAB Club meeting on Monday 24 November 2008 held at Riverview Hotel. At this impromptu meeting, Mr Lambert informed Mr Hanmer that he intended to remain at QRL to oversee the Palm Meadows development project and that should this project not proceed, he would stand down and not seek re-election at the 2009 AGM.* [128]

4.3.136 Mr Andrews voluntarily offered to retire but indicated that he would seek re-election in accordance with the selection process. Mr Lambert was selected by Mr Bentley to be the other retiring director. [129]

4.3.137 The process involved in Mr Bentley's selection of Mr Lambert for retirement was not straightforward. Initially, the chairman indicated that Mr Hanmer (deputy chairman) would speak with the other directors to see whether or not agreement could be reached. Mr Hanmer reported to the board that Mr Lambert had agreed to retire, in circumstances irrelevant to the Commission.[130] However, Mr Lambert disputed this[131] and it became necessary for Mr Bentley to exercise his power to select one of the directors for retirement. Mr Bentley selected Mr Lambert.[132] He informed Mr Lambert of his decision in early 2009.[133]

4.3.138 Mr Bentley believed Mr Lambert to be a "very good director."[134] There was no suggestion, in the evidence examined by the Commission, of Mr Lambert's ability or performance being a factor in Mr Bentley's determination.

4.3.139 However, by early 2009, Mr Bentley knew that Mr Lambert was agitating for action on the TattsBet issue. Mr Bentley was also aware that Mr Lambert and Mr Hanmer (who held the same view as Mr Bentley regarding the TattsBet issue)[135] were in disagreement.[136] These matters are explored in Chapter 8.

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127 As previously noted, the Commission has received two unsigned versions of the minutes of this meeting, one version of which has omitted all reference to the re-election of directors process (as well as the proxy issue as identified previously).
128 QRL, Board Meeting Minutes, 5 December 2008.
129 Transcript, Robert Bentley, 20 September 2013, page 67 lines 43-45, page 68 lines 15-16.
130 QRL, Board Meeting Minutes, 6 February 2009, page 8.
131 QRL, Board Meeting Minutes, 6 March 2009, page 2.
132 Transcript, Robert Bentley, 20 September 2013, page 67 lines 43-45, page 68 lines 15-16.
133 Statement of Michael Lambert, 27 August 2013, page 1; Statement of William Andrews, 27 August 2013, page 2 para 8.
134 Transcript, Robert Bentley, 20 September 2013, page 49 lines 40-45.
135 Transcript, Robert Bentley, 20 September 2013, page 52 lines 4-27; Transcript, Anthony Hanmer, 26 September 2013, page 5 lines 9-43, page 6 lines 15-19.
136 Transcript, Robert Bentley, 20 September 2013, page 71 line 1 – page 72 line 21.

4.3.140 In the end, the evidence does not permit a finding that Mr Bentley selected Mr Lambert for retirement because of his position (which he had made plain) on the TattsBet issue. He may have preferred keeping Mr Hanmer and Mr Ludwig, because they shared his views more readily on most issues. As such, Mr Bentley was not influenced in this regard by his interest in, or duty to, the Tatts Group.

The selection process

4.3.141 However, in relation to Mr Andrews' attempts to be reselected, Mr Bentley did play a role that may have influenced the outcome to deny him his right to a fair election. This matter was examined by the Commission notwithstanding that it had been the subject of Supreme Court proceedings which were successful in outcome for Mr Andrews (the *Andrews* litigation).

4.3.142 In March 2009, QRL retained Northern Recruitment (a recruitment consulting firm) to facilitate the short-listing of candidates for the vacant director positions. The principal officer of Northern Recruitment, and the person with whom all dealings occurred, was Mr Mark Wilson. Mr Wilson provided two statements to the Commission.[137]

4.3.143 QRL had retained Mr Wilson and Northern Recruitment previously.[138]

4.3.144 On 6 March 2009, the board resolved to appoint Northern Recruitment as the *independent* recruitment consultant.[139]

4.3.145 By 20 May 2009, the closing date for applications, 26 applications had been received and were provided to Northern Recruitment. The applicants included Mr Andrews, Mr Neville Stewart and Mr Milner. Mr Stewart was, at the time, chairman of the Toowoomba Turf Club and Mr Milner was chairman of the Brisbane Turf Club.[140]

4.3.146 Mr Bentley knew a number of the applicants.[141] In particular, he knew that Mr Andrews and Mr Stewart had applied for the positions.[142]

4.3.147 On 24 May 2009, Mr Bentley emailed Mr Grace of CGW asking for advice on the appropriateness of providing certain criteria required of applicants to Mr Wilson.[143] There is no doubt, as explained below, that Mr Bentley did contact Mr Wilson and expressed views as to the selection criteria.

4.3.148 On 3 June 2009 Mr Bentley sought an appointment with Mr Wilson.[144]

4.3.149 On 12 June 2009, a meeting took place between Mr Wilson and Mr Bentley at the office of Northern Recruitment. When questioned about this meeting, Mr Bentley said on oath (to the Supreme Court of Queensland in October 2009) that the discussion involved a personal matter.[145] Mr Wilson confirmed this at the trial.[146] However, in his statement to the Commission, Mr Wilson was unable to recall this particular meeting or any other meeting with Mr Bentley involving a personal matter.[147] Subsequently, after being asked by Mr Bentley's representatives to reconsider, Mr Wilson transmitted an email stating that he now recalled this meeting and confirmed that it had related to a personal matter.[148] Mr Wilson provided a further statement to the Commission

137 Statements of Mark Wilson, 13 August 2013 and 14 November 2013.
138 Northern Recruitment recruited Mr Orchard as director of integrity operations in 2008, see: Letter from Mark Wilson (Northern Recruitment) to Malcolm Tuttle, 4 April 2008.
139 QRL, Board Meeting Minutes, 6 March 2009.
140 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [12]-[13].
141 Transcript, Robert Bentley, 23 September 2013, page 19 lines 41-47.
142 Transcript, Robert Bentley, 23 September 2013, page 19 lines 41-47, page 20 lines 1-21.
143 Email from Robert Bentley to David Grace, 24 May 2009.
144 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, 21 October 2009, Robert Bentley, page 13 lines 20-30.
145 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, 21 October 2009, Robert Bentley, page 8 lines 51-58.
146 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, 21 October 2009, Mr Wilson, page 71 lines 47-55.
147 Statement of Mark Wilson, 13 August 2013, page 1 para 8.
148 Email from Mark Wilson to Greg Rodgers, 28 October 2013.

stating that "in all likelihood Mr Bentley's recollection is more than likely to be correct".[149] The reliability of evidence from Mr Wilson must be in doubt.

4.3.150 Mr Bentley had further contact with Mr Wilson.

4.3.151 After the meeting on 12 June 2009, Mr Bentley called Mr Wilson again on a number of occasions.[150] Mr Bentley gave evidence at the trial that he called Mr Wilson on 16 and 17 June 2009.[151]

4.3.152 On one occasion, Mr Bentley left a message for Mr Wilson in the following terms: "Please read Mark Oberhardt's column this morning then ring Bob and he'll explain the context". Mr Bentley asked at the time of leaving the message that it not be put in print form.[152] He was questioned about this at the public hearings and could provide no explanation as to why he left this message.[153] In any event, Mr Bentley failed to act in a transparent manner as required by the Code of Conduct.

4.3.153 In the Supreme Court in the *Andrews* litigation , Mr Bentley said in oral evidence

> *...in a normal operation the chairman, or the nominations committee, would sit down with a recruitment consultant and discuss who was going to be on the board, what skills were required. In this case it was an independent recruitment consultant. I spoke to Mark Wilson. I mean, how else would he possibly know or be able to make and form any assessment – and I looked at the number of people on the list of people that he had, the 26, and I think 21 would qualify under the mandatory criteria...*[154]

4.3.154 On another occasion, Mr Bentley instructed Mr Wilson that the board required candidates with club experience.[155] Yet, in his defence filed in the Supreme Court, Mr Bentley denied that he had told Mr Wilson this.[156] He contradicted this denial when giving evidence in the Commission's hearings.[157]

4.3.155 As Mr Bentley appreciated that Mr Stewart and Mr Milner had acted as chairmen of racing clubs, the inference is open that he directed Mr Wilson to select candidates with club experience, knowing that he was directing Mr Wilson to select Mr Stewart and Mr Milner for the shortlist. Indeed, that selection is exactly what occurred.[158]

4.3.156 On 18 July 2009, Mr Wilson wrote to QRL advising of the outcome of his deliberations and providing a shortlist of four names. This shortlist included Mr Milner, Mr Brian O'Hara, Mr Ryan and Mr Stewart.[159]

4.3.157 It may be inferred that Mr Bentley did not disclose to the other members of the board the complete picture of his role in the directions given to Mr Wilson. Mr Hanmer, for example, was never made aware of the contact between Mr Bentley and Mr Wilson during this period.[160] The position taken by Mr Bentley, mentioned below, supports this inference.

4.3.158 On 3 July 2009, the selection process was raised by Mr Bentley in a letter (prepared by Ms Reid) to Minister Lawlor. Mr Bentley reported:

149 Statement of Mark Wilson, 14 November 2013, page 2 para 8.
150 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, Robert Bentley, 21 October 2009, page 13 lines 47-60.
151 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, Robert Bentley, 21 October 2009, page 15 lines 1-47.
152 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, Robert Bentley, 21 October 2009, page 28 lines 28-31; Transcript, Robert Bentley, 23 September, page 27 lines 7-16.
153 Transcript, Robert Bentley, 23 September 2013, page 27 lines 8-16.
154 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, Robert Bentley, 21 October 2009, page 31 lines 30-40.
155 Transcript, Robert Bentley, 23 September 2013, page 24 lines 12-28.
156 Defence of the Defendant filed in *Andrews v Queensland Racing Limited* [2009] QSC 338 at para [17(c)], 25 September 2009.
157 Transcript, Robert Bentley, 23 September 2013, page 24 lines 12-28.
158 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [25].
159 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [16]; Letter from Mark Wilson to Shara Reid, 18 June 2009.
160 Transcript, Anthony Hanmer, 26 September 2013, page 97 lines 11-16.

Disturbingly, Mr [Mark] Wilson further comments:

... it may be worth noting that throughout this process I have had a sense of persons that are unidentified attempting to run interference or influence the decision to suit their own ends. The basis for this is the cross conversation, referrals, unsolicited endorsements and unnecessary self promotion, either by candidate or on behalf of candidates.

The four candidates that have been nominated were not in any way shape or form associated with any untoward activity during the selection process.[161]

Complaints about the selection process

4.3.159 On 6 August 2009, Mr Carter QC wrote to Minister Lawlor raising concerns about the director selection process and in particular the independence of Mr Wilson:

The compelling argument is that the process involving QRL and the so called Independent Recruitment Consultant (IRC) has seriously miscarried and has been tainted with illegality...[162]

4.3.160 On 6 August 2009, those concerns were raised in Parliament by the Opposition spokesperson for racing, Mr Ray Stevens MP:

There was one issue that particularly galled me. That relates to the response I received about the process for election of the new members to the Queensland Racing board, for which the minister has overall responsibility under the act. Four people were selected from the industry to vote for. They went out to a supposedly independent recruitment agency called the Northern Recruitment Agency. This was done at the current Queensland Racing board's request. Northern Recruitment states on its website –

...we go forth into the market place singularly on their –

that is, the client's –

behalf.

In other words, they are indicating that they will get a determined result for whoever hires them. In this case the chairman and QR board hired these people. One of the people who has been on the board for four years is respected solicitor, Mr Bill Andrews, who applied to be on that short list. Guess what? He did not make the short list. He did not have enough experience to get on the board after he had been on there four years. It is an absolute indictment on a great person in Queensland racing that he did not make the short list. Who did make the short list? We have one Neville Stewart, a long-time friend of Bob Bentley from the breeding industry. He is a long-time compatriot going back to the QPC days. Surprise, surprise! Neville while still being the chairman of the Toowoomba Turf Club, who agreed with Mr Bentley's proposal to put a new track to replace the grass track at Toowoomba, is on that particular short list to be selected by the other group.

It will be a money-back, odds-on, but worst-case scenario that the quinella for the elected representatives will be Mr Wayne Milner, who non-one [sic] is arguing about, and Neville Stewart. That is the quinella that will be elected in terms of Mr Bentley's direction.[163]

4.3.161 On 7 August 2009, Northern Recruitment issued a press release addressing the allegations made by Mr Stevens in Parliament. This press release was also published on QRL's website after, most likely, being authorised by Mr Bentley.[164] In his evidence, Mr Bentley agreed with its contents.[165] It read relevantly:

161 Letter from Robert Bentley to Peter Lawlor, 3 July 2009.
162 Letter from William Carter QC to Peter Lawlor, 6 August 2009.
163 Queensland Parliament, *Hansard*, 6 August 2009, page 1537.
164 Mr Tuttle also had the authority to approve press releases. Email from Scott Sharry (Clayton Utz) to Executive Director (Commission), 11 September 2013, 6.02pm; Transcript, Robert Bentley, 23 September 2013, page 14 lines 23-35.
165 Transcript, Robert Bentley, 23 September 2013, page 14 lines 27–43.

The process by which candidates were nominated for the positions of director with Queensland Racing, was ***not undertaken in consultation with anybody at Queensland Racing****...*[166]

(emphasis added)

Mr Bentley

4.3.162 On 10 August 2009, Mr Bentley wrote to Minister Lawlor in response to the contentions of Mr Carter QC and Mr Stevens:

Dear Minister,

I am in receipt of a letter form [sic] Bill Carter dated the 6th August that claims that the selection of directors process carried out was inconsistent with the QRL Constitution, lacked procedural fairness, was anti-discriminatory, possesses elements of cronyism and as such was illegal. ...

The process was ***Independent of QRL*** *...*

The basis on which the IRC selects those for interview is a matter for the IRC *(Independent Recruitment Consultant) ...*

No guidance or direction was given to the IRC by QRL*.*[167]

(emphasis added)

4.3.163 The inescapable conclusion is that Mr Bentley lacked integrity in the way he responded to assertions raised about the recruitment process. Mr Bentley denied providing "guidance or direction" to Mr Wilson. He has subsequently conceded that he did contact Mr Wilson about the relevant attributes[168] for the positions vacant on the board. He did not disclose this to the Minister.[169]

4.3.164 Why would Mr Bentley make these misleading statements about his communications with Mr Wilson? An inference open is that he suspected that his communications were not appropriate and sought to avoid the consequences that would flow if his involvement was revealed. Therefore, he denied that they occurred.

4.3.165 During the Commission's public hearings, Mr Bentley maintained that the selection process was not undertaken in consultation with anybody at QRL.[170] However, he accepted that he had meetings and conversations with Mr Wilson.[171] Mr Bentley had one meeting with Mr Wilson during which they discussed "what... the Board needed" and the "dynamics on the Board".[172]

4.3.166 Mr Bentley did not keep records of the meetings or of the conversations he had with Mr Wilson.[173] This is contrary to the requirement for transparency contained in the Code of Conduct. He did not include references to these conversations in his letter to the Minister on 10 August 2009. His explanation was that he did not "think it was needed".[174] Mr Bentley disagreed that his letter to the Minister was intentionally misleading.[175]

166 Northern Recruitment, Media Release, 'Mr Ray Stevens, LNP Member for Mermaid Beach – unprecedented, unsubstantiated and unnecessary attack on a Queensland small business', 7 August 2009.
167 Letter from Robert Bentley to Peter Lawlor cc: David Grace, 10 August 2009.
168 Transcript, Robert Bentley, 23 September 2013, page 24 lines 12–27.
169 Transcript, Robert Bentley, 23 September 2013, page 28 lines 30-46, page 32 lines 8-14.
170 Transcript, Robert Bentley, 23 September 2013, page 14 line 45 - page 15 line 3, page 16 lines 40-44.
171 Transcript, Robert Bentley, 23 September 2013, page 18 line 45 - page 19 line 8.
172 Transcript, Robert Bentley, 23 September 2013, page 22 lines 1-28.
173 Transcript, Robert Bentley, 23 September 2013, page 22 lines 5-27.
174 Transcript, Robert Bentley, 23 September 2013, page 23 lines 27-29.
175 Transcript, Robert Bentley, 23 September 2013, page 29 lines 9-13.

4.3.167 There is no doubt that the statements Mr Bentley made were misleading. He did provide "guidance or direction", and then represented that it had not occurred. The evidence justifies a conclusion that he did not disclose this guidance, to the board. A further reason for his untruthful statements is likely to have been that he appreciated that the guidance given to Mr Wilson would have been regarded as inappropriate by the board or, at least, by some members. It clearly was.

The *Andrews* litigation

4.3.168 As mentioned, Mr Andrews commenced litigation in the Supreme Court of Queensland, on 28 August 2009,[176] seeking an injunction restraining QRL from announcing the selection of the two directors at the AGM.[177] He alleged that the selection process was flawed for a number of reasons, including the absence of impartiality and independence on the part of Mr Wilson.[178]

4.3.169 On 23 October 2009, judgment was given in Mr Andrews' favour. The court found that Ms Reid had wrongly instructed Mr Wilson to limit the shortlist of candidates to four names, which was not required under the constitution of QRL.[179] The court ruled that, by acting on Ms Reid's instructions, Mr Wilson had not acted independently.

4.3.170 The court found that there was no evidence adduced at trial that Mr Bentley "directly interfered in the preparation of the shortlist".[180] Mr Bentley's legal representatives submitted to the Commission that the court's finding was based on the evidence of more witnesses and should be accepted as conclusive by the Commission.[181]

4.3.171 Before the Commission,however, there was other evidence not before the Supreme Court and which dictates a different conclusion. First, Mr Wilson initially denied to the Commission that any personal matter was discussed with Mr Bentley. He gave different evidence to the Supreme Court. Second, despite earlier statements by Mr Bentley where he denied giving directions or guidance, before the Commission he admitted that he had done so.[182]

4.3.172 Despite the judgment that Mr Wilson had not been independent, in that Ms Reid had instructed him incorrectly to limit the shortlist to four, and despite the protests of Mr Andrews, QRL persisted in engaging Mr Wilson to undertake the shortlist process again in accordance with the constitution (by not necessarily limiting the list to four).[183] Mr Bentley gave evidence that he thought it was "practical" to continue the process with Mr Wilson. He denied that he made this decision to ensure that the selected candidates would remain on the shortlist.[184]

4.3.173 Mr Andrews took further action in the Supreme Court against QRL. On 13 November 2009, the court restrained QRL from acting on the shortlist presented by Mr Wilson. The court concluded that the earlier judgment had "plainly found that [Mr Wilson] had not acted independently in that he had acted upon Ms [Reid]'s instruction to limit the shortlist to four names".[185] The Supreme Court also ordered that a further shortlist be prepared without the involvement of Mr Wilson or Northern Recruitment.[186]

4.3.174 In about September 2009, Mr Bentley provided to the Minister a document titled *The Case for Change* which advanced an argument in favour of one body to control all three codes of racing and with one board of directors.

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176 Statement of Claim filed in the Supreme Court of Queensland, E Courts search, 28 August 2009.
177 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [88].
178 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [56].
179 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54].
180 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [59].
181 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-39 para 163.
182 Transcript, Robert Bentley, 23 September 2013, page 24 lines 12-31.
183 QRL, Board Meeting Minutes, 3 November 2009.
184 Transcript, Robert Bentley, 23 September 2013, page 35 lines 1-30, page 36 lines 4-6.
185 *Andrews v Queensland Racing Limited* [2009] QSC 364 at [7].
186 *Andrews v Queensland Racing Limited* [2009] QSC 364 at [33] and [39].

4.3.175 In it, Mr Bentley referred to the *Andrews* litigation in the following terms:

> *The current system is open to manipulation and director candidates are not necessarily elected on merit – a candidate will be supported as a nominee of a sectional interest, and by any fair assessment, the process is compromised. I will deal with this later in this submission as an actual occurrence on two fronts applicable, to the Andrews v QRL Supreme Court trial...*
>
> ***William (Bill) Bernard Andrews v Queensland Racing Limited***
>
> *Again, QRL has found itself the subject of litigation.* ***QRL, in following the provisions of the company constitution*** *found itself a defendant against existing board member Bill Andrews (plaintiff) with the decision delivered ... on 23 October 2009.*
>
> *Without recounting the nature of the litigation brought by Andrews (as it is bound to be fresh in everyone's mind), it is of significant importance to note that Andrews was in receipt of financial assistance by others prepared to co-fund the action brought by him. The action by Andrews was co-funded by the following:*
>
> - *Basil Nolan - Vice President, Thoroughbred Breeders Queensland Association;*
> - *Bob Frappell - Chairman, Thoroughbred Breeders Queensland Association - Class 'A' Shareholder representative, QRL;*
> - *Kevin Dixon - Chairman, Brisbane Racing Club - Class 'A' Shareholder representative, QRL;*
> - *Tom Treston - former committee member, Queensland Turf Club; and*
> - *Dick McGruther - unsuccessful applicant for the vacant board position, QRL - deputy chairman, non-executive directors, Watpac – former auditor of QTC, when a partner with Bentleys MRI...*
>
> *Identifying and understanding the motives of those that have co-funded the Andrews action* ***provides a great insight as to the underlying reason why the action was initiated. Clearly, there are those out there that believe that the industry should be governed as it was prior to 1992, when the QTC reigned supreme as both a Principal Racing Authority (PRA) and a race club.***
>
> *In terms of the orders that have subsequently been handed down, in short, QRL is required to recommence the election process for two new directors starting with the compilation of a shortlist of candidates by an independent recruitment agency.*
>
> *Beyond the considerable financial cost of these inquiries, for extended periods of time,* ***the board of QRL*** *and senior staff* ***were distracted assisting with information to ensure that the proprietary [sic] of the PRA, namely QRL, was protected.*** *Not in any of these inquiries or court cases, has QRL been the plaintiff. In all instances, it has found itself defending its position.*
>
> *The Inquiries have emanated from disgruntled persons within the industry, who lack a preparedness to accept the necessary change that is vital for the Thoroughbred racing industry in Queensland to survive and prosper. This indeed is unfortunate and is a reflection of the influential few, who continue to support the notion of race club sovereignty. In the "Andrews versus QRL" case those who have co-funded the action are on the record as keen supporters of the QTC....*
>
> *I recap the frustration around due process and the associated costs by the clubs relentless pursuit of control, and their desire to revert to the past administration structure.* ***A system that featured dubious integrity practices, the pursuit of privilege and opened up the opportunity for manipulation and corruption****...*[187]
>
> (emphasis added)

187 QRL, *QRL Constitution The Case for Change*, September 2009, pages 6-10.

4.3.176 To advance an argument to the Minister, founded upon the events leading to the *Andrews* litigation as emanating from "disgruntled persons within the industry" who lacked "a preparedness to accept the necessary change that is vital for the Thoroughbred racing industry in Queensland to survive and prosper", fails to acknowledge that the litigation brought by Mr Andrews was successful. The court found that Mr Andrews had a justifiable complaint in that the consultant had not been independent in selecting the shortlist and had been influenced inappropriately by QRL.

4.3.177 On 27 November 2009, Mr Bentley wrote to ASIC making a complaint against Mr Andrews, in which he contended that ASIC should investigate matters relating to evidence given by Mr Andrews in the Supreme Court proceeding. The complaint was that, at the trial, Mr Andrews had admitted that contributions to his litigation costs had been made by persons involved in the racing industry.[188]

4.3.178 Mr Bentley then made this complaint to the Office of Racing, which was involved at that time in the process of selecting the new directors.[189] This was because the Office of Racing, for the Minister, was required to clear candidates for selection as "eligible persons" within the meaning of the Racing Act.[190]

4.3.179 Ultimately, a different recruiter was engaged and completed the process.[191] Mr Andrews' bid for directorship was unsuccessful. The directors selected were Mr Milner and Mr Ryan who were appointed on 21 December 2009.[192]

4.3.180 The Commission's inquiries have revealed that Mr Bentley made statements to the Minister about the process on two occasions. In his oral evidence to the Commission he admitted that these representations were, at least, unfair.[193]

4.3.181 Mr Bentley's conduct over an extended period, in relation to the selection process, did not comply with the Code of Conduct and justifies a conclusion that he merely paid lip service to the high standards he promoted as the policy of QRL in the conduct of its business particularly by the directors. It does not reflect well on him, as chairman of QRL, to have advanced a policy involving transparency and integrity, while acting in a manner that lacked both qualities.

4.3.182 When Mr Bentley's conduct over the proxy issue and the director selection are considered in combination with his conduct in relation to the removal of Ms Watson (discussed in Chapter 5), there is justification in reaching a view that, for him, the end justified the means even if those means were of questionable integrity. The Code of Conduct was not an impediment which restrained him when pushing for an outcome which he desired.

Ms Reid

4.3.183 On 18 June 2009, Mr Wilson wrote to Ms Reid to advise of the shortlist. This letter contained the names of four candidates:

> *Unfortunately,* ***we are required to reduce the numbers to four nominations*** *for consideration for the appointment of two Directors.*
>
> *...As an aside, I would also like to make the comment that the process that is currently constructed may tend to cause candidates who are not successful in their nomination to unnecessarily develop a sense of enmity towards the control body because by the very*

188 Letter from Robert Bentley to Maree Blake (ASIC), 27 November 2009.
189 Letter from Robert Bentley to Michael Kelly, 27 November 2009.
190 Letter from Shara Reid to Carol Perrett, 11 December 2009.
191 QRL, Board Meeting Minutes, 17 November 2009, section 2.0.
192 QRL, Annual General Meeting Minutes, 17 November and 21 December 2009.
193 Transcript, Robert Bentley, 23 September 2013, page 49 lines 33-45.

nature of the process of selection they must be excluded, and some, although capable, cannot be supported in their application...[194]

(emphasis added)

4.3.184 On 3 July 2009, Mr Bentley wrote to the Minister advising of the shortlist. This letter was prepared by Ms Reid and included the following passage:

I advise that Northern Recruitment were required to reduce the number of applications received (26), to four nominations for consideration for the appointment of two Directors...[195]

4.3.185 Ms Reid adopted this wording again in letters to the directors and the Office of Racing on 14 July 2009. Ms Reid also wrote to Class A and Class B members on 15 July 2009:

I advise that Northern Recruitment, the independent recruitment consultant considered the applications received (26), and has prepared a Shortlist of Director Candidates for consideration and election of two Directors. This meets the requirements of the Constitution that the Shortlist contain not less than the number of director positions plus two.[196]

4.3.186 In a board paper, prepared for a meeting of 7 August 2009, Ms Reid wrote:

I advise that Northern Recruitment were ***required to reduce the number of applications received (26), to four nominations*** *for consideration for the appointment of two Directors.*[197]

(emphasis added)

4.3.187 At the QRL board meeting of 7 August 2009, Ms Reid provided an update in relation to the director selection process. Mr Lambert and Mr Andrews raised concerns about the nomination process. They referred to Mr Wilson's letter of 18 June 2009 and asked Ms Reid to explain the reason why Northern Recruitment had limited the shortlist to four candidates. The following is recorded in the minutes:

Ms [Reid] further confirmed that the decision of the IRC to shortlist the nominations to 4 candidates was a decision made by the IRC, and at no time was QRL involved in the decision process, nor had Ms [Reid] conveyed any instructions to any person at the IRC in relation to the decision process to be undertaken.[198]

4.3.188 Mr Lambert gave evidence in the *Andrews* litigation of a conversation with Mr Wilson on 10 August 2009. He had enquired about the wording of Mr Wilson's letter of 18 June 2009 which suggested that the shortlist had to be restricted to four candidates.[199] Mr Lambert's evidence was that Mr Wilson had said that "he had been advised by Shara [Reid] that this was required under the Constitution".[200]

4.3.189 During oral evidence in the Supreme Court proceedings, Ms Reid denied instructing Mr Wilson to limit the shortlist to four candidates.[201] Mr Wilson, although initially denying Mr Lambert's version, gave evidence that this recollection was "not untrue".[202] Mr Lambert also gave evidence that Ms Reid had told him at the board meeting of 7 August 2009 that she "had previously held the erroneous view that cl 17.3 required the shortlist to contain a maximum of four names".[203]

194 Letter from Mark Wilson (Northern Recruitment) to Shara Reid, 18 June 2009.
195 Letter from Robert Bentley to Peter Lawlor, 3 July 2009; *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54].
196 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54(b)].
197 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54(c)].
198 QRL, Board Meeting Minutes, 7 August 2009, section 7.1.
199 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [52]-[53].
200 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [52]: Transcript, 20 October 2009, Michael Lambert, page 69 lines 48-53.
201 *Andrews v Queensland Racing Limited* [2009] QSC 338: Transcript, 21 October 2009, Shara Reid, page 88 lines 49-55, page 89 line 56.
202 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [53(e)].
203 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54(d)].

4.3.190 The court accepted the evidence of Mr Lambert.[204] The judge found that Ms Reid did instruct Mr Wilson that the shortlist was to contain a maximum of four names[205] and made the following observations about Ms Reid:

> *Ms [Reid] is a well qualified lawyer, but she was not an impressive witness. Her manner was nervous and defensive. Her conduct evinced lack of the careful attention to detail reasonably expected of someone in her position....*
>
> *Ms [Reid] acknowledged that she did not keep records of telephone conversations...*[206]

4.3.191 Ms Reid's evidence was rejected and the contemporaneous documents (referred to above) supported a finding that she had not been frank in giving that evidence.[207] In giving her evidence Ms Reid breached not only the Code of Conduct, but as a solicitor, she breached the high standards of honesty expected of an officer of the court, particularly when giving evidence on oath.

4.3.192 At the QRL board meeting on 16 December 2009, Ms Reid's position was raised. Mr Grace and senior counsel, at the request of Mr Bentley, attended the meeting. Counsel expressed a view that Ms Reid was "harshly treated and no inference should be taken from the comments from the transcript". The minutes record:

> *The Board **RESOLVED** that the matter was closed and pending the outcome of discussion with the government, that the workload of the legal department would be addressed.*[208]

4.3.193 The board was thus prepared to disregard the credit findings made by the Supreme Court about Ms Reid despite complaints made by Mr Andrews and Mr Lambert, who at the time were still directors.[209]

4.3.194 Ms Reid did not act with integrity in giving evidence in the *Andrews* litigation. As was plain from the contemporaneous documents, and the evidence of Mr Lambert, her version of events (in denying that she gave the instruction) was untruthful. She breached her responsibilities as an officer of QRL, as corporate counsel of QRL, as a legal practitioner and under the Code of Conduct.

4.3.195 As has been mentioned, Ms Reid was not available to give evidence on these matters during the public hearings for health reasons.

Management oversight – board committees

4.3.196 In addition to the adequacy of and adherence to the QRL/RQL Codes of Conduct, the Commission's inquiries also considered the adequacy of and adherence to the board committee charters.

QRL Audit Committee/ RQL Audit Finance and Risk Committee

4.3.197 The governing charters for these QRL and RQL committees (the Audit Committees) were generally the same. The primary objective of the Audit Committees was to assist the boards to fulfil their oversight responsibilities, by reviewing and reporting to the boards.[210] The matters on which the Audit Committees were to report included financial integrity and reporting, business risks, audit effectiveness, and processes for monitoring compliance with laws and RQL/QRL's code of business conduct.[211]

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204 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [53] and [54(d)].
205 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [53] and [54].
206 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54(c)].
207 *Andrews v Queensland Racing Limited* [2009] QSC 338 at [54].
208 QRL, Board Meeting Minutes, 16 December 2009. section 4.3.
209 QRL, Board Meeting Minutes, 16 December 2009, section 4.3 and 4.4.
210 Audit Finance and Risk Committee (AFRC), *Charter*, approved 1 July 2010, page 1; Audit Committee (AC), Charter, approved by the AC 3 June 2005, page 1.
211 The Commission is not aware of any code of business conduct ever having been created by QRL or RQL.

4.3.198 The Audit Committees had particular duties with regard to: financial integrity, including assessing the adequacy of the organisation's internal control systems for key financial processes and ensuring that all employees had an understanding of their roles and responsibilities; compliance and risk management, including reviewing the effectiveness of systems for monitoring compliance with internal policies and procedures as required or as requested by the board; and audit effectiveness, including ensuring that management responded to recommendations by the internal and external auditors.

4.3.199 Membership of both the QRL and RQL Audit Committees was to comprise a minimum of two board members. The Audit Committee was constituted by Mr Lambert (chairman) and Mr Hanmer. According to the meeting minutes examined by the Commission, it met five times in 2007, and four times each in 2008 and 2009.[212] The RQL committee was constituted by Messrs Ryan (chairman), Lette, Hanmer and Milner. It met on two occasions in 2010, four occasions in 2011, and once in 2012 before the end of the relevant period.[213]

4.3.200 Executive management and other management personnel also regularly attended meetings and assisted the committees to discharge their functions.[214] However, contrary to Mr Carter's belief expressed in his statement of 2 August 2013, employees were not *members* of the committees.[215]

4.3.201 In the context of good corporate governance, the Audit Committee charters reflected duties and tasks that are considered proper for company audit committees. It is also common to add risk management oversight to an audit committee's duties, as occurred for both the Audit Committees here.[216]

4.3.202 Principle 4 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations with 2010 Amendments* is to safeguard integrity in financial reporting ("the Principles" are discussed in more detail in Chapter 5). The Principles recommend that each board establish an audit committee, and that the committee be structured to consist only of non-executive directors and be chaired by an independent chair who is not the chair of the board.[217]

4.3.203 The "ideal audit committee" is described in *Ford's Principles of Corporations Law* as "another independent watchdog over the full time management including the managing director and the executive directors". Ford suggests that directors who are members of an audit committee may owe a higher duty of care, by virtue of the additional responsibilities of committee membership.[218]

4.3.204 The Audit Committees apparently complied with the process and form requirements of their charters with respect to membership, meeting frequency and reporting to the board.

4.3.205 In the course of the Commission's inquiries under Term of Reference 3(a), matters related to the management and practices of the committees arose in the context of procurement and financial accountability processes. Those matters have been addressed in Chapter 3.

212 AC Meeting Minutes, 2007: 2 February, 1 June, 3 August, 7 September and 7 December; 2008: 7 March, 6 June, 8 August, and 5 September; 2009: 6 March, 1 May, 26 June and 7 August; 2010: 15 January, 3 February and 1 April.
213 AFRC Meeting Minutes, 2010: 5 August and 6 December; 2011: 4 February, 10 June, 11 August and 10 October; 2012: 19 March.
214 Statement of Ronald Mathofer, 9 August 2013, page 9 paras 41-46.
215 Statement of Adam Carter, 2 August 2013, page 11 para 30.
216 Kiel et al, *Directors at Work*, pages 502, 506-507.
217 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 26.
218 Austin & Ramsay, *Ford's Principles of Corporations Law*, pages 878-879.

QRL Human Resources and Remuneration Committee/RQL Remuneration and Nomination Committee

4.3.206 The Commission was provided with two governing charters for the QRL Human Resources and Remuneration Committee (HRRC). The first was adopted by the board on 3 August 2007, following a board-directed review in July 2007.[219] It was a basic document which set out in broad terms the role and functions of the HRRC. The role was to ensure that a remuneration strategy was in place, and periodically undertake a review of human resource practices, concerns of employees, stakeholders and government.

4.3.207 The document suggested some general criteria against which review of practices should be conducted. The HRRC was to be comprised of (at least) three directors and was to meet annually or as otherwise required. As to reporting, it was to receive an annual report from the chief operations manager.

4.3.208 The second QRL charter is labelled "HRRC and Board Nomination Committee" and dated 4 April 2008. The document provided to the Commission was incomplete.[220] It was not formally adopted by the board. This is unfortunate as it appears to have provided a more detailed set of duties and responsibilities, especially in relation to remuneration and retention of executives.

4.3.209 For example, the HRRC was to review and make recommendations to the board regarding QRL's policy for determining executive remuneration and to maintain the contemporary relevance of such policy consistent with the objective of retaining and attracting quality personnel in a competitive executive market. The charter specifically provided that the HRRC was to ensure that the recommended remuneration of the CEO, executive directors and "direct reports" to the CEO, comprised a suitable balance between fixed and incentive pay, reflecting short and long term objectives relevant to the company's business objectives.

4.3.210 Attention to matters such as these by the QRL HRRC or RQL Remuneration and Nomination Committee (RNC) may have avoided or mitigated against the serious outcomes of the employment contract renegotiations during 2011, which are the subject of this Report at Chapter 7.

4.3.211 According to the documents examined by the Commission, the HRRC met only three times, on 22 June 2007, 4 April 2008 and 25 June 2009.[221] The QRL board meeting minutes record that the HRRC reported formally to the board only twice, on 6 July 2007 and 26 June 2009.[222] Such a long time between meetings obviously compromises the ability of a committee to carry out its functions appropriately.

4.3.212 The documents also show that at least two audits of matters which involved functions of the HRRC were conducted during the QRL period. Deloitte delivered an internal audit of human resources (HR) policies and procedures on 17 October 2008.[223] This appears to be part of the internal audit program overseen by the QRL Audit Committee.[224]

4.3.213 The October 2008 Deloitte report identified "important procedural and administrative weaknesses", including a lack of HR policies and detailed procedure documentation for specific areas due to the absence of a human resources department; no periodic review of HR policies; updating only if impacting external factors change; inconsistency across departments in

219 QRL, Board Meeting Minutes, 6 July 2007, page 10.
220 The legal representatives for RQL/QACRIB advised the complete document was unable to be located: Email from Clayton Utz to Executive Director (Commission), 16 August 2013.
221 Human Resources and Remuneration Committee (HRRC) Meeting Minutes, 6 July 2007 and 25 June 2009. No meeting minutes provided/located for 6 July 2007 or 4 April 2008.
222 QRL, Board Meeting Minutes, 26 June 2009, page 12.
223 Deloitte, *Queensland Racing Limited, HR Policies and Procedures Review*, 17 October 2008 [although watermarked as draft report, it appears to be the final version].
224 QRL Audit Committee, Meeting Minutes, 6 June 2008, pages 2-3.

interpretation by department managers in the process of hiring and inducting new employees; developing training plans and conducting exit interviews; and a failure over years to conduct the training required by the Awareness of Duties policy.[225]

4.3.214 The minutes of the HRRC made no reference to the Deloitte report. It was discussed by the Audit Committee on 6 March 2009. The minutes record that Mr Carter advised that the findings were being actioned, with a final report to be provided to the Audit Committee at its 5 June 2009 meeting. The committee concluded "further HR discussion is to be referred to the QRL board for consideration".[226] At a QRL board meeting on 6 March 2009, Mr Lambert advised the board of the Deloitte audit, simply noting (according to the minutes) that QRL's HR policies were the key issue of concern.

4.3.215 Examination of the QRL board, Audit Committee and HRRC meeting minutes demonstrates that the Deloitte report and recommendations were not dealt with again at board or committee level.

4.3.216 At the same board meeting on 6 March 2009, Mr Tuttle informed the meeting that HR Business Solutions (HRBS) were "currently conducting an HR audit and review of QRL's polices and methodologies". Mr Tuttle advised that QRL intended to engage HRBS as the company's "HR advisor, thereby removing the need to have an on-site HR Manager".[227]

4.3.217 The HRRC meeting minutes of 25 June 2009 record under a heading "HR Audit Summary" that the committee received an "Overview report" from HRBS auditing HR practices within QRL. It had been conducted in January 2009 and delivered in February 2009.

4.3.218 The HRBS report found that the HR functions, including succession planning and talent management, performance counselling, and recruitment and selection, were rated at the lowest score. [228]

4.3.219 As to remuneration, the report found that the practices were "largely unstructured, based on 'company practices' and the discretion of the managers and Chief Operations Manager".[229]

4.3.220 About recruitment and selection, the report said the processes "rel[ied] primarily on the knowledge, experience and style of the management team".[230] Each of these was said to represent a "significant risk to the organisation in terms of consistency, equity, legal compliance and the retention and distribution of organisational knowledge".[231]

4.3.221 Relevant to the issue of senior executive retention, the HRBS report found that the succession planning and talent management practices were "largely informal and undocumented, based on the discretion of the managers".[232] This was said to represent a "significant risk to the organisation as there [we]re a number of critical roles with QRL that currently [did] not have an identified successor, and high potential employees [were] not being actively trained and developed within the organisation".[233]

4.3.222 The report recommended:

> *Developing talent management and retention strategies for [the individuals who were identified as holding critical roles that contributed strongly and were in high demand in the market and difficult to replace], providing they are performing to a high standard, should be*

225 A statutory instrument made pursuant to section 81(p) of the *Racing Act 2002*.
226 QRL Audit Committee, Meeting Minutes, 6 March 2009, page 3.
227 QRL, Board Meeting Minutes, 6 March 2009, page 11.
228 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 6.
229 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 15.
230 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 11.
231 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 11.
232 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 18.
233 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 18.

undertaken as a matter of priority to ensure their ongoing satisfaction and employment with QRL. Developing succession plans for these roles should also be undertaken to minimise the potential risks and impacts if one of these individuals exits the organisation.[234]

4.3.223 Even applying the imprecise functions set out in the HRRC charter, the findings and recommendations of the HRBS report were directly relevant to the functions of the HRRC. The minutes recorded receiving the report, but no discussion about the issues or recommendations raised.

4.3.224 The matter of executive retention had been discussed by the QRL board on 3 October 2008, before either of the audit reports was delivered. The board recognised the need to secure necessary skills and knowledge within the organisation, and noted the significant costs associated with replacement of senior managers. The board resolved for a term of employment to be offered to "senior managers" with the term to conclude on 30 June 2012. The minutes do not name the senior managers or record the content of the employment offers.[235]

4.3.225 The RNC charter adopted by RQL in July 2010 contained more detail than QRL's HRRC version, but did not provide a specific benchmark for executive remuneration and retention as the draft second QRL charter did. The RNC charter referred to the concepts of executive retention and succession planning; however it listed no specific strategies to achieve these objectives.[236]

4.3.226 The duties in relation to CEO and senior executive remuneration were more explicit. This included a duty to obtain expert external advice to establish CEO and senior executive remuneration frameworks, to assess the market annually to ensure the CEO and senior executives were being rewarded commensurate with their responsibilities (appropriate to the company's circumstances), and to review annually remuneration levels in order to recommend the outcome of any salary framework reviews to the board.[237]

4.3.227 The RNC charter included duties about director nominations. Because of the specific processes and criteria set out in the RQL constitution, the RNC's duties were necessarily limited. The charter provided that the committee would obtain advice as required to ensure compliance with the constitution, and would periodically review the aggregate remuneration for directors. The charter also required the RNC to ensure that an appropriate induction and orientation program was in place for newly-appointed directors, and the committee could recommend programs for ongoing director education to the board.[238]

4.3.228 The RNC charter provided that membership would comprise at least two members of the board. The charter named the initial committee as Mr Bentley (chairman), Mr Ludwig and Ms Watson.[239] Meetings were to be held not less than twice a year, and the committee was to update the board about its activities and make appropriate recommendations.[240]

4.3.229 The first RNC meeting was held on 3 February 2011, seven months after RQL was established and nineteen months after the last HRRC meeting. By this time, Ms Watson had been removed as a director of RQL. The minutes record that membership was now two directors (Mr Bentley and Mr Ludwig), and that the committee remained compliant with its charter. Membership remained at two directors, Mr Bentley and Mr Ludwig, for the RQL period.

234 HR Business Solutions, *Queensland Racing Limited HR Audit Report*, February 2009, page 18.
235 QRL, Board Meeting Minutes, 3 October 2008, page 4.
236 RQL, *Remuneration & Nomination Committee Charter*, 1 July 2010, clause 3.1.
237 RQL, *Remuneration & Nomination Committee Charter*, 1 July 2010, clause 3.3.
238 RQL, *Remuneration & Nomination Committee Charter*, 1 July 2010, clauses 3.4 and 3.5.
239 RQL, *Remuneration & Nomination Committee Charter*, 1 July 2010, clause 4.1.
240 RQL, *Remuneration & Nomination Committee Charter*, 1 July 2010, clauses 4.3 and 5.

4.3.230 The RNC met more frequently than had the HRRC. It met on a total of five occasions between February 2011 and March 2012.[241] Mr Tuttle was the secretary/minute-taker for each of the meetings prior to his departure from RQL in March 2012. Mr Carter attended two meetings in April and August 2011 as CFO, and one in March 2012 as acting CEO.

4.3.231 The RNC meeting minutes demonstrate that the committee received reports about employee numbers and salary costs against the budget, considered applications from executives about new staffing positions and employee salary increases, and monitored performance reviews.

4.3.232 When the RNC met in April 2011, it resolved to recommend to the board that the contracts of nine executives be extended, and a contract offered to another employee and five executive assistants. The minutes record no discussion of the reasons for this recommendation. Mr Tuttle and Mr Carter, who were subjects of the resolution, were present at the meeting though are recorded as having "offered to excuse themselves for [that] section of the meeting".[242]

4.3.233 The next RNC meeting was held on 3 August 2011, two days before the employment contracts, the subject of Term of Reference 3(e), were approved by the board and executed. According to the RNC charter, consideration of the remuneration and retention of those executives were core functions of the RNC, yet the RNC meeting minutes contain no reference to those renegotiations. It is clear from the evidence before the Commission that Mr Bentley was heavily involved in the contract renegotiations. The circumstances surrounding the renegotiation of the four key executives' contracts are discussed in Chapter 7.

4.3.234 Review of benefits provided to directors, salaries of the CEO and management personnel, and director induction and development, are common corporate governance functions of remuneration and nomination committees.[243] Indeed, Principle 8 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations with 2010 Amendments* – to remunerate fairly and responsibly – recommends the establishment of a remuneration committee. The Principle specifically recommends that the committee structure should consist of a majority of independent directors, an independent chairman and have at least three members.[244] The commentary to the Principles states:

- *The remuneration committee should be of sufficient size and independence to discharge its mandate effectively.*
- *Companies should, where possible, limit the use of executive directors serving on a remuneration committee in order to address the potential for, or perception of, conflict of interest of executive director involvement in board decisions on their remuneration packages.*
- *The remuneration committee may seek input from senior executives on remuneration policies, but no senior executive should be directly involved in deciding their own remuneration.* [245]

4.3.235 The RNC did not act in a manner consistent with achieving the objectives of its governing charter. It is apparent from the items recorded in the meeting minutes that the committee's business did not extend to periodic or annual review of CEO and senior executive remuneration, or of executive retention and succession planning. Nor do the minutes suggest any consideration of board training. The Commission observes that the structure of the RNC, having Mr Bentley rather than an independent director as chairman, and only having two-director membership, was a factor impeding the committee's achievement of its objectives.

241 RNC, Meeting Minutes: 3 February 2011 (45 minutes), 14 April 2011 (45 minutes), 3 August 2011 (1 hour), 15 September 2011 (30 minutes), 28 March 2012 (30 minutes).
242 RNC, Meeting Minutes, 14 April 2011, page 2.
243 Kiel et al, *Directors at Work*, pages 505-506, 508.
244 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 36.
245 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 37.

4.4 Workplace culture and board involvement in executive functions

Background

4.4.1 The involvement of the board – in particular Mr Bentley (as chairman) – in the exercise of executive management functions was a dominant feature affecting workplace culture and management practices of both QRL and RQL throughout the relevant period.

4.4.2 In assessing the QRL and RQL boards' involvement in executive functions, regard is given to the board role as set out in the QRL and RQL constitutions and Codes of Conduct, as discussed at paragraphs beginning 4.2.2 and 4.3.8 above. The QRL and RQL constitutions and Codes of Conduct provided general rather than specific direction to their officers as to strategic direction and management.

4.4.3 The RQL Code of Conduct expressly provided a role description for the board chairman, to "play an important leadership role in ensuring Racing Queensland works effectively". This included responsibilities to ensure that the board reviewed the method by which the senior management team undertook day to day management of the company. This is clearly an oversight function of the chairman over the board, rather than of the chairman alone in respect of senior management.

4.4.4 It is also informative to examine what the board itself considered its role to be. At the first meeting of RQL on 1 July 2010, Mr Bentley discussed the operations of the board and protocols which "he wishe[d] to see adopted for the smooth operation of RQL".[246] The board carried his motion in favour of the following protocols:

1. *Staff interaction – Directors have full access to all staff for the purpose of ascertaining information to assist them to fulfil their Director duties.*
2. *Board Directors wishing to have a project advanced will contact the Chairman in the first instance and if thought worthy, the CEO will proceed to have the proposal advanced. Under no circumstances are Board Directors to engage staff to work on projects or seek to have projects advanced outside these guidelines.*
3. *Legal advice: Directors need permission from the Chairman to seek independent legal advice outside of advice sought from RQL's Senior Corporate Counsel. There is to be no outside engagements or advice sought of Legal Counsel without Board and CEO approval on any matter.*
4. *Media – all media statements and interviews will be undertaken by the Chairman or whoever the Chair designates.*
5. *Board papers – Directors wishing to submit a board paper will first discuss with Chair. ...*
9. *The expenses of the Chairman are to be approved by the CEO. ...*
11. *Confidentiality of Board deliberations must be strictly adhered to.* [247]

4.4.5 The issue of appropriateness of board involvement in executive management functions is a matter comprehensively considered by corporate governance theory, from which arises clear requirements about the separation of board and executive functions. Corporate governance arrangements are the subject of a separate Term of Reference 3(c), addressed in Chapter 5. However, that Term of Reference is focused on RQL only. The board-executive relationship has been framed as a "management issue" within Term of Reference 3(b), potentially capturing each of the relevant entities.

246 RQL, Board Meeting Minutes, 1 July 2010, page 4.
247 RQL, Board Meeting Minutes, 1 July 2010, page 4.

4.4.6 The relevant principles of corporate governance remain instructive to inquiries into this matter. Principle 1 of the *ASX Corporate Governance Principles and Recommendations with 2010 Amendments* provides that companies should establish and disclose the respective roles and responsibilities of board and management. The purpose is to facilitate board and senior executives' accountability and to ensure a balance of authority so that no single individual has unfettered powers.[248]

4.4.7 The commentary to the Principles explains the need for *clear separation* as:

> *Disclosing the division of responsibility assists those affected by corporate decisions to better understand the respective accountabilities and contributions of the board and senior executives. That understanding can be further enhanced if the disclosure includes an explanation of the balance of responsibility between the chair...and the chief executive officer.*[249]

4.4.8 To achieve this separation the commentary suggests the board adopt a formal statement outlining matters reserved to them and the areas of authority delegated to senior executives. The commentary acknowledges that the nature of matters reserved for the board and those delegated to senior executives depends on the size, complexity and ownership structure of the company, and will be influenced by company tradition and culture, and by the skills of directors and senior executives.[250]

4.4.9 More specifically, in relation to Mr Bentley's involvement at QRL and RQL, ASX Principle 2 provides that companies should structure a board to add value, which includes specific recommendations that the chairman should be an "independent director"[251] and that the roles of chairman and CEO should not be exercised by the same individual. Like the separation between board and executive functions, the division of responsibilities between the chairman and CEO should be agreed by the board and set out in a formal statement.[252]

4.4.10 The separation of responsibilities is not intended to deny the need for close relationships between the board and executives within a company. The relationship between the chairman and CEO is recognised as an important function of the chairman, and crucial to a well-functioning management-board relationship. *The Directors at Work: A Practical Guide for Boards* guidebook says: "The chair is the major point of contact between the CEO and the board and should be kept fully informed of the day-to-day happenings by the CEO on all matters that are of interest to the board".[253]

4.4.11 The same guidebook describes the role of the chair: "The chair often oversees the development of the board agenda, undertakes certain public relationships responsibilities... is also the driving force behind board evaluation processes... and is often the person to take on a key advisory role in the company".[254]

4.4.12 This description clearly limits the chairman's role to being informed of and overseeing day to day management, rather than having direct involvement in it.

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248 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 13.
249 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 13.
250 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 13.
251 The commentary (pages 16-17) defines an independent director as a non-executive director who is free of any business or other relationship that could materially interfere with – or could reasonably be perceived to materially interfere with – the independent exercise of their judgement. The commentary lists a number of relationships which affect independent status, including "an officer of or otherwise associated directly or indirectly with a material supplier or customer".
252 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, 2nd edition, page 18.
253 Kiel et al, *Directors at Work*, page 233.
254 Kiel et al, *Directors at Work*, page 233.

Mr Bentley – the chairman

4.4.13 QRL and RQL failed to make plain the separation between board and executive functions generally, and between chairman and CEO duties specifically. The operation of the executives' functions suffered as a result of the role Mr Bentley played in day to day affairs and his strong influence over the executives.

4.4.14 The direct involvement of the QRL and RQL chairman in executive management functions was a matter raised directly, in a number of statements,[255] and also thematically in the review of documents received by the Commission.

4.4.15 These statements and the documentary evidence revealed that Mr Bentley was heavily involved, not just in the high-level strategic direction of the company as contemplated by the constitutions and Codes of Conduct, but also effectively as an executive, in the day to day decision-making and management of the company.

4.4.16 This much was recognised by independent assessment in September 2008. Mercer Consulting delivered a review of non-executive director remuneration and said:

> *The structure of QRL is such that the organisation does not have a Head of Organisation such as Chief Executive Director, General Manager or Managing Director...The Chairman, while not an Executive Chairman functions like one, operating on a full time basis, with time commitments of around 20 days per month (or 240 days per annum)...*[256]

4.4.17 The significant extent of Mr Bentley's workload and presence was also recognised by independent assessment in May 2010. The Godfrey Remuneration Group delivered a market benchmark report of non-executive director remuneration for the purpose of determining the RQL directors' remuneration. The report recommended fees for Mr Bentley based on a workload of 112 days per annum [2.3 days per week over 48 weeks]; however noted "it is understood that Chairman is likely to devote around 180 days per annum [3.75 days per week over 48 weeks] to the role".[257]

4.4.18 The QRL management structure – without a CEO – which permitted Mr Bentley to operate as an executive chairman continued until July 2010. Upon commencement of RQL, QRL chief operations manager Mr Tuttle was made chief executive officer.

4.4.19 A number of QRL and RQL staff described Mr Bentley having his own office space at Deagon, and attending at the office most days every week.[258] Middle managers deposed that Mr Bentley asked them for information and assigned them tasks directly, rather than through the senior executive management channels.[259]

4.4.20 Certain staff who provided statements to the Commission noted that they found the nature of Mr Bentley's involvement as chairman unusual. These were staff with significant experience working in companies with hierarchical management structures. Mr Ronald Mathofer, business analyst at RQL, deposed:

> *In my employment with QRL I did find it unusual that members of the Board, particularly Mr Bob Bentley, approached me directly for information rather than directing requests through my manager. The management and board arrangements at QRL were much*

255 Provided to the Commission in statements by RQL staff.
256 Mercer, *Non Executive Director Remuneration Review: Queensland Racing Limited*, 25 September 2008, page 2.
257 Godfrey Remuneration Group, Racing Queensland: *Non-executive Director Remuneration Market Benchmark Report*, May 2010, page 5.
258 Statement of Malcolm Tuttle, 26 July 2013, page 7 para 24; Statement of Ronald Mathofer, 9 August 2013, page 7 para 31; Statement of Deborah Toohey, 2 August 2013, page 10 para 20; Statement of Adam Carter, 2 August 2013, page 33 para 99.
259 Statement of Malcolm Tuttle, 26 July 2013, page 7 para 24; Statement of Ronald Mathofer, 9 August 2013, page 7 para 30; Statement of Adam Carter, 2 August 2013, pages 32-33 paras 97-98.

more interactive than what I had previously encountered... In my role as an accountant for [a different company], requests for information and presentations always came from the manager above me and never directly from the Board.[260]

4.4.21 Ms Tracey Harris, former chief financial officer of QHRL and finance manager at RQL, described in her statement to the Commission that:

> *c. It was commonplace that Mr Bentley's approval would be sought even in relation to small issues such as general finance matters. For example, if I ran something past Mr Carter he would often send the matter to Mr Bentley to "okay" it;*
>
> *d. I observed that many decisions were not made independent of Mr Bentley. I was often told to do something by Mr Carter because "Bob said" or "Bob said to do it this way";*
>
> *e. Mr Bentley would speak to me directly about matters concerning the operations of RQL. On one occasion, in a meeting with Mr Bentley he informed me that an employee, Damien Raedler, was going to lose his job. On another occasion Mr Bentley came into my office to talk about developments at Albion Park and Logan. On that occasion he drew plans for me to look at.*[261]

4.4.22 The Commission received complaints from employees who had moved from GQL and QHRL during the 2010 amalgamation about being marginalised at RQL.[262] As mentioned above, in July 2010 RQL employed approximately 150 people. About 45 of those employees had transferred from GQL and QHRL. Employees from the non-thoroughbred codes therefore represented about a third of the total RQL staff.[263]

4.4.23 Staff who had previously worked at GQL and QHRL observed in their statements that the role of the board and the management structures at those entities were different from RQL. Specifically, according to Mr Darren Beavis, former general manager at GQL and greyhound racing manager at RQL, the board of GQL "left the day to day operations to the executive team and focused on the industry's strategic direction... the [RQL] board members appeared to be more hands on and at the offices on a regular basis".[264]

4.4.24 According to Ms Harris, at QHRL "there was a distinct separation between the Board Members and the Management team. No Board member actively participated and influenced any member of the Management team".[265]

4.4.25 This Term of Reference directs specific inquiry as to the involvement of the board in the exercise of functions by "the officer holding the position of company secretary" and "those involved in integrity matters".

4.4.26 Mr Bentley's pervasive management style extended to Ms Reid's functions as company secretary and corporate counsel. Ms Reid was treated as a conductor through which to obtain selective external legal advice, including on matters which involved her own interests (see Chapter 7), rather than an independent secretary and legal adviser. For example, when the board sought advice on Mr Bentley's conflict position in 2011, while Ms Reid instructed Mr Grace in the first instance, subsequent discussions on the matter were between Mr Grace and Mr Bentley, either directly or via Ms Reid (see Chapter 5).

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260 Statement of Ronald Mathofer, 9 August 2013, pages 7-8 paras 34-35.
261 Statement of Tracey Harris, 18 September 2013, pages 2-3 para 11.
262 Tracey Harris, former Chief Financial Officer at QHRL deposed to being "placed in 'isolation' where [her] access to all confidential information and visibility to day to day activities of Bob Bentley, Malcolm Tuttle, Shara [Reid] and Adam Carter was removed", following her questioning of Mr Bentley's attendance at Queensland Race Product Co meetings (Statement of Tracey Harris, 19 August 2013, page 1). Mr Beavis, former General Manager at GQL, deposed to feeling "shut out and left in an office to complete general data entry" on commencement with RQL and left seven months later when his position was made redundant, (Statement of Darren Beavis, 22 August 2013, page 1 para 2.2).
263 List of RQL employees produced by the lawyers for RQL, see: Letter from Clayton Utz to Executive Director (Commission), 12 July 2013.
264 Statement of Darren Beavis, 23 August 2013, page 1 para 2.2.
265 Statement of Tracey Harris, 19 August 2013, page 2.

4.4.27 The Commission is required to consider the integrity of Ms Reid's actions throughout the relevant period. Her conduct in management and workplace culture matters is to be assessed against the QRL Code of Conduct; integrity of actions in corporate governance matters (see Chapter 5); her compliance with responsibilities, duties and legal obligations during the employment contract renegotiations (see Chapter 7); and whether she acted in good faith and consistently with her responsibilities when dealing with the Tatts Group issue (see Chapter 8).

4.4.28 These inquiries raise serious concerns about Ms Reid's integrity and her compliance with duties as company secretary and as a legal practitioner. Those specific concerns are discussed where they arise in the other Chapters mentioned above.

4.4.29 Ms Reid's integrity and her capacity to discharge her dual functions as company secretary and corporate counsel appear to have been questioned by the board on only one occasion during the QRL period. At a board meeting on 16 December 2009, Ms Reid's position was raised by Mr Lambert, following the *Andrews* litigation. The board resolved that the matter was "closed" and the only outcome was that the workload of the legal department would be addressed.[266] The protection of Ms Reid from internal discipline, particularly by Mr Bentley, following external findings in the *Andrews* litigation which challenged her integrity, is a matter for concern.

4.4.30 It is accepted that Ms Reid's responsibilities increased during the relevant period. QRL conducted a large enterprise, which became larger upon amalgamation with the other codes to become RQL. Ms Reid was one part of a relatively small executive team managing day to day affairs. Ms Reid's role as corporate counsel, managing legal compliance in a highly regulated industry with little assistance, was an onerous one when added to the functions of company secretary.[267] It may be assumed that she performed many aspects of her roles adequately.

4.4.31 Due to her health, Ms Reid was not fit to appear to give evidence at the Commission's public hearings. As a result, inconsistencies in her accounts including sworn statements in court proceedings, police statement and ASIC interviews, could not be tested.

4.4.32 Ms Reid's involvement in matters raised by the Terms of Reference was informed by the documents received during the Commission's requirement process. Notice of potential adverse findings was provided to Ms Reid through her lawyers, and submissions in response were provided on her behalf.

4.4.33 Although Ms Reid was, like the other executive management personnel, subject to the influence of Mr Bentley, this does not absolve Ms Reid from the obligation to comply with duties she owed as an officer of the company and as a legal practitioner. Similarly, while it can be concluded that Ms Reid was not sufficiently experienced to perform the duties and functions required of her in the dual secretary-counsel role, this factor does not excuse breaches of duties she owed. Neither factor is good reason for Ms Reid's failure to act with integrity in the manners which have been identified in this Report.

4.4.34 The director of integrity operations during the RQL period, and for much of the QRL period, was Mr Jamie Orchard. Mr Orchard addressed this Term of Reference in his statement and said, "Other than when the Board was required to exercise a power reserved for the Control Body (such as warning off a person), members of the Board would not intervene in the day to day

266 QRL, Board Meeting Minutes, 16 December 2009, page 3.

267 The organisational chart shows that Shara Reid was assisted by an executive assistant/board secretary and one legal assistant. Throughout the relevant period the assistant and board secretary position was filled by Deborah Toohey, who provided a statement to the Commission setting out her duties, which were in the majority administrative. (See: Statement of Deborah Toohey, 2 August 2013, pages 2-3 para F-K). The legal assistant role was filled by three different people throughout the relevant period, and according to the employee details listed provided by the lawyers for RQL, the position was vacant from 6 January 2012. (See list of RQL employees produced by the lawyers for RQL: Letter from Clayton Utz to Executive Director (Commission), 12 July 2013.)

running of the integrity department".[268] No credible evidence to the contrary has been provided to the Commission. The Commission's inquiries suggest that board involvement in executive management functions focused on the roles of Mr Tuttle as CEO, Ms Reid as corporate counsel and company secretary, Mr Brennan as director of product development and Mr Mark Snowdon as infrastructure project manager/director.

4.4.35 Board awareness of the problems of board involvement in management functions was clear by mid 2011. Board minutes from 8 July 2011 record the following, under the heading "Executive Committees":

> *The Chairman advised he had discussions with Senior Executives and their view of the Directors involvement in management committees. The executive expressed an unanimous view that while it had been beneficial to have Directors [sic] involvement in the past on various projects the executive now needed to operate in an independent fashion and bring to the Board their input on projects... The Board agreed that this will clarify any misconceptions that the Board is involved in management operations.* [269]

4.4.36 At the same meeting, Mr Bentley requested that the Audit Committee review its charter to ensure it adequately reflected the requirements for good governance of RQL. The minutes recorded:

> *The Audit committee should not be restrained in delving into any issue that it deems necessary. However, is it [sic] essential that their oversight of administration covers compliance with the Racing Act and Section 81 policies rather than expending time on smaller issues that could be clarified by Management.*[270]

4.4.37 Despite the board's apparent attempt to distance itself from involvement in management functions, subsequent events suggest that the management style of Mr Bentley had become so entrenched that executive staff continued to rely on, or be subject to, his direction.

4.4.38 For example, in an email sent on 5 November 2011 by Mr Bentley to directors Messrs Milner, Hanmer, Ludwig, Lette and Ryan, and to executives Mr Tuttle, Mr Brennan, Ms Reid and Mr Snowdon, Mr Bentley addressed at length the progress of the Industry Infrastructure Plan (IIP). Mr Bentley noted that:

> *A decision was made by the board some months ago that the board would step aside from taking on executive functions. This was at the time of the race fields legislation and subsequently the execution of the infrastructure plan was to be an executive function, with any political requirements to be negotiated by the chairman... Final decisions would be made by the board.*[271]

4.4.39 Mr Bentley set out the recent history of his discussions with government, Contour Consulting Engineers Pty Ltd (Contour) staff and RQL executive staff about the development of the IIP business plans, the timing and extent of RQL and government expenditure, the current status of projects, and the next steps in the process. This email, and other statements and documents examined by the Commission, demonstrate Mr Bentley's direct involvement in management functions in relation to RQL's infrastructure project planning and expenditure.[272]

4.4.40 Other examples of Mr Bentley's involvement in infrastructure planning and procurement decision-making throughout the relevant period, outside his functions as a board member, are

268 Statement of Alfred Jamie Orchard, 26 July 2013, page 3 para 12.
269 RQL, Board Meeting Minutes, 8 July 2011, page 2.
270 RQL, Board Meeting Minutes, 8 July 2011, page 2.
271 Email from Robert Bentley to Malcolm Tuttle cc: Mark Snowdon, Wayne Milner, Anthony Hanmer, Paul Brennan, Shara Reid, William Ludwig, Bradley Ryan, 5 November 2011.
272 Statement of Malcolm Tuttle, 26 July 2013, page 7 para 24; Statement of Paul Brennan, 26 July 2013, page 7 para 20.

discussed in Chapter 3. The theme of the statements and documents is that nearly all decision-making of any significance in relation to infrastructure projects had to involve the chairman.

4.4.41 While it is plain that Mr Bentley had an important role to play in the IIP, that role should have been limited to liaising with government and leading the board's broader strategic decision-making. The day to day management of infrastructure project planning and expenditure ought to have been the responsibility of the relevant personnel: Mr Brennan, as director of product development and Mr Snowdon, as project manager/director, with Mr Tuttle overseeing as CEO.

4.4.42 The long-term effect of Mr Bentley's involvement in management functions on RQL workplace culture and practices was observed by Mr Kevin Dixon, the current chairman of the Queensland All Codes Racing Industry Board (QACRIB) and Queensland Thoroughbred Racing Board (QTRB), on his commencement with RQL the end of the relevant period. Mr Dixon was appointed as director of RQL on 17 April 2012 and chairman on 1 May 2012. In his statement to the Commission, Mr Dixon said:

> *The workplace culture and practice that I observed at RQL upon my commencement was one of a very 'flat' management structure, wherein there were seven separate areas each reporting directly to the Chief Executive Officer... My observation was that staff had felt, up until that time, constrained in their roles and that any steps to be taken in their role first had to be approved by Mr Tuttle and/or Mr Bentley. There was a culture of staff awaiting direction rather than proactively undertaking their employment duties... I observed that staff within the organisation had an expectation that I, as the Chairman, would direct them how to do their jobs rather than expect them to take their own initiative.*[273]

4.5 Conclusions

(i) Adequacy and integrity of the management policies, processes and guidelines of QRL and RQL

4.5.1 QRL and RQL had a comprehensive framework of policies, processes and guidelines intended to govern internal financial and human resources management. Overall, the management policies, processes and guidelines were adequate. The core management policy, the Code of Conduct, clearly identified high standards of integrity and applied to directors and employees.

4.5.2 Deficiencies in some human resources policies and processes were identified during the QRL period and remained throughout the RQL period; and the charters for the HRRC, and the RNC lacked specific detail about important management oversight functions.

(ii) Were the management policies, processes and guidelines adhered to?

4.5.3 In important respects, the management policies, processes and guidelines were not adhered to.

4.5.4 The evidence examined by the Commission highlighted two significant matters of non-compliance with the QRL Code of Conduct. The first concerned the actions of Mr Ludwig, Mr Bentley and Ms Reid in relation to a misuse of a proxy vote at a QRL meeting in 2008 and their subsequent conduct in relation to this issue.

4.5.5 The second instance of non-compliance with the Code of Conduct related to the actions of Mr Bentley and Ms Reid during the recruitment process for the replacement of two QRL directors in 2009.

273 Statement of Kevin Dixon, 2 August 2013, page 5 paras 9-10, 12.

4.5.6 The QRL and RQL Audit Committees generally complied with the requirements of their charters; however, in the ways identified in Chapter 3, they were deficient in meeting key responsibilities under the charters in relation to procurement and financial accountability processes.

4.5.7 The QRL HRRC failed in a number of ways to adhere to its charter and fulfil its functions. It did not meet or report to the board sufficiently frequently; and it did not adequately manage or respond to audits which produced findings and recommendations relevant to its functions.

4.5.8 The RQL RNC also failed to comply with its charter and fulfil its functions. It did not address the important issue of periodic or annual review of CEO and senior executive remuneration, executive retention and succession planning, or directors' training. Its membership compromised its ability to fulfil its functions in accordance with good corporate governance principles.

(iii) Were the QRL and RQL board and chair involvement in the exercise of functions by the executive management team and other key management personnel, including the officer holding the position of company secretary and those involved in integrity matters, appropriate?

4.5.9 The nature of the chairman's involvement in the exercise of functions by the executive management team was, throughout the entire relevant period, pervasive, and, therefore, inappropriate according to principles of good corporate governance and management. This inappropriate involvement extended to the functions of the company secretary, however not to those functions concerned with integrity matters. The involvement of the other directors of the QRL and RQL boards was not inappropriate in its nature or extent.

(iv) The nature of QRL and RQL workplace culture and practices

4.5.10 While QRL and RQL workplace culture and practices were generally sound, there was evidence of adverse impacts on some employees of the chairman's executive management influence. There was evidence of marginalisation of employees, and reliance on the chairman for direction and approval rather than appropriate independent exercise of functions.

Chapter 5

RQL Corporate Governance – Term of Reference 3(c)

"[T]he adequacy and appropriateness of RQL's corporate governance arrangements, in particular:

i. whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, acted with integrity and in accordance with RQL's constitution, in the best interests of the company and the racing industry;

ii. whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, operated consistently with the relevant applicable State and Commonwealth policies and legislation, including the Racing Act 2002 and the Corporations Act 2001 (Cth)*;*

iii. the policies, rules and procedures to identify and manage potential and actual conflicts of interests and to minimise the risks of directors and executives improperly using their position and information obtained for personal or financial gain;

iv. the adequacy of employment contracts in restraining former directors and executives from seeking employment with RQL's preferred contractors and suppliers..."

5.1 Introduction

5.1.1 As Term of Reference 3(c) is specifically limited to *RQL's corporate governance arrangements*, the relevant period for the Commission's consideration is from the date Racing Queensland Limited (RQL) commenced as the control body for the three codes on 1 July 2010 to 30 April 2012 (the RQL period).

5.1.2 This Term of Reference requires consideration of the adequacy and appropriateness of RQL's corporate governance arrangements.

5.1.3 Of the four particular issues identified, two concern the conduct of RQL's directors, executive management team and other key management personnel, including the company secretary and those involved in integrity matters (the RQL officers):

- Did they act with integrity[1], in accordance with RQL's constitution, and in the best interests of the company and the racing industry?
- Did they act consistently with applicable State and Commonwealth policies and legislation, including the *Racing Act 2002* (Qld) and the *Corporations Act 2001* (Cth)?

5.1.4 In relation to whether RQL's directors and officers acted with integrity and in the best interests of the company and industry, two primary matters are considered in this Chapter.

5.1.5 First, the board's pursuit of a generous indemnity insurance policy for RQL directors and officers, in connection with board decision-making about the renegotiation of employment contracts for four senior executives (the subject of Term of Reference 3(e) in Chapter 7), gave rise to questions about the board's actions being in the best interests of the company.

5.1.6 Second, the removal of Ms Kerry Watson as a director of RQL demonstrated a lack of integrity on the part of Mr Robert Bentley, in responding to Ms Watson's perceived breach of duty and instigating a motion for her removal from the board. Similar concerns arose in respect of board members Mr Anthony Hanmer and Mr William Ludwig in passing the chairman's motion.

5.1.7 The other two issues, raised by this Term of Reference, concern RQL itself, rather than the conduct of its officers:

- Were the conflict of interest management policies, rules and procedures adequate and appropriate?
- Did employment contracts adequately restrain former officers from employment with RQL's preferred contractors and suppliers?

5.1.8 As to RQL's conflict of interest management, there were comprehensive procedures in place to manage potential and actual conflicts of interest and to minimise the risks of officers improperly profiting from their position with the company. They ought to have enabled duties to be met. The framework was, however, capable of confusing those officers subject to its requirements and was implemented inconsistently.

5.1.9 While this Term of Reference refers to the *adequacy* of employment contracts in restraining former officers from employment with preferred contractors or suppliers, the Commission has concluded that the framing of this inquiry involves a misconception and it does not raise a matter of importance in respect of the conduct of the business of RQL.

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1 *Integrity* is a word used in various contexts throughout the Terms of Reference. As is explained in Chapter 3, it is taken to require consideration of issues surrounding moral and ethical soundness and robustness. It is specifically used in Term of Reference 3(a) in the context of procurement and financial accountability, 3(b) in the assessment of management and workplace culture, and 3(c) in the examination of corporate governance arrangements. Integrity also arises as an incident of other Terms of Reference, which consider whether officers' actions were in accordance with their responsibilities (in 3(e) employment contract negotiations), and in good faith and in the best interests of the company (3(f) the arrangements between Product Co and the Tatts Group). These matters are referred to in the "Integrity and Best Interests" section below, and discussed in more detail in the other Chapters.

5.1.10 It should be acknowledged, as was submitted on behalf of Messrs Bentley, Hanmer, Ludwig, Wayne Milner, Malcolm Tuttle, Paul Brennan, Jamie Orchard and Ms Shara Reid, that the corporate governance arrangements of RQL appear to have been generally sound.[2] Directors deposed in their statements that board meeting papers and minutes were, for the most part, prepared and circulated in a timely manner, board discussions were open and robust, and committee and reporting structures were established and functional.[3]

5.1.11 While the Commission's inquiries have led to adverse findings against RQL directors and executives, these are limited to specific circumstances and events, rather than a "general criticism of the entire corporate governance arrangements of RQL".[4]

5.1.12 Significant matters of integrity, which involved corporate governance and directors' and officers' duties during the RQL period, are raised in the other Terms of Reference:

- in relation to Term of Reference 3(b), the adequacy of RQL board committee charters and exercise of management oversight functions, and the appropriateness of the chairman's involvement in executive management functions, are considered in Chapter 4
- in the context of Term of Reference 3(e), the conduct and duties of the directors and four senior executives in relation to the renegotiation of the executives' employment contracts are brought into particular focus and dealt with in Chapter 7
- within Term of Reference 3(f), the actions of the chairman, other directors, CEO and company secretary/corporate counsel in response to the introduction of race information fees are discussed in Chapter 8.

5.2 Background

5.2.1 Term of Reference 3(c) requires consideration of RQL's framework of rules, relationships, systems and processes within which authority was exercised and controlled, encompassing the mechanisms by which the company, and those in control, were held to account.[5] Standards of corporate governance include both general non-binding principles and mandatory standards. The general principles are intended to provide guidance for effective structures and practices. Mandatory standards impose legal constraints and responsibilities on company officers.[6]

5.2.2 The *ASX Corporate Governance Council* has identified eight "general Principles" of practice in its *Corporate Governance Principles and Recommendations with 2010 Amendments*. The Principles are not strictly applicable to the non-listed entities considered in the Report, but provide a useful guide:

1. *Lay solid foundations for management and oversight*
2. *Structure the board to add value*
3. *Promote ethical and responsible decision-making*
4. *Safeguard integrity in financial reporting*
5. *Make timely and balanced disclosure*

2 Submission of Rodgers Barnes & Green, 1 November 2013, Part 3 pages 3-10 para 35.
3 Statement of Bradley Ryan, 25 July 2013, pages 6-7 paras 40, 45; Statement of Wayne Milner, 26 July 2013, pages 2-3 paras 7, 9; Statement of Robert Lette, 30 July 2013, pages 5-6 paras 5, 7.
4 Submission of Rodgers Barnes & Green, 1 November 2013, Part 3 page 3-10 para 35.
5 This is the definition of corporate governance set out in the 2nd edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2010, page 3.
6 *Ford's Principles of Corporations Law* refers to corporate governance mechanisms, which may operate together or in isolation to "ensure that companies are directed and controlled in a manner that protects and promotes the interests of participants". These mechanisms include legal duties, company structural factors, market factors, and enforcement actions by regulators and members: Austin, RP & Ramsay, IM 2013, *Ford's Principles of Corporations Law*, Lexis Nexis, Butterworths, Australia, 15th edition, pages 368-370.

6. *Respect the rights of shareholders*
7. *Recognise and manage risk*
8. *Remunerate fairly and responsibly.*[7]

5.2.3 The law imposes *mandatory standards* in the form of legal duties and liabilities on officers (directors and executives) who make and carry out management decisions.[8] The primary objective is to ensure that officers act with reasonable care and diligence, in the interests of the company, and for a proper purpose.[9] Legal duties include statutory duties under the Corporations Act, and general law duties under the common law and in equity.

5.2.4 The Corporations Act imposes obligations on company officers:

- section 180 – duty to exercise powers and discharge duties with care and diligence
- section 181 – duty to exercise powers and discharge duties in good faith in the best interests of the corporation and duty to act for a proper purpose
- section 182 – duty not to use position to gain an advantage improperly for themselves or someone else or cause detriment to the corporation
- section 183 – duty not to use information improperly obtained by virtue of their position to gain an advantage for themselves or someone else, or cause detriment to the corporation.

5.2.5 The duties contained in sections 180 to 184 apply in addition to general law duties.[10] Section 184 makes a breach of the duties in sections 181 to 183 a criminal offence where intention or recklessness is proved.

5.2.6 The statutory duty of care and diligence reflects a director's duty of care, skill and diligence of the same standard both at common law and in equity. The duty is also owed in contract, where service (employment) contracts contain an express or implied term that the officer will exercise the care and skill of a person who occupies that position. The fiduciary relationship between officers and the company gives rise to multiple duties of loyalty in equity. The statutory duties to act in good faith in the best interests of the company and for a proper purpose mirror the same duties in equity.

5.2.7 The Corporations Act imposes duties which require directors to manage conflicts of interest, which may influence the exercise of their management powers:

- section 191 – duty to notify other directors of material personal interest when conflict arises
- section 195 – duty not to be present at a meeting while the matter in which the director has a material personal interest is being considered, and not to vote on the matter.[11]

5.2.8 These statutory duties, in sections 191 and 195, apply only to directors.

5.2.9 Obtaining company consent to act in the presence of a conflict, by complying with those statutory rules on disclosure and voting, may not always be sufficient to discharge the fiduciary duty of loyalty owed by a director to the company. In some circumstances, the nature of the conflict of interest may result in the conflicted director owing a heightened standard of care.[12] For example, this may require the director to take positive action to prevent or suggest a course of action to limit harm to the company.[13]

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7 ASX Corporate Governance Council 2010, *Corporate Governance Principles and Recommendations with 2010 Amendments*, 2nd Edition, pages 10-12.
8 Austin & Ramsay, *Ford's Principles of Corporations Law*, pages 401-402.
9 Austin & Ramsay, *Ford's Principles of Corporations Law*, page 368.
10 *Corporations Act 2001*, section 185.
11 *Corporations Act 2001*, sections 195(2), (3) and (4) provide for exceptions to this duty.
12 Austin & Ramsay, *Ford's Principles of Corporations Law*, page 473; *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler & Ors* (2002) 41 ACSR 72 at 166.
13 Austin & Ramsay, *Ford's Principles of Corporations Law*, pages 550-551.

5.2.10 The meaning of *best interests* of a company will depend upon the company's nature. For example, the best interests of a company limited by shares will generally be the collective interests of the shareholders. Where a decision affects the interests of one class of members adversely and the interests of another class beneficially, directors must act fairly as between the members.[14]

5.2.11 For a company which does not exist for the benefit of its members, like RQL, the company constitution will generally set out the interests of the company, including its objects and purpose.[15] Subject to the constitution, officers have the duty of deciding where the company's best interests lie and how they are to be served.

5.2.12 The circumstance which gave rise to a conflict in the case of Mr Bentley was a conflict of duties: the concurrent holding of directors' fiduciary duties to both RQL and the Tatts Group Limited (Tatts Group).

5.2.13 As a matter of principle, a director will not breach his or her duty merely by holding multiple directorships. However, an assessment of the circumstances may lead to a conclusion that the duty has been breached. Recent case law has confirmed that a breach can arise where the conflict is not, or cannot be, properly managed. This tension was described by Justice Barrett in *Elkington v Farsands Solutions Pty Ltd*:

> *This observation makes it plain that it is not bad conduct or unsound practice for a company merely to have as a director...a person who has other allegiances or interests. Nor is it unlawful....*
> *The real challenge and responsibility faced by persons holding multiple directorships or having multiple interests is to deal properly with conflicts between duty and duty or between duty and interest as and when they arise...*[16]

5.2.14 In *Links Golf Tasmania Pty Ltd v Sattler*, Justice Jessup referred to the High Court's discussion of multiple directorships in *R v Byrnes & Hopwood*[17] and commented:

> *The emphasis here, it may be noted, is on the way that competing interests might infect the fiduciary's decision-making or conduct generally in what ought to be the interests of his or her principal or beneficiary.*[18]

5.2.15 Conflicted directors must therefore pay careful attention to the relationship and tensions between their conflicting duties and/or interests. These may change over time to create a situation where it is impossible to manage the conflict effectively and discharge the duties owed.

5.2.16 In addition to these statutory and general law duties, employment contracts or internal policies may also contain other terms which impose duties on officers to act, or be restrained from acting, in certain ways. These duties may apply not only in the course of employment or appointment but also beyond.

5.2.17 A provision which restrains in some way the future conduct of a party to a contract for employment is not uncommon in commercial and some employment contracts, where concerns about competition influence contracting relationships. However, it is highly unusual in employment relationships to preclude a former employee from going to work for a supplier or contractor, as the element of competition is absent.

14 Austin & Ramsay, *Ford's Principles of Corporations Law*, pages 445-446.
15 Austin & Ramsay, *Ford's Principles of Corporations Law*, pages 426-427.
16 *Elkington v Farsands Solutions Pty Ltd* [2012] NSWCA 334 at [35].
17 *R v Byrnes & Hopwood* (1995) 183 CLR 501.
18 *Links Golf Tasmania Pty Ltd v Sattler* (2012) 90 ACSR 288 at [557].

5.2.18 Traditionally there has been a presumption against the validity of restraint of trade clauses. The reason is a public policy consideration: that there is a public interest in every person carrying on trade freely, against interference with individual liberty of action in trade. The law has developed, however, to recognise the validity of such clauses where the restraint is reasonable in the interests of the parties and of the public. Courts tend to refuse to enforce restraint clauses where that restraint is considered excessive or onerous.[19]

5.2.19 Most statutory and general law duties owed by company officers cease on termination of appointment or employment. However, officers remain bound by the statutory and fiduciary duty not to profit from information gained from their former position. Understandably this duty remains because, despite not being involved in the management of the company, former officers retain the power to act against the interests of the company by misusing the information. In addition to the statutory and general law duties and individual contractual conditions, companies may, and often do, impose additional duties in internal instruments such as a code of conduct.

5.3 Integrity and best interests

Introduction

5.3.1 Term of Reference 3(c)(i) requires consideration of whether RQL and its officers acted with integrity and in the best interests of the company and the racing industry.

5.3.2 During the public hearings, the notion of *transparency* was used as a benchmark against which to consider the actions of Mr Bentley (and others) across issues raised by the Terms of Reference. When asked by counsel assisting, Mr Bentley expressed his understanding of transparency as: "...open and fair. You can see through it".[20] Mr Bentley agreed that transparency was required so that a person making inquiries about an event or a decision could, at a later date, see what had happened previously.[21] Transparency is an aspect of integrity.

5.3.3 The duty of RQL directors to act in the best interests of the company was informed by the company's constitution which required that regard be given specifically to the best interests of the codes as a whole (the racing industry), and to the continued existence and welfare of *each individual code*. The constitution provided:

> *3.1 In addition to the powers conferred by the Corporations Act, the objects of the Company are to exercise the powers and perform the functions of a Control Body.*
>
> *3.2 The income and property of the Company must be applied solely towards the promotion of the objects of the Company as set out in this Constitution and no portion of it can be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise by way of profit to the Members.*
>
> *3.3 The Company will have regard to the **best interests of the thoroughbred, harness and greyhound racing codes as a whole**, and the **continued existence and welfare of each individual code** in exercising its powers and performing the functions of a Control Body.[22]*
>
> (emphasis added)

19 LexisNexis 2012, *Workplace Law – Fair Work: Restraints of Trade Commentary*, [Com 450,100].
20 Transcript, Robert Bentley, 23 September 2013, page 13 lines 10-12.
21 Transcript, Robert Bentley, 23 September 2013, page 13 lines 10-21.
22 RQL, *Constitution*, (undated), clause 3 'Objects', lodged with ASIC 14 July 2010.

5.3.4 The RQL constitution therefore expressed clearly the purpose of the company (to exercise the powers and perform the functions of a control body) and what was meant by best interests in the exercise of that purpose (the interests of the racing codes as a whole and the continued existence and welfare of each individual code).

5.3.5 Section 34A(2) of the Racing Act provided that "in making a decision ...the control body must make a decision that is in the best interest of all the codes of racing for which the control body holds an approval while having regard to the interests of each individual code".[23]

5.3.6 The Commission's inquiries into corporate governance were, necessarily, reactive to the information forthcoming during the RQL period. A number of events raised questions about whether RQL officers acted with integrity, and in the best interests of the company and industry.

5.3.7 It is uncontroversial that the racing industry is riven with gossip, rumour, speculation and innuendo. It is unsurprising then that the Commission received allegations that officers of RQL acted without integrity. The majority of those allegations were vague, unsupported by evidence or were little more than repetition of rumour. Nonetheless, the Commission considered all such allegations on their merits and, unless commented on in this Report, found them to be baseless.

5.3.8 The Commission also received allegations of a serious nature that required further investigation. The Commission received allegations about the use of RQL funds to purchase equipment for a business conducted by a person associated with RQL. The Queensland Police Service received the same information and conducted a preliminary investigation. After considering documents produced to the Commission by the relevant supplier, the Commission concluded that there was no evidence of misconduct and that the allegations were based on a misunderstanding.

5.3.9 Diverse matters involving integrity of officers did arise in the other Terms of Reference. These matters were investigated by the Commission in respect of RQL officers during the RQL period, as well as QRL officers in the relevant period prior to July 2010.

5.3.10 These matters are dealt with specifically in other Chapters.

5.3.11 Matters bearing on the integrity of the actions of directors and management personnel, insofar as they relate to procurement and financial accountability, are addressed in Chapter 3.

5.3.12 That Chapter also includes discussion of integrity matters surrounding the synthetic tracks installed at Corbould Park, Caloundra and at Clifford Park, Toowoomba.

5.3.13 The Commission investigated the actions of Mr Bentley, Mr Ludwig and Ms Reid in relation to an alleged misuse of a proxy vote at a QRL meeting in 2008. The actions of Mr Bentley, Mr Ludwig and Ms Reid were considered against integrity provisions of the QRL Code of Conduct which was the core management policy and are considered in Chapter 4.

5.3.14 The actions of Mr Bentley in the process for replacement of two QRL directors in 2009 have also been investigated. Mr Bentley's actions were again considered against the integrity provisions of the QRL Code of Conduct and are discussed in Chapter 4.

5.3.15 Whether RQL officers acted consistently with their responsibilities in the renegotiation of employment contracts raised questions involving the integrity of Mr Bentley, Mr Ludwig, Mr Tuttle, and Ms Reid in particular, and is developed in Chapter 7.

5.3.16 The examination of whether the directors of the relevant entities, including RQL, acted in good faith and in the best interest of the company in relation to TattsBet Limited's (TattsBet) deduction of interstate race information fees raised questions concerning integrity and RQL's best interests and is analysed in Chapter 8.

23 *Racing Act 2002*, section 34A(2).

RQL directors' and officers' liability policy

5.3.17 In 2011, the board of RQL determined that it was appropriate to have the company offer the directors and other RQL officers a new arrangement to indemnify them against liability relating to their roles at RQL.

5.3.18 It is normal practice for officers to be indemnified by a company to which they are appointed. The RQL constitution provided that every director, secretary and other officer was to be indemnified out of the assets of the company, and that the company may pay insurance premiums to insure directors, the secretary and officers against liabilities incurred by them and liability for costs and expenses incurred in defending proceedings, whatever the outcome.[24]

5.3.19 In 2010 the directors signed Deeds of Indemnity and Access, which required RQL to take out an indemnity policy covering claims made against a director during the period which that person was a director of RQL, and for a period of seven years from the date of ceasing to be a director. The policy was to insure against all liability which might arise out of circumstances which relate to the director having exercised powers of that office, other than liability arising out of wilful breach of duty, and a contravention of section 182 or 183 of the Corporations Act.[25]

5.3.20 This insurance was therefore permitted by the company constitution and required by the Deeds of Access and Indemnity. Indeed, RQL had a directors' and officers (D&O) liability insurance policy in place at all times, covering directors and officers, including senior executives.

5.3.21 In examining the context of the events leading up to the new liability policy in 2011, however, questions arose as to whether the decision to create new deeds and take out a new policy were in the best interests of the company. The context specifically relates to the board's decision to approve renegotiated employment contracts for four senior executives. That decision is a subject of Term of Reference 3(e).

5.3.22 In early July 2011 Clayton Utz was retained by RQL to review urgently the existing D&O policy and advise whether the coverage was appropriate for RQL directors and officers. The Clayton Utz file contains two emails from this time. In one email (at Mr Bentley's request), Ms Reid provided a letter dated 5 July 2011 from the four executives outlining their concerns about their employment. In another email three minutes later, Ms Reid requested the advice.[26]

5.3.23 That same day, Mr Barry Dunphy emailed Mr Mark Waller (a partner in Clayton Utz's Insurance and Risk team), giving him instructions on the D&O insurance review, as well as communicating the urgency required for the work to be completed, namely that it be finalised in two days by 7 July 2011.[27] Mr Dunphy commented that he would call Mr Waller shortly to provide him with a briefing on the matter, but that he would

> *...also send you a copy of an earlier advice that we sent to Racing Queensland about the potential risk for the Directors under the Corporations Act if they inappropriately escalated the entitlements of existing senior staff.*[28]

5.3.24 At the RQL board meeting of 20 July 2011, Ms Reid stated that she had been working with the insurance provider on the policy review, and after her own review and advice from Clayton Utz she recommended the policy from the insurance provider. This included a seven year "run-off" cover, being supplementary cover, that would not be able to be cancelled once purchased.

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24 RQL 2010, *Constitution*, clause 25, 'Indemnity'.
25 Example, *Deed of Access and Indemnity between Queensland Racing Limited (QRL) and Wayne Norman Milner (Director)*, signed by Wayne Milner and Shara Reid for QRL on 4 March 2010.
26 Email from Shara Reid to Barry Dunphy, 5 July 2011, 1.23pm; Email from Shara Reid to Barry Dunphy, 5 July 2011, 1.26pm; Statement of Barry Dunphy, 5 September 2013, page 10 para 59.
27 Statement of Barry Dunphy, 5 September 2013, page 10 para 59; Email from Hayley Schofield on behalf of Barry Dunphy to Mark Waller, 5 July 2011, 1.38pm.
28 Email from Hayley Schofield on behalf of Barry Dunphy to Mark Waller, 5 July 2011, 1.38pm.

The board authorised Ms Reid to accept the offer and for Clayton Utz to draft new deeds of indemnity for each RQL director.[29]

5.3.25 On 5 August 2011, each director signed a new Deed of Access and Indemnity.[30] At a meeting that day, the board approved new employment terms for the four senior executives which are the subject of Term of Reference 3(e).[31]

5.3.26 On 17 November 2011, Ms Reid instructed Clayton Utz to draft Deeds of Access and Indemnity for the four senior executives.[32] Clayton Utz provided draft deeds to Ms Reid that day, but the documents were never executed.[33]

5.3.27 In response to questions about the connection between the two events which occurred on 5 August 2011, Mr Bentley gave evidence that: "...it was a fairly substantial decision that we'd made, and we wanted to make sure that – I mean going forward, that if there was any trouble or it was going to be queried, that we would be covered".[34] Mr Bentley suggested that the board sought to clarify the adequacy of the policy coverage more broadly, to include coverage for inquiries such as this, but he emphasised "we weren't going to deliberately go out and contravene the Corporations Act".[35]

5.3.28 Of itself it was not inappropriate for the company secretary/corporate counsel to make inquiries and further the development of augmented policies of insurance for the directors and officers of RQL.

5.3.29 However, in the context of the renegotiation of employment contracts on particularly advantageous terms to the four senior executives, the investigation and taking up of those D&O policies may take on a different colour. A recommendation arising out of the investigations considered in Chapter 7 that the Australian Securities and Investments Commission (ASIC) investigate the conduct of the directors of RQL and certain of the senior executives, including Ms Reid, over the employment contracts, also includes the renegotiated D&O policies.

The removal of Ms Watson

Introduction

5.3.30 In a letter dated 30 October 2010 to Mr Bentley and copied to Minister Lawlor and Mr Michael Kelly of the Office of Racing, Ms Watson recorded

> *...some issues that are causing me concern with the Strategic Asset Plan that was presented to the Directors of Racing Qld, on the 24th of September, 2010. This document was prepared with no input from myself at all with regard to the Greyhound Racing Industry.*[36]

5.3.31 On 6 December 2010, a special meeting of the directors of RQL was held. Those present were Messrs Bentley, Hanmer, Lette, Ludwig, Milner and Ms Watson and Mr Ryan (by telephone). The solicitor, Mr David Grace, Ms Reid and Ms Deborah Toohey of RQL were present by invitation.[37] The meeting was called by the chairman, Mr Bentley, to address his motion for the removal of Ms Watson as a director of RQL. Mr Bentley had delivered a notice of the motion, dated 9 November 2010 – "reasons for the action were discussed at the board meeting on 5 November 2010."

29 RQL, Board Meeting Minutes, 20 July 2011, pages 1-2.
30 See for example: *Deed of Indemnity, Insurance and Access between Racing Queensland Limited and Robert Bentley*, executed for RQL by Shara Reid as secretary and Wayne Milner as director on 5 August 2011, drafted by Clayton Utz.
31 RQL, Board Meeting Minutes, 5 August 2011, pages 6-7.
32 Email from Shara Reid to Paul Miller, 17 November 2011.
33 Emails from Paul Miller to Shara Reid, 17 November 2011; Emails from Mark Waller to Michelle Hutchinson, 2 November 2012.
34 Transcript, Robert Bentley, 19 September 2013, page 16 lines 15-18.
35 Transcript, Robert Bentley, 19 September 2013, page 18 lines 10-25.
36 Letter from Kerry Watson to Robert Bentley cc: Peter Lawlor and Michael Kelly, 30 October 2010.
37 RQL, Members Meeting Minutes, 6 December 2010.

5.3.32 The minutes of the meeting of the board of 5 November 2010 relevantly record:

> *The Chairman advised the meeting that there was a matter he wished to consider in camera and requested all executives leave the meeting.*
>
> *A proceeding of a detailed account of the meeting is an attachment and sealed.*[38]

5.3.33 The minutes of the *in camera* meeting record, in summary, three matters alleged to justify the removal of Ms Watson:

- that Ms Watson had copied a letter, addressed to the chairman, to the Minister and to Mr Kelly in circumstances where confidentiality in relation to board decisions (already made) was paramount
- that "Ms Watson admitted that she had in fact telephoned Mr Paul Felgate [a director of Greyhounds Queensland Limited (GQL)] and had sought his support to lobby the Minister for the reinstatement of Logan as the headquarters of greyhounds."[39] Mr Milner tabled a file note as a record of his telephone conversation with Mr Felgate, in which Mr Felgate recounted this conversation with Ms Watson
- the chairman asked Ms Watson if she knew a Ms Sue Burly, who had been a contributor to a website which was critical of board decisions and of the asset plan.[40]

5.3.34 The minutes of 6 December 2010 record that the motion was carried by majority, with only Mr Lette voting against it. Mr Lette argued that removal was too harsh and would prove unpopular in industry circles. Mr Bentley expressed the view that the "breach of governance" by Ms Watson could not be overlooked because of industry considerations or media opinion.[41] Mr Hanmer, Mr Milner and Mr Ryan supported the chairman.

5.3.35 Mr Ludwig is recorded as advising that

> *...confidentiality and accepting decisions taken was the key to proper board behaviour and once a decision was debated and passed, the result must be accepted. There has always been opportunity for alternative views and debate.*[42]

5.3.36 Ms Watson swore in an affidavit, in legal proceedings commenced in relation to her removal, that the *in camera* minutes of 5 November 2010 were not accurate.[43]

5.3.37 Ms Watson deposed that she did not make disclosure of the plan to Mr Felgate, nor seek his support to derail the plan, and that she made this clear at the RQL meeting.[44] She denied that she had breached board confidentiality by providing information to Ms Burly critical of the board's decisions.[45]

5.3.38 Ms Watson's response about Ms Burly was not recorded in the minutes.

5.3.39 Submissions were made to the Commission on behalf of some directors and senior executives that the Commission should find that Ms Watson breached RQL's Code of Conduct by acting in the interests of "sectional interests".[46] However, a breach of the Code of Conduct was not advanced as a reason for Ms Watson's dismissal at the time of her removal. It is unecessary for the Commission to make a determination on the correctness, or otherwise, of Ms Watson's actions nor whether she should have been removed. The Commission's inquiry into the circumstances of her removal arises for another reason.

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38 Letter from Shara Reid to Kerry Watson, 10 November 2010, attaching minutes of 5 November 2010.
39 Letter from Shara Reid to Kerry Watson, 10 November 2010, attaching minutes of 5 November 2010.
40 Letter from Shara Reid to Kerry Watson, 10 November 2010, attaching minutes of 5 November 2010.
41 RQL, Members Meeting Minutes, 6 December 2010.
42 RQL, Members Meeting Minutes, 6 December 2010.
43 Affidavit of Kerry Watson (QCAT) sworn 6 March 2012, pages 42-44 paras 121-127.
44 Affidavit of Kerry Watson (QCAT) sworn 6 March 2012, pages 45-47 paras 131-137.
45 Affidavit of Kerry Watson (QCAT) sworn 6 March 2012, pages 47-49 paras 140-142.
46 Submission of Rodgers Barnes & Green, 1 November 2013, Part 3 page 3-15 para 50.

5.3.40 One ground advanced by Mr Bentley for Ms Watson's removal was that her letter of 30 October 2010 had been copied to the Minister and to Mr Kelly. The fact that the chairman advanced the motion on this basis justifies this investigation as to whether he acted with integrity, in good faith and in the best interests of RQL and the racing industry in so doing.

5.3.41 In focusing upon this aspect, it is accepted that confidentiality in board decision-making is important. It is uncontroversial that it was in the interests of the racing industry to receive the very substantial funds necessary to upgrade the infrastructure for the three codes of racing.

5.3.42 Mr Bentley believed that the government "would not be inclined to provide the tax redirection if the plan that it agreed to lacked community support and there was adverse media".[47] For government to approve this plan, which involved the sale of Albion Park and the abandonment of the Logan site for greyhounds, required the support of all three codes.

5.3.43 Mr Bentley appreciated that the two minor codes were unlikely to support such a plan. Despite this, he presented and advanced that plan to the most senior members of government on the implicit basis that it had been developed in consultation with the two minor codes, or at least, had RQL board support.

5.3.44 When Ms Watson revealed to the Minister that it had not, Mr Bentley moved to remove her from the board.

The background

5.3.45 In her letter dated 30 October 2010 to Mr Bentley which she copied to the Minister and Mr Kelly, Ms Watson referred to prior events dating back to December 2009 as the foundation for her complaint. For this reason, it is necessary to examine this background too.

5.3.46 On 23 December 2009, a meeting of the chairs of the three codes of racing took place at QRL headquarters at Deagon. Mr Bentley, Mr Lette and Ms Watson were present as the chairs, together with each chief executive - Mr Michael Godber (harness), Mr Darren Beavis (greyhounds) and Mr Tuttle (thoroughbreds). Mr Kelly and Ms Carol Perrett of the Office of Racing were also present.

5.3.47 Minutes of the meeting were prepared by Mr Bentley and provided to Premier Bligh[48] and to the other codes.[49] The minutes recorded:

> *Albion Park Harness*
>
> *Significant discussion initiated by Mr Lette on the issue of Albion Park being sold if the codes merged ensured [sic]. The chairman [Mr Bentley] advised that this has never been discussed at any board meeting of the thoroughbred code and he would be prepared to advise the minister at the 4th January meeting that there was no agenda to sell Albion Park. In addition, the new control body would give a commitment to allocate up to $14M to a maximum of $18M on infrastructure at Albion Park from the proposed funding package. The commitment is on the basis that the funding package, subject to all council and State Government approval, is at the amount of $100M as rumoured. If the funding is less than this, the committed amount would be reduced relatively.*
>
> *The estimate of $14M – $18M is an estimate offered by Mr Lette.*
>
> *Logan Greyhound*
>
> *Ms Watson looked for further assurance on the proposed Logan complex and a similar commitment was given that provided the project received all necessary construction*

47 Statement of Robert Bentley, 26 July 2013, page 9 para 30.
48 Letter from Robert Bentley to Premier Bligh, 29 December 2009.
49 Letter from Robert Bentley to Robert Lette, 30 December 2009; Letter from Robert Bentley to Kerry Watson, 30 December 2009.

and building approvals from council and State Government then the new control body would allocate up to $10M from the proposed government funding [note if the funding model is less then $100M a pro rata reduction could would also apply as with the Harness commitment].

The gifting of land and the previously agreed $10M by government is a commitment outside this meeting and does not form part of this discussion.[50]

5.3.48 On 31 December 2009, Ms Watson wrote to Mr Kelly:

I wish to advise that the Greyhound Queensland Board of Directors supports in principle the formation of one control body to govern the racing industry in Queensland provided there are adequate safeguards in place for the minor codes, appropriate employment guarantees are agreed covering all existing control body staff and that the present business plans for greyhound can still be implemented.

The Board is prepared to work with the government and the other two codes in forming the new entity.[51]

5.3.49 On 7 January 2010, Mr Hanmer emailed Ms Watson (with a copy to Mr Kelly):

Kerry,

This has to be the form of words (agreed between Fraser & Bentley)

> *Dear Minister,*
>
> *Greyhounds Queensland supports fully the integration of the Control Body as specified, and providing the safeguards as previously outlined in correspondence and minutes are honoured.*
>
> *Kerry Watson*

Kerry this has to go to Andrew Fraser at the following address ...

Andrew wants it from you not an executive; grateful if Darren could send me a copy by fax ...

I would confirm our conversation that the Treasurer would like us to proceed immediately upon the merger with your inside track the 2nd storey of the grandstand and also the addition of the lights (fittings of which you have in storage).[52]

5.3.50 On 7 January 2010, Ms Watson wrote to the Treasurer:

Greyhounds Queensland Ltd supports fully the integration of the Control Body as specified, providing the safeguards as previously outlined in correspondence and minutes are honoured.[53]

5.3.51 On 7 January 2010, Mr Beavis forwarded a copy of the letter, sent by Ms Watson to the Treasurer, to the other directors of GQL. That email was copied to Ms Watson. Mr Beavis recorded "below is confirmation of further guarantees for the greyhound industry in particular for the Logan facility".[54]

5.3.52 On 8 January 2010, Mr Hanmer emailed Ms Watson:

Kerry, attached is the letter and as you can see from Kearra's note these are the instructions to send it to the Treasurer. Can you please get Darren to send me a copy after he sends your signed copy to Fraser.

---

50 Three Codes Chairman's Meeting Minutes, 23 December 2009.
51 Letter from Kerry Watson to Michael Kelly, 31 December 2009.
52 Email from Anthony Hanmer to Kerry Watson cc: Michael Kelly, 7 January 2010, 3.15pm.
53 Letter from Kerry Watson to Andrew Fraser cc: Michael Kelly, 7 January 2010.
54 Email from Darren Beavis to David Stitt, C T Williams, Jeremy Turner cc: Kerry Watson, 7 January 2010, 4.07pm.

On the same vein, after we spoke this morning, Mike Kelly rang me on another matter and I had the opportunity of passing by him the subject we spoke about this morning. In the general clamour of today I got hold of Bob Bentley, the question I posed was "I am personally comfortable for Kerry and the Harness board to begin briefing her architect and lighting engineers on the projects which will be completed as a matter of urgency after our merger. Do you agree?"

Both Mr Bentley and Mike Kelly believe you should go ahead. I was a little surprised with the Racing Offices [sic] views after this mornings [sic] conversation.[55]

5.3.53 In response, Mr Beavis sent an email drafted by Ms Watson to Mr Hanmer:

Greyhounds Queensland is prepared to sign the attached draft letter to the Premier of Queensland in congratulating the government in recognising the racing industry's contribution to the Queensland economy and supporting one amalgamated control body.

The letter is signed in good faith on the provision that no deal or arrangement has or will be made between Qld Harness Racing Ltd, the government or the new control body on the ownership or future of the Albion Park complex.[56]

5.3.54 On 8 January 2010 Mr Hanmer responded to Mr Beavis copy to Ms Watson:

Darren, for the sake of good order and reassurance I would confirm that in all conversations with the Treasurer he has made it absolutely plain that the greyhound code will not lose it's [sic] 50% share holding of Albion Park. In a letter to the Treasurer dated 5th January and viewed by your chairman this has been made absolutely clear. I trust this is of reassurance. Your Chairperson will also have told you to proceed with briefing the architect and lighting engineers for Logan.[57]

5.3.55 On 11 January 2010, GQL published a media release:

Greyhound racing will be a big winner from the proposed State Government injection of $80 million to the three racing codes over four years.

The State Government on Saturday announced it would "usher in a new era" for the racing industry with the funding package to redevelop key facilities across the State. Treasurer Andrew Fraser said the funding package, sourced from the redirection of half of the revenue gained from wagering taxes, will help revitalise an industry that has been estimated to directly and indirectly employ 43,000 people across the State.

...

"GQL has been asked by the State Government to proceed with the original plans for a multi-storey grandstand complex, and two racetracks at Logan" said Ms Watson.

"Greyhound Racing has landed another big winner. The $10 million compensation for the closure of the Gold Coast track in 2008 will be 'topped up' by the State Government to complete the Logan complex as we initially planned."

Greyhound Queensland Ltd Chair Kerry Watson said today she was happy the State Government had recognised the urgent need for a new greyhound facility at Logan, which is a 'key priority' of the funds allocation.

GQL is now in the process of meeting with its engineers and architects to amend the development application that is soon due to go to the Logan City Council.[58]

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55 Email from Anthony Hanmer to Kerry Watson, 8 January 2010, 10.49am.
56 Email from Darren Beavis to Anthony Hanmer cc: Kerry Watson, 8 January 2010, 11.15+1000.
57 Email from Anthony Hanmer to Darren Beavis cc: Kerry Watson, 8 January 2010, 11.33am.
58 GQL, Media Release, 11 January 2010.

5.3.56 On 11 January 2010, Ms Watson forwarded a copy of the press release to Mr Hanmer. He responded on 11 January by email:

> *Well done Kerry. The more pressure we put on this issue the less opportunity the government will have to reverse any part of its decision. So, your release is most welcome. Bob's release on Stevens is after some rambling on the LNP (Nats) or whatever they are called at present.*[59]

5.3.57 During his oral evidence provided to the Commission, Mr Hanmer agreed that his emails encouraged Ms Watson to believe that there was a level of commitment to the Logan development on the part of Mr Bentley and Mr Kelly, as well as from himself. He agreed that these representations encouraged Ms Watson to give her consent to the amalgamation on behalf of the greyhound code.[60]

5.3.58 Mr Hanmer said he believed at the time that the Logan development would proceed, however he could not give a "cast-iron guarantee".[61] He accepted that he had no authority to give assurances, or make a commitment to Ms Watson on this issue.[62]

5.3.59 Mr Bentley also accepted that he knew of Ms Watson's preference for the development of the site at Logan and that it had been her position for a long time.[63] Mr Bentley denied giving assurances to Ms Watson about the Logan development but said that, prior to March 2010, there was no intention that the greyhound facility would not go ahead.[64]

5.3.60 Until notified to the contrary by Mr Bentley at the RQL board meeting on 24 September 2010, Ms Watson and the greyhound code were justified in maintaining a belief that it was his intention, as chairman of RQL, to support the Logan development for the greyhound code proceeding as part of his infrastructure redevelopment plan.

5.3.61 Mr Bentley maintained, during his oral evidence, that he did not give any guarantees to the minor codes and cited a letter he wrote to Mr Lette on 5 February 2010 as evidence of his disclosure in this regard.[65] In this letter, Mr Bentley responded to Mr Lette's request that assurances be given in relation to the harness code[66] and a long term guarantee that Albion Park would remain the home of harness racing:

> *The matters outlined above are matters for the incoming 3 code board. Neither the current board of QRL nor myself as Chair of Queensland Racing, have any mandate to decide these outcomes or furnish any guarantees.*[67]

5.3.62 Despite this statement that the final decision was one for the board of the incoming amalgamated control body, and the limits on his mandate and that of the board of QRL, it said nothing to change the perception he had given regarding his support for retaining Albion Park for harness racing when he became chairman of the amalgamated control body.

5.3.63 These representations made by Mr Bentley to Mr Lette, prior to amalgamation, became the subject of litigation between QHRL, RQL and Mr Bentley.[68]

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59 Email from Anthony Hanmer to Kerry Watson, 11 January 2010, 5.16pm.
60 Transcript, Anthony Hanmer, 26 September 2013, page 129 lines 22-34.
61 Transcript, Anthony Hanmer, 26 September 2013, page 128 lines 18-20.
62 Transcript, Anthony Hanmer, 26 September 2013, page 128 lines 18-37.
63 Transcript, Robert Bentley, 23 September 2013, page 66 lines 13-28.
64 Transcript, Robert Bentley, 23 September 2013, page 66 lines 34-46.
65 Transcript, Robert Bentley, 23 September 2013, page 67 lines 3-15.
66 Letter from Robert Bentley to Robert Lette, 5 December 2010.
67 Letter from Robert Bentley to Robert Lette, 5 December 2010.
68 Proceedings commenced in late 2010 and were discontinued in 2013: Queensland Courts E-Courts Search.

5.3.64 On the evidence available to the Commission, no similar letter was sent to Ms Watson for the greyhound code, but whether or not this occurred is not to the point. It is the integrity of Mr Bentley and Mr Hanmer in their dealings with Ms Watson which is.

5.3.65 The willingness of Mr Bentley and Mr Hanmer to give Ms Watson the assurances and encouragement that she sought for the greyhound code was plainly directed to obtaining her consent to the amalgamation. They must have appreciated that they had allowed her to believe that the amalgamated control body, of which they would be directors, would not pursue a plan that failed to include the Logan development for the greyhound code.

5.3.66 RQL commenced its operations as the amalgamated control body on 1 July 2010. The first meeting of the board of RQL took place that day and the proposal to commence the formulation of "the Strategic Asset Plan" for industry infrastructure development was announced by the chairman:

> *The Chairman updated the Board in relation to the Strategic Asset Plan with the following:*
>
> 1. *The Strategic Asset Plan is required [as] a result of the Issues Paper prepared by Queensland Racing Limited, which was debated with the Queensland Government late last year (2009) and subsequently approved early 2010.*
> 2. *The Issues Paper identified a range of projects that collectively would need funding in excess of $150M. The final outcome resulted in a redirection of wagering tax to RQL of 50%, and as such, projects will need to [be] prioritised. The Issues Paper identified various projects that were specific to securing the funding.*
> 3. *The Queensland Government has advised that the rebate of taxation revenue funding will be held by Government and paid into an account on a monthly basis. The Queensland Government will allow for draw-downs, only against those projects specified against the Strategic Asset Plan. Each project will be supported by a cash flow analysis and a construction timetable.*
> 4. *The Strategic Asset Plan will consider the assets of the 3 racing codes, to secure the best economic outcomes.*
> 5. *Plans for some projects have been under investigation for some time; however, this does not automatically give these projects the right to continue as they were initiated when the 3 Control Bodies administered each code in isolation. In addition, a submission of a DA does not necessarily mean that a project will be approved by the Board.*
> 6. *Prior to the merger of the 3 codes, QRL had engaged the services of a consultant to carry out the due diligence analysis and prepare costings and cash flows for the Strategic Asset Plan. In particular, the BRC's Master Plan and the Ipswich / Logan greyhounds are currently under investigation and the results will be available at a future Board Meeting.*
> 7. *The draft strategic projects that are under consideration should be available for the August 2010 Board Meeting.*
>
> *The Board NOTED the Chairman's update.*[69]

5.3.67 Ms Watson did not receive any information about any change in the plan for Logan from Mr Bentley or from the relevant executives of RQL until the board meeting held on 24 September 2010.

5.3.68 Prior to 24 September 2010, Mr Bentley participated in the creation of a plan to develop and sell Albion Park and abandon the Logan project. He did not disclose the plan or his involvement in developing it to Mr Lette or Ms Watson before 24 September 2010. Mr Bentley and Mr Ludwig did, however, disclose it to senior members of government.

69 RQL, Board Meeting Minutes, 1 July 2010.

5.3.69 On 18 August 2010 a meeting was held to discuss a strategic plan for racing attended by Premier Bligh, the Deputy Premier, Mr Paul Lucas, Treasurer Fraser, Minister Lawlor, Mr Bentley and Mr Ludwig. Staff from the Premier's office, including Mr Ken Smith, the director-general of the Department of the Premier and Cabinet, were also present. In his submission to the Commission Mr Smith said the discussions "included proposals for significant rationalisation of facilities".[70] It is extremely unlikely that this proposal, advanced to such senior members of the government, did not involve the sale of Albion Park and the abandonment of Logan. These matters were important parts of the overall rationalisation which dictated the funds required to be injected into the industry by government.

5.3.70 In his statement to the Commission, Mr Alex Beavers, assistant under treasurer, said he attended a meeting with "RQL officials" on 2 September 2010 which included Mr Gerard Bradley, the under treasurer.[71] Mr Beavers recalled the proposal by RQL of "a strategic asset plan which proposed numerous and various plans for racing infrastructure throughout the state".[72]

5.3.71 On 10 September 2010, a "follow-up" occurred[73] where "RQL presented a proposal to free up funds (by way of early access to wagering monies) through the redevelopment and future sale of Albion Park".[74] Mr Bradley provided to the Commission a copy of that presentation titled "Strategic Asset Plan for Queensland all codes" dated 10 September 2010.[75] Relevantly, this presentation indicated that the rationalisation of venues would include a multi-use harness and greyhound two code primary venue with full training at Deagon. It also proposed the sale of Albion Park to contribute to the plan funding. The presentation gave timelines which required:

- submission of valuation of Albion Park to the Treasurer by 10 September 2010
- submission of cash flow analysis and concept drawing of projects by 10 September 2010
- decision of the Treasurer on underwriting Albion Park land and approval of the asset plan by 30 September 2010.[76]

5.3.72 Neither Mr Bentley nor Mr Ludwig said that they had disclosed to government at these meetings that the plan to sell Albion Park and abandon Logan had not involved, or been approved by, the RQL board and, in particular, the board members who represented the minor codes.

5.3.73 Although Mr Bentley did not recollect these particular meetings with government, he accepted that they took place.[77] Mr Bentley said he did not inform the RQL board of these meetings in advance, but had developed the plan with RQL staff[78] and that the plan included the sale of Albion Park.[79]

5.3.74 Mr Ludwig agreed that he, too, did not reveal these plans to any other board member.[80]

5.3.75 When the RQL board met at Deagon on 24 September 2010 Mr Lette was not present. The minutes relevantly record:

> ***2.0 Strategic Asset Management Plan***
>
> *The Chairman advised all Board Members that the information before them today was **strictly confidential** and that any Board Member found breaching Board confidentially [sic], the Chairman would seek their resignation. This message was also conveyed to Mr Bob Lette*

70 Statement of Kenneth Smith, 5 September 2013, page 8 para 39.
71 Statement of Alex Beavers, 5 September 2013, pages 6-7 paras 43-48.
72 Statement of Alex Beavers, 5 September 2013, page 7 para 44.
73 Statement of Gerard Bradley, 2 September 2013, page 8 para 61.
74 Statement of Alex Beavers, 5 September 2013, page 7 para 45.
75 Statement of Gerard Bradley, 2 September 2013, attachment GPB-6.
76 Statement of Gerard Bradley, 2 September 2013, attachment GPB-6.
77 Transcript, Robert Bentley, 23 September 2013, page 62 line 42 – page 63 line 18.
78 Transcript, Robert Bentley, 23 September 2013, page 63 lines 19-38.
79 Transcript, Robert Bentley, 23 September 2013, page 64 lines 32-44.
80 Transcript, William Ludwig, 27 September 2013, page 27 lines 7-45.

by email and telephone owing to his inability to attend the meeting. ... The Chairman advised all present that this measure of confidentiality was necessary as the funding package for the Strategic Asset Plan was currently before Treasury and Cabinet.

The Chairman gave the Board a summary of the steps that had been taken to progress the Strategic Asset Plan to this conclusion and how the Plan and funding had progressed from the 'Issues Paper' presented to the Queensland State Government in mid 2009.

...

Ms Kerry Watson expressed her concerns that the Logan greyhound track would not be proceeding and sought explanation as to the feasibility of Deagon. Ms Watson expressed concern that a 2 track complex development at Deagon was not located geographically to suit the needs of greyhound participants.

The Chairman advised Ms Watson that the Logan economic impact did not stack up and the site at Logan, being a former refuse tip, would not hold ground water. The Deagon option was a better fit and was in accordance with the Board's direction of multi use facilities.

Ms Watson expressed her support for the establishment of the greyhound track at Bundamba.

...

The Board noted the projects to be undertaken and the Chairman sought the Board's comments to be available for the next Board Meeting, scheduled on Tuesday, 27 September 2010.

*The Board Members were asked to review the full Strategic Asset Plan before the next Board meeting. A complete set of Strategic Asset Plan documents were **tabled** and individual documentation was made available for each Board Member to take away. The Chairman advised the Board that a complete set of documents were couried [sic] to Mr Lette prior to the meeting ...*[81]

5.3.76 The next meeting of the board occurred one working day later on Tuesday 28 September 2010. Again Mr Lette was absent. The minutes record:

6. Strategic Asset Management Plan

..

Ms Kerry Watson inquired into the possibility of marketing the sale of the units [in the redevelopment of Albion] to an overseas market. ... Ms Watson stated that overall she approved of the concept. Ms Watson asked if the Logan feasibility took in the constant usage by greyhound owners and trainers, operating out of the facility.

...

Ms Watson expressed concerns that the greyhound industry participants may not be happy due to traffic and travel distance to dog trials and races at Deagon.

The Board agreed that the Logan site did not offer a superior location as far as travel was concerned and whilst there would be some extra travel for some stakeholders the location of Deagon and Ipswich was a better alternative. ...

*The Board **RESOLVED** that the Board authorise the Chairman to recommend the Strategic Asset Development Plan to the Queensland Government.*

***MOVED** Mr Wayne Milner **SECONDED** Mr Bill Ludwig*

***Motion carried**.* [82]

81 RQL, Board Meeting Minutes, 24 September 2010.
82 RQL, Board Meeting Minutes, 28 September 2010.

5.3.77 In her affidavit of 6 March 2012 in proceedings brought against RQL and Mr Bentley arising out of her dismissal from the board, Ms Watson swore

> *...I voted in favour of the overall plan for the whole of Queensland, but reiterated my concerns that I did not agree with Deagon as it was the wrong place to build a greyhound venue. I said it should have been Logan as promised. I had a long list of reasons that I informed the board of before the vote took place. ... I did not discuss any of this with anyone in the greyhound racing industry as it was all strictly confidential. I told them about the emails I had from Tony Hanmer guaranteeing the building of the Cronulla Park [Logan] complex, and the two tracks etc. I said to them 'you'd be building in the wrong place. It needs to be at Logan. The development plans are well down the track. Logan is where it should be, not a shared facility at Deagon.' I let my feelings be known to the board.*[83]

Discussion

5.3.78 The legal representatives for Mr Bentley and Mr Ludwig submitted that there is no evidence of a finalised plan being provided to government prior to being disclosed to the board of RQL on 24 September 2010.[84] Whether or not the plan was finalised is, however, irrelevant. The pertinent issue is that the government was informed of a plan which included the sale of Albion Park and the abandonment of the Logan development before representatives of the greyhound and harness codes, who were members of the board of RQL, knew of it.[85]

5.3.79 They contend that it was reasonable for Mr Bentley and Mr Ludwig to discuss a plan with government, prior to revealing it to the board of RQL, as "there was no point presenting a plan to the board of RQL for approval before there was a reasonable likelihood of it receiving government approval and funding".[86] Again, these submissions do not address the relevant issue.

5.3.80 During the period from early 2010 until 24 September 2010, Mr Bentley made no disclosure to Mr Lette of any change to his expressed intent in respect of Albion Park or Logan,[87] nor to Ms Watson. During the same period, he was involved in planning the sale/development of Albion Park, the abandonment of Logan, and the development of a joint facility for the harness and greyhound codes at Deagon.

5.3.81 It was not until Friday 24 September 2010, at the RQL board meeting, that the proposal to sell Albion Park and abandon Logan was revealed. Ms Watson was asked to keep the plans strictly confidential but to make a determination about the whole of plan for the three codes by the following Tuesday. She was given no opportunity to consult other members of her code.

5.3.82 At that meeting on 24 September 2010, Mr Bentley and Mr Hanmer must have appreciated the invidious position in which Ms Watson had been placed.[88] They had previously encouraged her to represent to her code that she had reliable assurances from Mr Bentley and Mr Hanmer. Now she learned that those assurances were not to be honoured.

5.3.83 Did Mr Bentley act in good faith and with integrity in placing his proposal before the government before clearing it with the board of RQL, when he must have appreciated that government would be concerned to know whether the plan had support of the three codes and of the industry?

5.3.84 Ms Watson's letter of 30 October 2010 did contain information relevant to government, namely that she (and therefore the greyhound code) had not been a party to the development of a plan which involved the sale of Albion Park and the abandonment of Logan.

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83 Affidavit of Kerry Watson (QCAT), 6 March 2012, page 25 para 78.
84 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-44 para 189.
85 Statement of Gerard Bradley, 2 September 2013, attachment GPB-6.
86 Submission of Rodgers Barnes & Green, 1 November 2013, Part 2 page 2-44 para 190.
87 Transcript, Robert Bentley, 23 September 2013, page 68 line 41 – page 69 line 7.
88 For that matter, Mr Lette's position for the harness code was the same, when he received and reviewed the plan by email.

5.3.85 Mr Bentley did not act with integrity in placing the plan before senior members of government without first disclosing to them that the board had not been involved in the development of that plan, and some members were in all likelihood going to take objection to it. This is particularly acute as he appreciated that the government was unlikely to approve a plan that did not have the support of two codes of the industry. Indeed the diversion of the wagering tax to fund the infrastructure development was dependent on amalgamation of the codes.

5.3.86 Mr Bentley told the Commission at the public hearings that he did not consider it unusual that the board was not consulted about the strategic plan (including the sale of Albion Park). He said he "didn't want to see an opportunity where we got $110 million from the government scuttled before we started".[89]

5.3.87 But this concern cannot justify his failure to disclose to his fellow directors and the chairs of the greyhound and harness codes, until after having advanced the plan to senior members of government, that his assurances prior to the amalgamation would not be met.

5.3.88 He did not act with integrity by placing Ms Watson in a position which denied her an opportunity to address her code about the plan before a vote was taken on it.

5.3.89 The facts supporting this finding against the integrity of Mr Bentley's actions also sustain the conclusion that Mr Bentley did not act in accordance with section 34A(2) of the Racing Act. That section provided that "in making a decision ...the control body must make a decision that is in the best interest of all the codes of racing for which the control body holds an approval while having regard to the interests of each individual code".[90]

5.3.90 The exclusion of Ms Watson from the development of a plan which included proposals against the greyhound code's interest, meant that the board's decision cannot genuinely be said to have had regard to the interests of each individual code.

5.3.91 The objective of obtaining approval for $110 million for the industry was admirable, but did not justify Mr Bentley's conduct. He objected to Ms Watson informing the government of disunity on the board of RQL in relation to the plan for fear of jeopardising the funding.[91]

5.3.92 Did Mr Bentley act in good faith in advancing the motion to remove Ms Watson?

5.3.93 Mr Bentley clothed his objection to Ms Watson's letter by promoting the view at the time that the letter constituted a breach of confidentiality, which he contended was owed by each board member. Yet, in the Commission's hearings, it was Ms Watson's change of position that he said was objectionable.[92]

5.3.94 Mr Bentley's direction to the board to maintain this confidence cannot be said to have been given in good faith. He had already revealed this plan to the Minister and to Mr Kelly. It is questionable then that Ms Watson was duty bound to remain confidential about her lack of involvement in the plan, particularly where she and the code she represented had been led to believe that Mr Bentley did not intend to support a different plan for Albion Park and Logan. She was entitled to expect him to notify her of his change of mind with the freedom to disclose the matter to the stakeholders.

5.3.95 Mr Bentley's actions, in the course of events leading up to and culminating in Ms Watson's removal from the board, reflect a lack of good faith and show a lack of integrity in leading RQL.

5.3.96 Mr Bentley did not comply with the RQL Code of Conduct, in that he failed to act in a transparent manner. He was focused on achieving his objective at the cost of appropriate standards for a chairman in his position.

89 Transcript, Robert Bentley, 23 September 2013, page 70 lines 23-39.
90 *Racing Act 2002*, section 34A(2).
91 Transcript, Robert Bentley, 23 September 2013, page 69 lines 34-38; Statement of Robert Bentley, 26 July 2013, page 9 paras 32-33.
92 Transcript, Robert Bentley, 23 September 2013, page 62 lines 7-8.

5.4 Legislation and policies

5.4.1 When read in the context of this Term of Reference, which is about corporate governance arrangements, "relevant applicable State and Commonwealth policies and legislation" should be read to mean only those policies and legislation relevant to corporate governance. Other than the Racing Act and the Corporations Act, the Commission identified the *Public Sector Ethics Act 1994* (Qld) relevant to this Term of Reference. For the reasons explained in Chapter 4, this legislation did not apply to RQL.

5.4.2 In accordance with the Commission's inquiries under this Term being largely reactive, the following matters of non-compliance with legislation and policy are considered in the Chapter:

- Corporations Act, section 191 and 195 – directors' conflict of interest management (see section 5.5 below)
- Racing Act, section 34A(2) – control body to make decisions in the best interest of all codes having regard to each individual code (see section 5.3 above).

5.4.3 In the course of the Commission's investigations in response to other Terms of Reference, questions also arose as to compliance with specific provisions of the Corporations Act. Those matters are addressed in relation to those other Terms of Reference.[93]

5.5 Conflicts of interest

5.5.1 Drawing on the existing mechanisms of QRL, RQL developed a comprehensive framework of policies and processes to identify and manage conflicts of interest. This framework applied to all RQL directors and executive management personnel.

RQL conflict of interest framework: policies, rules and procedures

5.5.2 The primary process by which RQL directors sought to comply with their duty under section 191 of the Corporations Act was by means of a conflict of interest declaration attached to the board meeting minutes.

5.5.3 During the RQL period, Mr Bentley was the only director who had a conflict which consistently required him to observe the section 195 duty. That duty required that he not be present during a meeting in which he had a personal material interest or a duty to the Tatts Group in relation to a matter to be determined by RQL. Also, he could not vote on a matter which was part of or incidental to RQL's relationship with the Tatts Group.

5.5.4 The processes adopted by Mr Bentley and the board included Mr Bentley declaring his conflict when the matter arose in a meeting and vacating the chair. Sometimes the board followed the process permitted by section 195(2), to allow Mr Bentley to remain present after the board voted their approval.

5.5.5 From the Code of Conduct Part 4.3 "Integrity", the following provisions were part of RQL's conflict management framework:

> ***4.3.1 Conflicts of Interest:*** *Every Racing Queensland official must:*
>
> - *Carry out their duties impartially and regardless of personal preferences.*
> - *Avoid private, financial or other interests or undertakings that could directly or indirectly compromise or conflict with the performance of their duties.*
> - *Disclose any interest, which may impact or have the potential to impact on the performance of their duties.*

93 See Chapter 7 for discussion of Corporations Act duties in relation to the 2011 employment contracts renegotiations, and Chapter 8 for duties related to the Tatts Group race information fees.

- *Take action to resolve any conflict between personal interests and official duties in favour of the public interest.*

All full-time employees of Racing Queensland must disclose in writing to the CEO or Director Integrity Operations (as appropriate) any secondary paid employment they may have. Failure to disclose this information may result in a Racing Queensland official being disciplined or, in appropriate cases, instantly dismissed. Secondary employment within the racing industry represents a prima facie conflict of interest and is not permitted without specific authorisation.[94]

5.5.6 The Code contained the following relevant definitions:

> ***Conflict of Interest:*** *a real or perceived conflict between a private interest and an official duty. A real conflict of interest exists when a reasonable person, in possession of the relevant facts, would conclude that the official's private interests interfere, or are likely to interfere, with the proper performance of the official's duties. A perceived conflict of interest exists when it appears that an official's private interests may interfere with the proper performance of the official's duties although, in reality, this may not be the case.*
>
> ***Interest:*** *used in relation to declaring personal interests or conflicts of interest, the term "interest" means direct or indirect personal interests of Racing Queensland Limited officials. Interests may be pecuniary (that is, financial or economic forms of advantage) or non-pecuniary (that is, non-financial forms of advantage).*[95]

5.5.7 Relevant to improper use for personal or financial gain of information obtained through the position held at RQL, the Integrity section of the Code contained a sub-section on "Confidentiality":

> *No Racing Queensland official may take, or seek to take, improper advantage of confidential information gained in the course of employment or in their official capacity. No Racing Queensland official may disclose confidential information to any person unless it is required by law or is required by their duties and is consistent with this Code or specifically authorised. If a Racing Queensland official resigns or leaves Racing Queensland, the official must not disclose confidential information acquired when they acted as an official of Racing Queensland.*
>
> *A member of the Board of Racing Queensland must not disclose confidential information discussed at Board meetings and/or acquired while acting as a Board member.*[96]

5.5.8 The Code of Conduct provided that the CEO and director of integrity operations were responsible for ensuring all RQL officials within their organisational area complied with the Code.[97] When adopting the Code on 1 July 2010, the RQL board appointed two "Company Compliance Officers": Mr Orchard (director of integrity operations) for "Integrity Compliance" and Ms Reid (senior corporate counsel and company secretary) for "all other compliance".[98]

5.5.9 Further, RQL had two conflict of interest disclosure guideline documents.[99] The "Conflict of Interest Disclosure" was for directors, and the "Conflict of Interest Disclosure and Punting Requirements" was for employees (including executives).[100]

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94 RQL, *Code of Conduct*, 1 July 2010, pages 7-8.
95 RQL, *Code of Conduct*, 1 July 2010, pages 3-4.
96 RQL, *Code of Conduct*, 1 July 2010, page 8.
97 RQL, *Code of Conduct*, 1 July 2010, Clause 3.3.
98 RQL, Board Meeting Minutes, 1 July 2010, page 13.
99 These documents were not "policies" as they were not formally adopted by the RQL board. The content of the documents, however, resembled RQL policies insofar as they required certain actions, and were in practice adopted by the board.
100 RQL, *Conflict of Interest Disclosure* (guideline for directors) (undated); RQL, *Conflict of Interest Disclosure and Punting Requirements* (guideline for employees) (undated).

5.5.10 Both guidelines contained a description of the meaning of conflict:

> *A conflict of interest occurs when a person's interests influence, or appear to influence the impartial performance of that person's duties and responsibilities…*
>
> *Conflicts of interest arise regularly in practice and the fact that a conflict may arise is not in itself a problem. However it will become a problem if it is not properly handled…*
>
> *The conflict of interest may be:*
>
> - *an actual conflict of interest in which there is direct conflict between the officials [sic] current duties and existing private interest;*
> - *a perceived conflict of interest in which it could be perceived by others that an officials [sic] private interest could improperly influence the performance of their official duties; or*
> - *a potential conflict of interest in which an official has private interests which could interfere with official duties in the future.*[101]

5.5.11 The guidelines required any interest in or related to the racing industry to be disclosed. Such mandatory disclosure extended to interests of a close family member. Personal or family relationships with industry participants were presumed to give rise to a prima facie conflict of interest and required to be disclosed.

5.5.12 Each guideline was accompanied by a "Conflict of Interest and Racing Interest Declaration" form. The guidelines, when read together with the forms, provided the process or framework for conflict disclosure and management.

5.5.13 Directors were required to make disclosures by completing the declaration form and providing it to the director of integrity operations. This was to be completed on commencement as a director, and thereafter, annually, even if there were no new interests to disclose. Directors were also required to make further disclosures whenever there was a change in a previously disclosed interest, by completing the form and providing it to the director of integrity operations.

5.5.14 The process for employee disclosure was the same as for directors; however forms were to be provided to an employee's manager at the time of annual performance review discussions.

5.5.15 Both forms listed the following:

> ***Racing Interest***
>
> *I have the following interests in the racing industry: (If no interests insert the word 'nil')*
>
> *I have the following interests which may amount to an actual, perceived or potential conflict of interest: (If no interests insert the word 'nil')*
>
> *[section to be signed and dated by both the board member and director of integrity operations, or employee and manager]*
>
> ***Statement of Conflict of Interest/Racing Interests Resolution or Management***
>
> *Action taken or to be taken to resolve or manage conflicts of interest or racing interests:*
>
> *The above action has been agreed on to resolve conflict of interest or racing interests declared.*
>
> *[section to be signed and dated by both the board member and director integrity operations, or employee and manager]*

101 RQL, *Conflict of Interest Disclosure* (guideline for directors) (undated); RQL, *Conflict of Interest Disclosure and Punting Requirements* (guideline for employees) (undated).

5.5.16 The employee guideline and form contained additional items, "Punting Requirements" and "Punting Acknowledgement." It provided that punting by RQL staff gave rise to a specific perceived or actual conflict, especially for those staff employed in the integrity department or involved in handicapping/grading or racing operations. The guideline prohibited those staff from betting on races of any code conducted in Australia, and required other RQL staff to be "very conscious of any possible negative perceptions arising [from punting] and take appropriate steps to avoid that occurring to the extent possible". All employees were required to sign and return to their manager an acknowledgement of the requirements in relation to punting.[102]

5.5.17 In addition, each executive's contract of employment contained the following:

> *9.1 You are being appointed as a senior executive. This means that you are required to always act in good faith in RQL's best interests and to ensure that you are not placed in a situation where your duties to RQL are in conflict with your personal interests. This extends to ensuring that you are not in a situation where there could be a reasonably perceived conflict between your duties to RQL and your personal interests. RQL's Conflict of Interest Policy contains more information about circumstances when conflicts can arise. If you are in doubt you must seek clarification from RQL. This clause does not limit your rights or duties...*
>
> *9.2 You must not accept any payment or other benefit from any person as an inducement or reward for any act or forbearance with any matter or operation transacted by RQL or on its behalf. You must report any actual or potential conflict of interest to RQL immediately.*
>
> *9.3 You warrant that, from 1 July 2010, there will be no circumstances which would create a perceived or actual conflict of interest between your personal interests and your obligations to RQL. You will be required to complete and sign the Conflict of Interests and Racing Interest Declaration Form prior to commencing with RQL. This form will be required to be completed annually or where there is any change to your circumstances.*
>
> *9.4 You agree that you will immediately notify the Chief Executive Officer[103] in writing if a conflict or risk of conflict arises which will impact on your actual or perceived ability to carry out your obligations under this agreement. After assessing the conflict or risk of conflict, RQL may give you written notice requiring you to remedy the conflict or risk of conflict within a specified time.*
>
> *9.5 You agree that you will not enter into or be involved in any other employment or business activity that could conflict with, be detrimental to or interfere with RQL's interests or the performance of the responsibility of your position with RQL.[104]*

5.5.18 The Commission was provided with two versions of the RQL "Gifts and Benefits" policy marked as amended on 7 September 2011 and 4 November 2011. Each version stated it was authorised by the Remuneration and Nomination sub-committee. The "Expense Reimbursement" policy was formally adopted by the RQL board on 1 July 2010 as an "internal financial management" policy.

5.5.19 The Gifts and Benefits policy "applie[d] to the giving and receipt of gifts and benefits by all RQL employees and board members". The content was largely internally repetitive and appears to have been pieced together from various sources, including the Public Sector Ethics Act and government material. Relevant to integrity, conflict management and improper use of position for personal or financial gain, the policy provided:

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102 RQL, *Conflict of Interest Disclosure & Punting Requirements*, (undated).

103 In Mr Tuttle's contract, he was to notify the board.

104 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*; Paul Brennan, Malcolm Tuttle, Jamie Orchard, signed 1 July 2010, Clause 9; RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*; Paul Brennan, Malcolm Tuttle, Jamie Orchard, signed 5 August 2011, Clause 9.

Being a Racing Queensland Limited officer involves public trust. This means that duties must be carried out impartially and with integrity. Consequently, it is not appropriate for RQL officers to be offered or to accept or to give gifts and benefits that affect or may be likely to affect the performance of their official duties. ...

Policy principles and obligations

...

3. *Any gift or benefit, regardless of monetary value, accepted from an individual or organisation or given to an individual or organisation implies a relationship with that individual or organisation which is likely to interfere with objectivity and independence.*
4. *'Public perception' is an important consideration and can be defined as 'the perception of a fair-minded person in possession of the facts.'*

...

7. *Receipt and giving of reportable gifts or benefits must be declared and recorded in the register. The register is to be subject to regular review. The reviewer must be independent and should communicate any results of the review to the Integrity Services Manager. The purpose of such review should include analysis for trends or patterns which may cause concern and need corrective and preventative action.*

...

Policy for non-acceptance or not giving

A gift or benefit may not be accepted or given if any of the following principles apply:

- *it is intended – or is likely – to cause the recipient or donor to act in a partial manner in the course of their duties; or*
- *the donor or reasonable observer would apprehend that the recipient may be under obligation to the donor; or*
- *it is not offered openly; or*
- *it is an offer of money or anything readily convertible to money – eg. shares.*

Policy

...

If the aggregate value of multiple gifts or benefits received or given by a RQL officer from or to the same donor in a financial year exceeds $250, each individual gift or benefit becomes a reportable gift or benefit.

An intangible gift or benefit which is also a reportable gift or benefit may be retained by the RQL officer to whom it was given only with the consent of the Chief Executive of RQL.

These principles should be widely published and made generally available, particularly to those individuals or organisations likely to receive or offer gifts and benefits.

Agencies are to communicate the principles to all suppliers and potential suppliers.

...

Guidelines in support of the policy and procedure

The Public Sector Ethics Act 1994 which each RQL officer is bound by includes five ethical obligations. One is 'Integrity' which requires that:

...

- *official powers must not be improperly used;*
- *any conflict that may arise between the RQL officer's personal interests and official duties is resolved in favour of the public interest...*[105]

105 RQL, *Gifts and Benefits policy* (draft), 7 September 2011.

Adherence to the framework

5.5.20 RQL plainly had in place a comprehensive framework for conflict of interest disclosure and management.

5.5.21 However, the framework featured duplication of obligations across the Code of Conduct, the conflict of interest disclosure guidelines and provisions in employment contracts. There was also duplication of oversight responsibilities. The Code itself named the CEO and the director of integrity operations as responsible for the management of Code compliance, however the RQL board separately appointed the director and the corporate counsel as company compliance officers. Such duplication was capable of causing confusion.

5.5.22 In many respects, the conflict management framework was properly implemented and complied with. However in some important respects, mechanisms within the framework were inconsistently applied, or not applied at all. As a result, directors and officers compromised their own integrity, and the integrity and transparency of RQL management and decision-making.

5.5.23 Rather than complying with conflict duties, a culture of lip service to the policies and procedures appears to have become normal practice. One possible explanation for this failure and/or poor management was a lack of understanding within RQL of the meaning and significance of conflict of interest and of the scope of duties owed by officers.

5.5.24 The responsibilities assigned to the CEO and director of integrity operations were not properly understood by those officers as necessary duties in their roles and they did not comply with them.

The chairman

5.5.25 Throughout the relevant period, the chairman of RQL had a conflict between his duty to RQL and his duty to the Tatts Group, of which he was a director.

5.5.26 The influence of the chairman's conflict, as it specifically applied to the matters considered by Term of Reference 3(f), is addressed in Chapter 8 of this Report. The management of that conflict generally, by the chairman himself and by the board, is relevant to an assessment of RQL's conflict of interest management framework.

5.5.27 To assess the chairman's and board's compliance with the statutory disclosure obligations at a formal level, the Commission conducted a review of the RQL board meeting minutes through the RQL period.

5.5.28 Mr Bentley, like the other directors, declared his conflict at each board meeting by way of an attachment to the minutes.[106] Over the course of the RQL period, Mr Bentley separately declared a conflict of interest in relation to 32 specific meeting items. These were items concerning Queensland race information, Queensland Race Product Co Ltd, Betfair, race information fees, race information legislation, and the product agreement.

5.5.29 Of Mr Bentley's 32 conflict declarations, 10 occurred when a separate board meeting was convened for the purpose of discussing applications for authority to use Queensland race information and race information legislation. The minutes of those meetings generally recorded, "[o]wing to a previously and continuously disclosed conflict of interest, Mr Bob Bentley was excluded for the purposes of this meeting". The deputy chairman, Mr Hanmer would open and chair those meetings.

106 On 29 June 2010, by way of a "Conflict of Interest Declaration Form", Robert Bentley declared the following: director of Tatts Group, director/chairman of Sunshine Coast Racing Pty Ltd, director/chairman of Australian Racing Board, vice-president of the Asian Racing Federation. These did not change throughout the RQL period.

5.5.30 On 16 occasions, the minutes recorded Mr Bentley as having declared his conflict and left the meeting, returning after the item had been discussed. The minutes then recorded: "The Chairman advised the board that in relation to discussion on race information legislation, it could be seen as a conflict with his position as a Director of Tatts Group. The Chairman stood down and left the meeting on this subject. The Deputy Chairman, Mr Tony Hanmer took the Chair."

5.5.31 On eight occasions the minutes recorded Mr Bentley as having declared his conflict, and the board either expressly or implicitly agreeing to him staying in the meeting. It would appear, at least from the minutes, that on these occasions Mr Bentley did not participate in discussions and did not vote on any motions.

5.5.32 On one of these eight occasions, the minutes recorded that the board requested that Mr Bentley remain in the meeting. This was at a meeting on 4 November 2011 in relation to Betfair. The minutes recorded:

> *The Chairman noted that as there could be a perceived conflict of interest he would take no part in the discussion. The Board requested the Chairman's presence but accepted that a conflict could exist. The Chairman remained but indicated that he would express no opinion. The Chairman requested Mr Hanmer to take the chair.*[107]

5.5.33 Only on one occasion was Mr Bentley clearly recorded as having contributed to the discussion. This was in relation to the renegotiation of the product agreement with TattsBet which would expire in 2014 at a meeting on 7 June 2011. The minutes recorded: "The Chair recognised he has a conflict and would not take part in any decisions that ultimately would be made," and then "the Chair advised the board that in his opinion no discussion should be commenced prior to any Government decision on the tax redirection package as this could be considered in any further funding agreements".[108]

5.5.34 Sometimes, Mr Bentley's conflict was recorded on multiple occasions, as matters which were affected by the conflict were discussed at different times during the one board meeting. For example, on one occasion the items "Queensland Race Information" and "Queensland Race Product Co Ltd", "Betfair Audit" and "Race Information Fees" were discussed separately. The chairman declared a conflict and left the meeting for the first item; however he remained present in the meeting for the second and third items after again declaring his conflict for each item.[109]

5.5.35 On only one occasion did the meeting minutes expressly record that the board had any discussion or gave specific consideration to Mr Bentley's conflict as it related to the matter to be discussed, before agreeing to permit him to stay in the meeting. The minutes of 19 December 2011 record:

> *The Chairman declared a conflict of interest and advised that he would not take part in the decision making process nor would he vote. The Deputy Chair canvassed the Boards [sic] opinion on its Chairman's conflict and whether remaining in the room constituted a conflict. The remaining Board members had no objection to him remaining through the discussion.*[110]

5.5.36 On the same occasion, the minutes expressly recorded that Mr Bentley had not received the board papers relevant to a matter in which he had a conflict and left the meeting.[111] Ms Reid,

107 RQL, Board Meeting Minutes, 4 November 2011, page 12.
108 RQL, Board Meeting Minutes, 7 June 2011, page 6. The minutes do not record the board's decision to agree to allow Mr Bentley to remain in the meeting.
109 RQL, Board Meeting Minutes, 17 February 2012, pages 10, 12, 15, 17.
110 RQL, Board Meeting Minutes, 19 December 2011, item "Betfair", page 18.
111 RQL, Board Meeting Minutes, 19 December 2011, item "Race Information – Waterhouse Entities", page 9.

company secretary, said in her statement to the Commission that it was common practice for Mr Bentley to receive board papers which did not contain material relating to TattsBet, Product Co or race information, as a measure of "further" reducing the position of conflicts of interest.[112]

5.5.37 This review of board minutes depicts inconsistencies in the chairman's practice of declaring his conflict, as well as the board's practices of managing and responding to the conflict. For his part, Mr Bentley sometimes declared his conflict and automatically left the meeting. Sometimes he declared the conflict and offered to leave the meeting. In responding to the latter situations, the board sometimes gave implied or silent agreement to him staying for the discussions, and sometimes express agreement.

5.5.38 It is, therefore, difficult to assess whether the other directors turned their minds to the nature and extent of Mr Bentley's conflicting duties to the Tatts Group, thereby satisfying them that the conflict should not disqualify him from voting or being present. This is the process required by section 195(2) of the Corporations Act in order to relieve directors of restrictions on voting and being present when matters in which they have a conflict are considered. On no occasion was a resolution passed in these terms, though on the majority of occasions when Mr Bentley remained in the meeting the minutes do record some acquiescence or approval from the other directors.

5.5.39 Minutes from an RQL board meeting on 6 May 2011 record:

> *[t]he Board expressed concern over the constant and continuing reference to the Chairman's 'perceived conflict' for holding positions on RQL and Tatts Group.*[113]

Mr Hanmer is recorded as referring to investigations by ASIC, the CMC, the Australian Competition and Consumer Commission (ACCC) and gaming regulators, as well as a barrister's opinion, to suggest that there was no cause for concern. Mr Milner proposed that the board "put the matter to rest by obtaining an opinion from a prominent QC" on Mr Bentley's position. The board carried Mr Milner's motion, and Ms Reid on behalf of RQL instructed Mr Grace of Cooper Grace Ward lawyers (CGW) to brief a senior and junior barrister.[114]

5.5.40 The CGW file provided to the Commission shows that Mr Bentley himself corresponded about the advice with Mr Grace, both directly and via Ms Reid. Mr Bentley was also provided with a draft version of the brief and supplementary brief to counsel.[115]

5.5.41 On 8 May 2011, Mr Bentley emailed Mr Grace, suggesting that he had excused himself from Tatts Group board meetings on matters concerning RQL and Product Co, and expressing his view that "while on the surface there would seem to be potential conflict, there are very few issues that have raised their head".[116] He wrote:

> *RQL*
>
> *1 Product Co is the related party to Tatts Group not RQL*
>
> *2 Product is supplied through contract fixed to 2014 no request has been raised for change or modification at board level*
>
> *3 RGB [Mr Bentley] is noted in all minutes as a director of Tatts Group*

112 Statement of Shara Reid, 29 July 2013, page 7 para 26. Note that Ms Toohey's statement to the Commission did not include this detail in her description of the process by which she collected and distributed board papers.
113 RQL, Board Meeting Minutes, 6 May 2011, page 6.
114 RQL, Board Meeting Minutes, 6 May 2011, page 6. Cooper Grace Ward legal file opened 10 May 2011, '*Racing Queensland re Corporations Act Advice*'.
115 Emails between Robert Bentley and David Grace, and between Shara Reid and David Grace, various dates in May 2011 re Cooper Grace Ward legal file opened 10 May 2011, '*Racing Queensland re Corporations Act Advice*'.
116 Email from Robert Bentley to David Grace, 8 May 2011.

The following RGB [Mr Bentley] was not involved or took part in any discussion.

1 Race fields legislation outcomes Tatts Group and bookmakers (Product Co)

2 Dealings with bookmakers (Product Co)

3 Tabcorp attempted takeover of Unitab 2006

5 All Product Co meeting no minutes received

5.5.42 On 11 May 2011, Mr Bentley forwarded to Mr Grace an email he had received that day from Ms Penny Grau, the Tatts Group general counsel and company secretary:

> *You asked me to ascertain and advise of any Board meeting where you left the meeting due to a possible conflict of interest. We have reviewed the Board Minutes from 2007 on. The only time that the minutes record this happening was at the Board meeting held on 24 July, 2009. At the meeting you left... for 40 minutes. During that period the CE advised the Board of several potential acquisitions/divestment opportunities for the Group... Although you have left the Board meeting on other occasions this is generally related to a discussion about your re-election or other like matters.*[117]

5.5.43 It appears from the CGW file that counsel were briefed and subsequently requested further information relating to media rights contract negotiations between RQL (on behalf of clubs) and Sky Channel, which was owned by Tabcorp and had previously been the subject of a takeover offer from Tattersalls Limited of the Tatts Group.[118] Mr Bentley, through Ms Reid, advised there was "no need to go into such depth" and that advice was only sought in relation to conflict of interest and corporate activity.[119] Mr Grace replied that the information requested was necessary for counsel to assess properly the position of conflict and corporate activity.[120]

5.5.44 The information was not provided and the following day on 26 May 2011, Ms Reid informed Mr Grace that RQL was withdrawing instructions to obtain the advice. The reason given was that Mr Bentley had received advice from the Victorian Commission for Gambling and Liquor Regulation that it was of the opinion he had no conflict of interest.[121] No resolution from the board about withdrawing the instructions, and, no further consideration of the matter is recorded in the RQL board minutes.

5.5.45 The collective view of the other directors, at least as can be understood from the review of the minutes, appears to have been that Mr Bentley's leadership over these issues and his personality made paying lip-service to the conflict disclosure framework sufficient. Mr Hanmer, Mr Lette and Mr Ryan gave evidence in their statements to the Commission to the effect the conflict of interest disclosure and management processes in place operated effectively.[122]

5.5.46 In January 2010, in correspondence to Mr Kelly at the Office of Racing, following criticism from a stakeholder about Mr Bentley's conflict, Mr Hanmer suggested that the QRL board "probably over govern[ed]" the conflict issue.[123] Reflecting on these matters, at the Commission's hearings, Mr Hanmer agreed that Mr Bentley "at times" had trouble understanding how to manage his conflict issue.[124]

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117 Email from Robert Bentley to David Grace, 11 May 2011.
118 Brief to Counsel dated 9 May 2011; Brief to Counsel for Joint Opinion dated 13 May 2011.
119 Email from Shara Reid to David Grace, 25 May 2011.
120 Email from David Grace to Shara Reid, 25 May 2011.
121 Email from Shara Reid to David Grace, 26 May 2011.
122 Statement of Anthony Hanmer, 29 July 2013, pages 5-6 para 13(e); Statement of Robert Lette, 30 July 2013, pages 6-7 paras 8, 12; Statement of Bradley Ryan, 25 July 2013, page 7 para 46.
123 Email from Anthony Hanmer to Michael Kelly cc: Robert Bentley, 3 January 2010.
124 Transcript, Anthony Hanmer, 26 September 2013, page 36 lines 46-47.

5.5.47 Mr Tuttle said in his statement to the Commission:

> *I noted that dealing with potential conflicts of interest was a matter that was taken very seriously and members of the Board were also cognisant of the issue…Where Bob Bentley was concerned, he went out of his way to ensure that his role as a Director of Tatts Group did not affect the control body.*[125]

At the hearings, Mr Tuttle clarified that Mr Bentley did receive information related to race information and legislation, and expressed his view that any potential conflict issue was related more to the use of that information, rather than his holding of conflicting director's duties, which Mr Tuttle maintained was "managed very carefully".[126]

5.5.48 Mr Bentley's declarations and actions did not, however, demonstrate a serious attempt to manage his conflict appropriately.

5.5.49 There has been no explanation of the utility to RQL of Mr Bentley remaining in meetings to hear matters about which he had a conflict of interest, but not contributing to or voting on those matters, or being able to use the information. The only apparent utility is the opportunity for Mr Bentley to hear and listen to discussions about matters in which he had a competing interest and/or duty. For example, Mr Hanmer gave reports to the board of RQL about the board meetings of Product Co. This could have been necessary only for Mr Bentley to hear, as all other RQL directors were also directors of Product Co.

5.5.50 A further concern was the practice by which meeting minutes were settled. It was RQL practice that the board secretary, Ms Toohey, then company secretary, Ms Reid, then Mr Bentley, and generally Mr Tuttle, would each review and make amendments to the draft meeting minutes before they were circulated to the board members. Ms Toohey said in her statement to the Commission:

> *My recollection is that Mr Bentley changed the draft almost every time. Mr Bentley commonly has significant input into the draft minutes. Generally, Mr Tuttle as the then Chief Executive Officer also looked at the minutes at the same time, and also amended them from time to time. When Mrs Reid, Mr Bentley and Mr Tuttle were comfortable with the draft, I would then send them to Mrs Reid, and she would send them electronically to each Board member. From time to time each of the Board members (with the possible exception of Mr Bill Ludwig) made comments on the draft minutes. I then tracked changes from each board members and showed them to Mr Bentley and Mrs Reid to see whether they agreed with the amendments. Mr Bentley, as Chairman, took final responsibility for the minutes. Sometimes he directed me or Mrs Reid to accept changes made by other Board members, and sometimes not. There was no particular pattern as to which amendments (from which Board members) tended to be accepted by him and which were not. From there the minutes were included in the Board papers for the next meeting as drafts…Once approved by the Board at the meeting, I made any changes which were required by discussion at the meeting (which did happen from time to time)…Once this process had been completed, I gave Mr Bentley a copy to sign as Chairman. Once signed by Mr Bentley as the Chairman, I entered the minutes into the Company Register. Once the minutes had been signed and registered, my practice was to destroy my notes.*[127]

5.5.51 The practices illustrated by the board minutes indicate a simplistic interpretation and application of the mechanisms in section 195(2) Corporations Act by which conflicted directors are permitted by the other directors to participate in board discussions and decision-making. This in turn suggests a lack of insight about the effect, or potential effect, of the chairman's conflicting

125 Statement of Malcolm Tuttle, 26 July 2013, pages 8-9 para 28.
126 Transcript, Malcolm Tuttle, 1 October 2013, page 6 lines 35-43.
127 Statement of Deborah Toohey, 2 August 2013, page 5.

duties. Mr Lambert gave evidence at the hearings that "to my mind there was no conflict for Mr Bentley being in attendance at a Product Co meeting to discuss race fields legislation. There was no conflict in my view...in regard to race fields legislation".[128] That perception is plainly incorrect.

5.5.52 The importance of conflict management was recognised by the government from 2000, when the control bodies began to adopt a corporate structure. At various times between 2000 and 2009, the relevant minister and later the Office of Racing arranged for corporate governance training, including conflict of interest, for control body directors and employees. Attendance sheets from training sessions held in August 2000, April 2005, August 2006, and June 2008 indicate that Mr Bentley did not attend any of the sessions.[129] The same sheets show that of the RQL directors, only Ms Watson (on two occasions) and Mr Ludwig (on one occasion) attended any training.[130]

5.5.53 Both Mr Bentley and Mr Hanmer swore in statements to the Commission that Mr Dunphy of Clayton Utz had provided directors' duties training at the commencement of the RQL period in July 2010.[131] The Commission's inquiries concluded that no such training ever occurred. Clayton Utz informed the Commission that the firm's records did not indicate that Mr Dunphy provided training to RQL either in 2010 or in early 2011.[132]

5.5.54 When asked at the hearings about his non-attendance at the training sessions which did occur, Mr Bentley said

> *...we [Mr Lette and Mr Bentley] were well across the issues of conflict of interest and we did not see it necessary to attend. The conflict of interest and the training that we asked Barry Dunphy to do was for incoming directors who didn't have a lot of experience in that.*[133]

5.5.55 The chairman, the other directors and the company secretary/corporate counsel plainly considered that the processes adopted by them during the course of board meetings discharged their duties to manage Mr Bentley's conflict. The submissions on behalf of Messrs Bentley, Hanmer, Ludwig, Milner, Tuttle, Brennan, Orchard and Ms Reid were that no finding could be made criticising those persons concerning the treatment of conflicts of interests at RQL.[134]

5.5.56 Leaving aside the procedures followed, consideration should also be given to the impact the conflict itself had on Mr Bentley's ability to discharge his duties of loyalty as chairman.

5.5.57 Mr Bentley's conflicting duties became unmanageable in 2008 when the race fields fees were introduced as an issue for QRL and later RQL. Managing the relationship between QRL then RQL and the Tatts Group, and the decision-making around that relationship, would normally have been central to his role as chairman as well as decisions about the race field fees charged to corporate bookmakers which concerned charging the competitors of Tatts Group.

5.5.58 In those circumstances, it is difficult to see how Mr Bentley could have fulfilled his duty to act in the best interests of RQL, when proper management of his conflict required him to have no part in RQL decision-making responding to the race fields legislation. The competing interests could be said to "infect [Mr Bentley's] decision-making or conduct generally in what ought to be the interests of [his] principal or beneficiary", RQL.[135]

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128 Transcript, Michael Lambert, 30 September 2013, page 28 lines 28-35.
129 Corporate governance and conflict of interest training attendance sheet records: 7 August 2000, 27 April 2005, 4 June 2008, 25 June 2008; Email from Kelly Skuse to Carole Miller, 1 August 2006, 2.19pm.
130 Corporate governance and conflict of interest training attendance sheet records: 7 August 2000: attended by Kerry Watson; 27 April 2005: attended by William Ludwig and Kerry Watson.
131 Statement of Robert Bentley, 26 July 2013, page 14 para 43(c); Statement of Anthony Hanmer, 29 July 2013, page 5 para 13(c).
132 Letter from Clayton Utz to Executive Director (Commission), 11 September 2013.
133 Transcript, Robert Bentley, 19 September 2013, page 37 lines 28-31.
134 Submission of Rodgers Barnes & Green, 1 November 2013, Part 3 page 3-12 para 41.
135 Justice Jessup in *Links Golf Tasmania Pty Ltd v Sattler* (2012) 90 ACSR 288 at [557].

The other directors

5.5.59 The other directors similarly used the process of an attachment to the board minutes to declare their conflicts of interest.[136] As there were no conflicts which infected RQL board business in the same manner as Mr Bentley's Tatts Group conflict, the Commission has found no reason to doubt the effectiveness of this particular declaration process as it applied to the other directors and was observed by them in practice.

5.5.60 The Commission obtained documents called *personnel files* for directors, and *employee files* for executive officers. These files suggest non-compliance with the Conflict of Interest Disclosure process provided for by the policy and form referred to at sections 5.5.2 to 5.5.17. While a failure to comply with the process does not mean the directors failed in their statutory duties, it does suggest that the more comprehensive conflict management framework, which the directors had established for themselves, was compromised.

5.5.61 The directors' personnel files go some way to explain the directors' failure to comply with the conflict management framework. Mr Bentley's file contains a blank conflict of interest and racing interest disclosure form, which suggests that he did not disclose his interests (in this format) on commencement as a director of RQL, or subsequently.[137] The files for Mr Hanmer, Mr Milner and Mr Lette demonstrate that they completed and signed the forms in July 2010 which included declared conflicts and racing interests.[138]

5.5.62 None of the directors' forms, other than Mr Lette's, contained detail about the steps agreed to be taken to manage declared conflicts. No form was countersigned by Mr Orchard, the then director of integrity operations. The personnel files also suggest that no annual update of the disclosure forms occurred after July 2010 as was required by the form's guideline.

5.5.63 The content of the declaration attachment to RQL board minutes was informed by the conflict forms. But it merely listed the conflicts, without the framework for oversight and management of declared conflicts or potential conflicts as provided for in the form.

5.5.64 In his statement to the Commission, Mr Orchard said he was responsible for the "Conflict of Interest Disclosure and Punting Requirements" guideline and form, which at a meeting on 7 May 2010 the then-informal RQL board agreed to issue to all staff.[139] Mr Orchard accepted that this guideline did not relate to directors. He said he had never seen the directors' version of the guideline, or the forms completed by the directors. Mr Orchard considered that, because the policy was not formally adopted by the board, the directors were not obliged to complete the declaration form.[140]

5.5.65 Mr Orchard was not aware of the directors' version of the conflict disclosure policy and declaration forms. In circumstances where the directors (not the chairman) were aware of the form and accepted its contents by signing, that the document was not one formally adopted by the board should not absolve the directors of an obligation to comply with the procedures set out in it.

The executives

5.5.66 The employee files show that Mr Tuttle, the CEO, signed the disclosure forms completed by Ms Reid and Mr Orchard in July 2010. Both Ms Reid and Mr Orchard declared no interests.

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136 Mr Bentley's initial Conflict of Interest Declaration Form was signed on 29 June 2010, Mr Milner's on 1 July 2010, Mr Ludwig's 1 July 2010, Ms Watson's 1 July 2010, Mr Hanmer's 27 June 2010, Mr Lette's 30 June 2010, and Mr Ryan's 28 June 2010.

137 Mr Bentley's RQL employee file included a blank conflict of interest and racing interest disclosure form.

138 Directors' employee files, Messrs Hanmer, Ludwig, Milner and Lette. Mr Hanmer: member of Sunshine Coast Turf Club, Mr Milner: race horse owner/breeder, member of Brisbane Racing Club, Sunshine Coast Turf Club, Victoria Racing Club, Life Member QROA, member QTBA, "son Bradley owns Eventageous Pty Ltd a company contracted to QRL"; Mr Lette: life member of Albion Park Harness Racing Club, member Brisbane Racing Club, part-ownership of thoroughbred race horses (2), non-executive director of Watpac Limited contractor/development for Brisbane Racing Club, "former partner and now consultant to Mullins Lawyers". Mr Ludwig listed no interests.

139 RQL, Informal Board Meeting Minutes, 7 May 2010, page 1.

140 Statement of Alfred Jamie Orchard, 28 October 2013, pages 1-2 paras 4, 9, 11.

Mr Brennan's employee file contained no disclosure forms for the RQL period at all. Mr Tuttle completed a form in July 2010, which was recorded as "noted" by Mr Orchard in April 2011. Mr Tuttle completed a further disclosure form in 2011, with no relevant interests declared. This was signed by Mr Bentley on the same day. The employee files for Mr Brennan, Mr Orchard and Ms Reid did not contain disclosure forms for 2011.

5.5.67 The conflict of interest and racing interest disclosure form process was not adhered to by RQL directors or the executives.

5.5.68 In the 2013 Deloitte Report with respect to RQL purchasing, Mr Brennan is recorded to have received engineering and construction advice for personal purposes, from Contour Consulting Engineers Pty Ltd (Contour) and another RQL contractor/supplier Integral Construction.[141] Mr Brennan failed to report receipt of these services to RQL.

5.5.69 In a statement to the Commission, Mr Brennan explained that in May 2011 he was looking to purchase a new house where he could agist his daughter's pony. Mr Brennan informed Mr Thomson (of Contour) of this, at which point Mr Thomson confirmed he was also looking for a rental property for the purpose of agisting his own horses. Mr Thomson attended when Mr Brennan inspected two houses and had Contour staff provide a "basic review" of the two properties.[142]

5.5.70 Emails contained in the Deloitte Report show that Mr Brennan received advice from staff at Contour about engineering matters for the properties, on 12 May and 15 June 2011.[143] Mr Brennan offered to pay for the services; however Mr Thomson advised him he did not wish to be paid, according to Mr Brennan, "due to the benefit he had obtained from the inspections and the assistance I [Mr Brennan] had provided to him at Pony Club events".[144] Mr Brennan proceeded to purchase "three (3) bottles of aged scotch and three (3) bottles of expensive red wine (cost of $400.00) and provided these to Brett Thomson in payment for the services that had been provided".[145]

5.5.71 Mr Brennan explained that from mid-2010 his daughter attended the same pony club as Mr Thomson's wife and daughter. Mr Brennan said that during this period, on occasions, Mr Thomson would contact him and "ask that [he] keep an eye on [Mr Thomson's] wife and daughter at Pony Club events where he was unable to attend".[146]

5.5.72 Mr Brennan considered that the receipt of services from Contour did not put him in a position of actual or perceived conflict of interest. He said:

> *The exchanging of what were essentially personal favours did not compromise or affect my relationship with Contour....I had no personal interest in any of the infrastructure projects with which Contour was associated. I did not have any conflict with the duty I owed to my employer. QRL/RQL encouraged strong relationships between RQL officials and its consultants/contractors, so that consultants and contractors could be called on to provide sponsorship of key events such as the Awards Nights.*[147]

5.5.73 On 16 June 2011 Mr Brennan sought the advice of Integral Construction, a company engaged by RQL, via Contour, for industry infrastructure works, about costs estimates for renovation plans in relation to a house he was considering purchasing. On 21 June 2011 Mr Brennan received a response from an employee at Integral Construction who provided cost estimates for two options and advised:

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141 Deloitte 2013, *Racing Queensland Limited Final Report: Examination of Procurement Processes*, 29 April, pages 2-3.
142 Statement of Mr Brennan, 11 October 2013, page 15.
143 Deloitte 2013, *Racing Queensland Limited Final Report: Examination of Procurement Processes*, 29 April, Appendix D "Emails of Interest", Email #1A and #1B.
144 Statement of Paul Brennan, 11 October 2013, page 15.
145 Statement of Paul Brennan, 11 October 2013, page 15.
146 Statement of Paul Brennan, 11 October 2013, page 19.
147 Statement of Paul Brennan, 11 October 2013, page 16.

Contour will need to look at the existing external walls to determine if there are any load bearing members that will need to be dealt with...The most economical way of doing the work maybe [sic] to engage a 2man carpentry crew and pay them direct on hourly rate. They will also be able to source the material for you. If we are comfortable with the carpentry crew that you run with, you can use our license and buy the materials, insurances etc at cost on our account.[148]

5.5.74 It is clear that the services provided to Mr Brennan and the gift he gave in return, to Contour, were in relation to personal matters not RQL business. Even so, the services were obtained, initially, by virtue of Mr Brennan's position with RQL and corresponding relationship with Contour and Integral Construction. In accordance with the policies' spirit of integrity and concern for public perception, the prudent course would have been for Mr Brennan to declare to Mr Tuttle, as his manager, receipt of these services and the gift he gave to Mr Thomson, and have the matters openly recorded for future review. Failing to do so, particularly in circumstances involving Contour – which, by mid-2011, was in the process of very substantial works for the purpose of the Industry Infrastructure Plan – was always prone to create perceptions of impropriety.

5.5.75 In the course of its inquiries, the Commission was not alerted to any other matters relevant to this sub-Term of Reference.[149]

5.6 Employment contracts and restraint provision

Background

5.6.1 Term of Reference 3(c)(iv) requires the Commission to consider the adequacy of employment contracts in restraining former directors and executives from seeking employment with RQL's preferred contractors and suppliers. Any inquiry as to adequacy must be preceded by an established need. No such need existed in the circumstances mentioned in this Term of Reference. The Commission examined what, if any, restraint provisions existed over RQL directors and executives to respond to this Term of Reference.

RQL's restraint provisions

5.6.2 The term refers to the adequacy of *employment contracts* in restraining both directors and executives. Companies do not appoint directors by contract. Rather, directors consent to act as directors in order to be validly appointed.[150] The directors of RQL, and the company secretary Ms Reid, each signed a *consent to act* in March 2010, prior to the registration of RQL as a company.[151] The consent provided that the directors, "consent[ed] to act as a director of RQL as from the date of the registration of the Company by the Australian Securities and Investments Commission". Ms Reid signed a consent to act as the company secretary.[152]

5.6.3 Companies normally engage their executives and other employees on terms contained in a contract for employment or services. This was the case for RQL. The Commission received the RQL employment contracts for the four executives named in the Terms of Reference, as well as contracts for other key management personnel, and persons who originally had renegotiated contracts approved by the board in May 2011 but which were later rescinded in August 2011.[153]

148 Deloitte 2013, *Racing Queensland Limited Final Report: Examination of Procurement Processes*, 29 April, Appendix D "Emails of Interest", Email #1C.
149 See footnote 162.
150 *Corporations Act 2001*, sections 117(2) and (5), 120, 201D.
151 Robert Bentley, Anthony Hanmer, William Ludwig, Bradley Ryan and Kerry Watson signed consents to act on 12 March 2010, Wayne Milner on 11 March 2010, and Robert Lette on 16 March 2010.
152 Shara Reid also signed an employment contract for her role as senior corporate counsel, discussed in the section immediately below.
153 RQL, Board Meeting Minutes, 5 August 2011, page 5.

The renegotiation of employment contracts of the four named senior executives is the subject of a separate Term of Reference 3(e), addressed in Chapter 7. For the purposes of the Commission's inquiries into Term of Reference 3(c)(iv), it need only be noted that the employment contract provisions relating to the executives' duties after cessation of employment did not change between the original and renegotiated contracts.

5.6.4 None of the RQL employment contracts contained clauses to restrain employees from seeking employment with RQL's preferred contractors and suppliers. The only restraints which survived the period of employment were related to the treatment of confidential information. Each employment agreement contained a section "Confidential Information". The section included express provision that the obligations of the confidential information clause survived the termination of the agreement, and provided, "[y]ou must not, after termination of employment use Confidential Information for a purpose other than for the benefit of RQL".[154]

5.6.5 Confidential information was defined as "the trade secrets and all other information regarding RQL's affairs which become known to you in circumstances where you know, or should know, that the information is to be treated as a confidential".[155] The section also contained a non-exhaustive list of items considered to be confidential information.

5.6.6 The following provisions of the Code of Conduct were relevant to the duties of both executives and directors on termination of employment or appointment:

> ***4.3.1 Conflicts of Interest***
>
> *Former Racing Queensland employees must also continue to respect the provisions of the Code, particularly in relation to confidentiality of information and ownership of intellectual property to which the former Racing Queensland employee had access in the course of work with Racing Queensland.*
>
> *All Racing Queensland officials resigning or retiring to take up business appointments should give consideration to possible conflicts of interest that may arise. Where an offer of appointment could give rise to an actual or apparent conflict of interest, a Racing Queensland official should apply to the CEO or Director Integrity Operations (as appropriate) for assent to take up the proposed employment. If a conflict of interest is identified, the CEO or Director Integrity Operations (as appropriate) may obtain an undertaking from the Racing Queensland Official regarding the use of information gained in the Racing Queensland official's employment with Racing Queensland.*
>
> ***4.3.3 Confidentiality***
>
> *If a Racing Queensland official resigns or leaves Racing Queensland, the official must not disclose confidential information acquired when they acted as an official of Racing Queensland.*
>
> *If a Board member resigns or leaves the Board the member shall have the duty:*
>
> - *Not to disclose confidential information*
> - *To act bona fide in the interests of Racing Queensland.*[156]

5.6.7 Hence there were no provisions in employment contracts or other sources of duties restraining former RQL directors and executives from seeking employment with RQL's preferred contractors and suppliers.

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154 Clause 11.3 in employment contracts for Shara Reid, Malcolm Tuttle, Paul Brennan, Jamie Orchard, Adam Carter, Peter Smith, Mark Snowdon, Colin Truscott; clause 9.3 in employment contracts for Deborah Toohey, Ali Wade, Jaime Knight, Kearra Christensen (all July 2010 versions).

155 See for example: RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 1 July 2010, Clause 22.2.

156 RQL, *Code of Conduct*, 1 July 2010, page 7.

5.6.8 However, the Code of Conduct, compliance with which was an express condition of the executives' employment contracts[157] and binding on all RQL officials including directors, did seek to restrain officers from possible conflicts of interest when resigning or retiring from RQL to take up a new role. Where a new role could give rise to an actual or apparent conflict, officers were obliged to apply to the CEO or director of integrity operations for permission to take up the appointment. The Code provided for the CEO or director to obtain an undertaking from the official regarding the use of information gained in their employment.[158]

5.6.9 The only clear restraint imposed on former directors and executives therefore was the obligation not to disclose or use confidential information gained from their position at RQL. This duty was also imposed on both directors and officers by the Code of Conduct and was an express condition of the executives' employment contracts.

5.6.10 The Commission understands this Term of Reference to have been prompted in particular by the circumstance of Mr Brennan and Mr Tuttle both taking up employment with Contour after ceasing employment with RQL.

5.6.11 Following his resignation from RQL on 26 March 2012 Mr Brennan commenced employment with Contour as chief executive officer on 28 March 2012, two days after his resignation from RQL.[159] Contour was considered, in practical terms, as a preferred supplied to RQL.

5.6.12 Mr Brennan's account of events leading to his employment with Contour is summarised here from his statement to the Commission:[160]

- Ten days prior to his resignation from RQL[161], Mr Brennan was in a meeting with Contour about Mr Russell Thompson leaving Contour to work for RQL as a project manager[162]
- The directors of Contour informed Mr Brennan that they were concerned Mr Thompson's departure at short notice would have a significant impact on the business
- Mr Brennan mentioned that once the election was over, if there was a change of government, he would "more than likely leave RQL or be pushed out by the new board"[163]
- The directors of Contour outlined that Mr Thompson's departure would require the directors to be more "hands-on in the company" and asked whether Mr Brennan would be "interested in assisting Contour in this regard"[164]
- Mr Brennan did not discuss the matter any further with Contour until he met with the directors again on 27 March 2012, the day after his resignation from RQL
- After his resignation Mr Brennan organised to meet with the directors of Contour. This occurred on 27 March 2012 and Contour put forward a proposal, a requirement of which was that Mr Brennan commence "immediately as both Directors had booked holidays for early April 2012, and [he] needed to be briefed on staff and project requirements in their absence"[165]
- Mr Brennan considered Contour's proposal and decided to accept its offer and the condition that he start immediately. He commenced as CEO of Contour on 28 March 2012.

157 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid; Paul Brennan, Malcolm Tuttle, Jamie Orchard*, signed 1 July 2010, Clause 10.4; RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid; Paul Brennan, Malcolm Tuttle, Jamie Orchard*, signed 5 August 2011, Clause 10.4.
158 RQL, *Code of Conduct*, 1 July 2010, page 8.
159 Statement of Paul Brennan, 11 October 2013, pages 19-20.
160 Statement of Paul Brennan, 26 July 2013, page 11 paras 35-37; Statement of Paul Brennan, 11 October 2013, page 19.
161 Mr Brett Thomson says this meeting was on 15 March 2012, see: Statement of Brett Thomson, 5 August 2013, page 2 para 16(e).
162 The Commission received information that a near relation of a director of Contour had obtained employment with RQL. The Commission found nothing to support this rumour. Its origin is likely to have been as a consequence of Mr Russell Thompson's move to RQL in March 2012. He was no relation to Mr Brett Thomson, a director of Contour.
163 Statement of Paul Brennan, 26 July 2013, page 11 para 37.
164 Statement of Paul Brennan, 26 July 2013, page 11 para 37.
165 Statement of Paul Brennan, 11 October 2013, pages 19-20.

5.6.13 Mr Brennan's account of events is supported by Mr Brett Thomson of Contour.[166]

5.6.14 On 28 March 2012 Mr Brennan gave an undertaking to assist RQL, in accordance with the employment contract clause which required reasonable assistance regarding any matter relating directly or indirect to his employment, or which arose out of events which occurred during the period of his employment.[167]

5.6.15 Mr Tuttle also resigned from RQL on 26 March 2012. Unlike Mr Brennan, he did not immediately commence work with Contour. In between leaving RQL and doing so he worked for a human resources consultancy firm. While seeking to promote the firm's services to Contour, Contour offered him a position as director of business development.[168] He commenced with Contour in this role on 15 October 2012. [169]

5.6.16 The absence of a restraint of directors and executives from seeking employment with RQL's preferred contractors and suppliers does not, without more, suggest any error of judgment or policy in the drafting of the terms of engagement. No such restraint was required to satisfy the duties owed to RQL nor to advance the best interests of RQL. Preferred suppliers could not be considered to have been in competition with RQL.

5.7 Conclusions

(i) Did RQL, its directors and officers act with integrity, in accordance with RQL's constitution, in the best interests of the company and the racing industry?

5.7.1 RQL, by the actions of its chairman, supported by the majority of directors, in relation to the removal of Ms Watson as a director, did not act with integrity, in accordance with the company constitution and in the best interests of the company and the racing industry.

5.7.2 By the actions of its chairman, directors and company secretary/corporate counsel, RQL may also be found not to have acted in the best interests of the company in relation to the 2011 directors' and officers' liability insurance and directors' deeds of indemnity. It would be appropriate for ASIC to consider this issue.

5.7.3 There are other examples of a failure by RQL, its directors and officers to act in RQL's best interests, which are set out in other Chapters of the Report:

- The chairman's heavy involvement in executive management functions, particularly those of the CEO, director of product development, and company secretary/corporate counsel
- The actions of four senior executives in seeking, and the board in approving, the serious changes to those executives' employment contracts in 2011 and in approving their payouts in 2012
- The actions of the chairman, the other directors, the CEO and company secretary/corporate counsel in responding to the introduction of race information fees affecting arrangements between RQL, Product Co and the TattsBet.

(ii) Did RQL, its directors and officers act consistently with applicable State and Commonwealth policies and legislation, including the *Racing Act 2002* and the *Corporations Act 2001* (Cth)?

5.7.4 By the actions of its chairman, supported by the majority of directors, in the removal of Ms Watson as a director, RQL did not act consistently with s 34A(2) of the Racing Act.

166 Statement of Brett Thomson, 5 August 2013, page 2 para 16.
167 *RQL, Offer of Employment, Made by Racing Queensland Limited to Shara Reid; Paul Brennan, Malcolm Tuttle, Jamie Orchard*, signed 1 July 2010, Clause 15.9; RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid; Paul Brennan, Malcolm Tuttle, Jamie Orchard*, signed 5 August 2011, Clause 15.9.
168 Statement of Malcolm Tuttle, 26 July 2013, page 12 para 39.
169 Statement of Brett Thomson, 5 August 2013, page 3 para 17.

5.7.5 The chairman, directors, company secretary/corporate counsel and other officers, did not act consistently with their duties under the Corporations Act in matters related to:

- the renegotiation of executive employment contracts
- the TattsBet race information fees issue.

(iii) Were the conflict of interest management policies, rules and procedures adequate and appropriate?

5.7.6 RQL had a comprehensive framework of policies, rules and procedures which ought to have been adequate to manage potential and actual conflicts of interest and to minimise the risks of directors and executives improperly using their position and information obtained for personal or financial gain.

5.7.7 However, the framework was compromised by the duplication of disclosure obligations across internal policies and procedures, and inconsistency in the assignment of oversight responsibilities for implementation and management of the framework.

5.7.8 The framework was not, in substance, adhered to by either directors or executives.

5.7.9 This may be, in part, due to the complications arising from duplication and oversight, but also due to a lack of insight and understanding at all levels, of the meaning and significance of conflict of interests in corporate governance.

(iv) Did employment contracts adequately restrain former officers from employment with RQL's preferred contractors and suppliers?

5.7.10 The conditions of appointment (directors) and employment contracts (executives) for RQL officers did not impose any restraint on those officers from subsequent employment with the company's preferred contractors and suppliers. The obligations imposed by the general law, the company Code of Conduct and the executives' employment contracts were sufficient to protect the interests of the company when and if such events arose.

Chapter 6

Government Oversight – Term of Reference 3(d)

"[W]hether there was sufficient and appropriate oversight by the responsible Minister, executive government and chief executive, including under the provisions of the Racing Act 2002*, for the operations of the relevant entities ..."*

6.1 Introduction

6.1.1 This Term of Reference is very broad. Not every example of oversight will or could possibly be investigated. To do so would mean an impossibly cumbersome Report of little interest and, plainly, not within the intention of the directive "to make full and careful inquiry" into government oversight.

6.1.2 Much of what was done as a matter of routine by the Office of Racing, which was charged with monitoring the racing control bodies, was done well or competently. Nothing has been identified in the Commission's investigations which would suggest that the day to day oversight of the control bodies needed to be further investigated. The response to the equine influenza outbreak in 2007 – an event which was far from routine – earned widespread praise for all concerned. A little will be said later in this Chapter about that event because it does demonstrate that in the integrity and animal welfare aspects of its role, oversight was sufficient and appropriate.

6.1.3 Where the Commission has identified weakness in government oversight of the operations of the relevant entities, attention has been given to those matters. They concern:

- the process whereby Queensland Racing Limited (QRL) sought Ministerial approval for amendments to its constitution
- the amalgamation of the three control bodies into a separate single control body, and the process undertaken to carry it into effect and approve its constitution
- oversight of QRL's and Racing Queensland Limited's (RQL) purchasing policies.

6.2 Some definitions

6.2.1 This Term of Reference asks whether the oversight by the responsible Minister, executive government and chief executive was *sufficient* and *appropriate*. The Oxford and Macquarie Dictionaries define "sufficient" as "enough; adequate" suggesting that the test for "sufficient" is to meet the minimum requirements and not a merit assessment of what may have been done better or what would have been best in the circumstances.

6.2.2 The several definitions of *appropriate* included in the Oxford and Macquarie Dictionaries are "suitable or proper in the circumstances" and "suitable or fitting for a particular purpose, person, occasion etc". They suggest that a value judgment will intrude in measuring the conduct under scrutiny.

6.2.3 It is the *oversight* which is to be evaluated. The Oxford Dictionary describes *oversight* as "the action of overseeing something" while the Macquarie Dictionary proposes "supervision, watchful care".

6.2.4 This Term of Reference envisages that the principal reference point will be the *Racing Act 2002* (Qld) but contemplates, by prefixing the reference to that Act with the expression "including", that other Acts, standards or official policy may have relevance. This may include the Minister's Code of Ethics/Code of Conduct, the *Public Sector Ethics Act 1994* (Qld) and *Public Service Act 2008* (Qld).

6.2.5 Finally, the oversight to be investigated is of the *operations* of the relevant entities. Those entities throughout the relevant period had two principal roles – as regulator to manage the integrity of racing in Queensland and the welfare of animals used in the industry, and a commercial role managing the racing calendars, clubs, venues and revenue. The Racing Act is mainly concerned with integrity in racing and the welfare of animals.[1] When the Racing Industry Capital Development Scheme (RICDS)[2] was being considered and implemented government had a further, non-statutory, role.

1 *Racing Act 2002*, section 4.
2 Discussed in Chapter 9.

6.3 The Ministers

6.3.1 In addition to their portfolio and collective responsibilities to Cabinet, Parliament and ultimately the electorate, the responsible Ministers for racing had and have express powers and responsibilities under the Racing Act.

6.3.2 The relevant period for the Commission's Terms of Reference is from 1 January 2007 to 30 April 2012. However, it is useful to mention two Ministers who held that portfolio immediately prior because key reforms and decisions under their administration form an important part of the background to matters within the relevant period.

Ms Merri Rose

6.3.3 Ms Rose was the Minister for Tourism and Racing from 16 December 1999 to 15 January 2004[3] and the responsible Minister during significant reforms to the racing industry. They followed a Ministerial review of the governance structure of the thoroughbred racing code in Queensland[4]. The most significant change was to remove control of racing in Queensland from the Queensland Principal Club (QPC) and replace it with an independent company limited by guarantee.[5] This was effected in stages, with an Interim Board established in December 2001 followed by the Queensland Thoroughbred Racing Board (QTRB).[6]

6.3.4 The new *Racing Act 2002* (Qld) came into force on 1 July 2003 and repealed the *Racing and Betting Act 1980* (Qld). A key reform was for a control body for a code of racing to be a company incorporated under the *Corporations Act 2001* (Cth) and approved by the Minister. In Ms Rose's second reading speech, some of the stated policy intents of the legislation were:

- to place "greater emphasis on government's role to ensure the probity and integrity of racing" so that "responsibility for the management of the industry rests in the rightful place—with the industry control bodies"
- to ensure that "the accountability for racing to be conducted in a financially viable, safe and responsible manner for the promoters, the participants and the animals is not—and should not be—the responsibility of the government and a cost to taxpayers"
- that the "government will, through this legislation, require standards of integrity and safety to be met in the public interest with as little interference in the daily lives of people as possible".[7]

6.3.5 Transitional provisions allowed the QTRB, the Queensland Harness Racing Board (QHRB) and the Greyhound Racing Authority (GRA) to continue as statutory authorities for up to three years to be able to form companies and apply for control body approval for their respective codes.[8] All three control bodies continued as statutory authorities for the duration of Ms Rose's appointment as the responsible Minister for racing.

Honourable Robert Schwarten

6.3.6 Mr Schwarten was Minister for Public Works, Housing and Racing from 12 February 2004[9] to 13 September 2006.[10] Two Commissions of Inquiry into aspects of the racing industry were undertaken during Mr Schwarten's appointment.[11]

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3 16 January 2004, *Queensland Government Gazette*, No. 10, page 143.
4 Queensland Parliament, *Hansard*, 9 November 2001, page 3718.
5 For a fuller consideration of these changes see Appendix B "A Brief History of Racing in Queensland", page 423 and following.
6 *Racing and Betting Amendment Act (No. 2) 2001*, sections 3A and 3B.
7 Queensland Parliament, *Hansard*, 17 September 2002, pages 3525-6.
8 *Racing Act 2002*, section 370 and Schedules 1 and 3.
9 12 February 2004, *Queensland Government Gazette*, No. 27, page 433.
10 13 September 2006, *Queensland Government Gazette*, No. 14, page 183.
11 Described more fully in Appendix B "A brief history of racing in Queensland".

6.3.7 The *Racing Amendment Act 2005* (Qld) reformed country racing by establishing eight country racing associations[12] and the Queensland Country Racing Committee (QCRC).[13] It imposed a new statutory requirement for the QTRB to allocate seven per cent per annum of its share of the net TattsBet Limited (TattsBet) product fee to non-TABQ clubs as prize money.[14]

6.3.8 On 22 December 2005, Mr Schwarten approved QRL, effective from 1 July 2006, as the first company limited by guarantee to be a control body in Queensland for the thoroughbred code. Under the constitution of QRL, approved by the Minister, the existing members of the QTRB were given "further" three year initial terms to 2009 as directors of the company. An important condition of that approval was for QRL to obtain the ratification of the Minister before implementing any amendment to its constitution.

6.3.9 On 1 July 2006, the *Racing Amendment Act 2006* (Qld) facilitated the transfer of assets, liabilities, responsibilities and employees from the former QTRB to QRL as the thoroughbred control body. The Act extended to 30 June 2008 the time for the greyhound and harness authorities to transition to the company model.

6.3.10 On 19 October 2004, Premier Beattie announced $12 million "to provide better and safer access from Nudgee Road" linking Eagle Farm and Doomben racecourses, "improving public safety and animal welfare" as part of investigations into the proposed Brisbane Super Track Project.[15]

Mr Andrew Fraser

6.3.11 Mr Fraser was the first Minister during the relevant period, being the Minister responsible for racing from 13 September 2006 to 26 March 2009. Mr Fraser held the racing portfolio first as Minister for Local Government, Planning and Sport and then as Treasurer. The racing portfolio was administered through the Department of Local Government, Planning, Sport and Recreation (DLGPSR) and the Department of Treasury (Treasury) respectively.

6.3.12 Mr Fraser's Ministerial titles did not include the term "racing" whilst holding the racing portfolio. He said this was a deliberate decision by government to "send a clear message that racing was an area that was to be led by industry rather than government".[16]

6.3.13 Some key events during Mr Fraser's appointment as the responsible Minister for racing or as Treasurer include:

- the approval of funding for synthetic racing tracks in June 2007
- Ministerial approval on 19 February 2008 of Greyhounds Queensland Limited (GQL) and Queensland Harness Racing Limited (QHRL) as company control bodies for their codes of racing facilitated by the *Racing Amendment Act 2008* (Qld)
- QRL's application in August 2008 for the Minister to ratify proposed amendments to its constitution and investigations into complaints about the pre-application process
- the introduction of "race fields legislation" in the *Revenue and Other Legislation Amendment Act (No. 2) 2008* (Qld)
- As Treasurer he considered RQL's business cases and authorised payments to RQL in February and March 2012 under the RICDS.

12 *Racing Amendment Act 2005*, section 5.
13 *Racing Amendment Act 2005*, section 12.
14 *Racing Amendment Act 2005*, section 16.
15 P Beattie, "Doomben And Eagle Farm To Combine For Super Track Project", *Ministerial Media Release*, 19 October 2004 at http://statements.qld.gov.au/Statement/2004/10/19/doomben-and-eagle-farm-to-combine-for-super-track-project, viewed 19/11/13.
16 Statement of Andrew Fraser, 5 August 2013, page 9 para 22.

Mr Peter Lawlor

6.3.14 Mr Lawlor was the responsible Minister for racing from 26 March 2009 to 21 February 2011 as Minister for Tourism and Fair Trading administered through the Department of Employment, Economic Development and Innovation (DEEDI).

6.3.15 Key events during Mr Lawlor's appointment as the responsible Minister include:

- the submission to government by Mr Robert Bentley of the *Queensland Racing Industry Issues Paper* in May 2009 seeking government funding for infrastructure
- Cabinet Budget Review Committee (CBRC) approval to establish the RICDS in November 2009
- the *Racing and Other Legislation Amendment Act 2010* (Qld) which amalgamated the control bodies of the three codes, appointed as the single control body RQL and abolished the QCRC
- Ministerial approval of the constitution for RQL
- release of RQL's draft Industry Infrastructure Plan (IIP) to be funded by the RICDS.

Honourable Timothy Mulherin MP

6.3.16 Mr Mulherin was the responsible Minister for racing from 21 February 2011 to the change of government on 26 March 2012. His racing responsibilities were administered through DEEDI.

6.3.17 Key events during Mr Mulherin's appointment as the responsible Minister include:

- CBRC endorsement of RQL's amended IIP in July 2011
- Minister's endorsement of RQL's further amended IIP in January 2012
- assessment of RQL's business cases to support payments to RQL in February and March 2012 under the RICDS.

Honourable Jeffrey Seeney MP

6.3.18 The Deputy Premier was the responsible Minister for racing during a brief transitional government from 26 March 2012 to 3 April 2012. Key events during this time include:

- resignations of Mr Malcolm Tuttle, Mr Jamie Orchard, Mr Paul Brennan and Ms Shara Reid as senior executives of RQL on 26 March 2012
- Ministerial notice of 28 March 2012 made under section 45 of the Racing Act directing RQL to review its policy for employment of non-licensed staff so as to require chief executive approval to terminate the employment of any staff, employ any new staff or make redundancy/termination payments to any staff
- Ministerial invitation of 28 March 2012 made to RQL to amend its control body approval conditions including to require chief executive approval for payments and contracts of $20,000 or over
- a Ministerial request of 27 March 2012 made under section 60 of the Racing Act for the Auditor-General to undertake an audit of RQL
- Ministerial approval of 30 March 2012 of the control body assessment program for 2012 under section 46 of the Racing Act.

Honourable Steven Dickson MP

6.3.19 The present Minister for National Parks, Recreation, Sport and Racing was appointed on 3 April 2012. Key events within the relevant period (to 30 April 2012) include:

- appointment of Mr Kevin Dixon on 17 April 2012 to the board of RQL, as nominated by the chief executive of the Department of National Parks, Recreation, Sport and Racing (NPRSR)
- the resignations of Mr Bentley, Mr Anthony Hanmer and Mr William Ludwig from the board of RQL on 17 April 2012 effective 30 April 2012.

Premier

6.3.20 The Premier administers portfolio responsibilities through the Department of the Premier and Cabinet (DPC). Key roles of the Premier relevant to this Inquiry include:

- presiding at Cabinet meetings[17] and coordinating government policy
- chair of CBRC, which has the primary role of considering matters with financial or budgetary implications for the government[18]
- responsibility for adherence to the caretaker conventions and practices.[19]

6.3.21 During the relevant period, the Premiers were Mr Peter Beattie from 26 June 1998 to 13 September 2007 and Ms Anna Bligh from 13 September 2007 to 26 March 2012.

6.3.22 The directors-general of DPC during the relevant period were Mr Ross Rolfe from 2005 to 6 July 2007[20], Mr Ken Smith from 14 September 2007 to 2 July 2011[21], Mr John Bradley to 25 March 2012[22] and Mr John Grayson from 26 March 2012 to present.

Treasurer

6.3.23 The Treasurer administers portfolio responsibilities through Treasury. Key roles of the Treasurer relevant to this Inquiry include:

- standing member of the CBRC[23]
- state budget and state taxation administration and policy[24]
- authorising funding allocations to RQL from the RICDS from November 2009.

6.3.24 Ms Bligh was Treasurer from 13 September 2006 until her appointment as Premier on 13 September 2007. A key decision during this time relevant to the Terms of Reference was the CBRC approval in June 2007 of a grant of $12 million to assist in laying three synthetic tracks in drought afflicted southeast Queensland.

6.3.25 Mr Fraser was Treasurer from 13 September 2007 to 26 March 2012. Mr Fraser administered both the racing and Treasury portfolios from 13 September 2007 to 26 March 2009. Key events during the relevant period relating to Mr Fraser's administration of the Treasury portfolio included:

- CBRC approval in November 2009 to establish the RICDS
- consideration of RQL's business cases to support payments made to RQL under that scheme.

17 *Queensland Cabinet Handbook*, part 1.2.
18 *Queensland Cabinet Handbook*, part 3.1.1.
19 *Queensland Cabinet Handbook*, part 9.1.
20 P Beattie, "Premier Thanks Ross Rolfe For Significant Contribution To Qld", *Ministerial Media Statements*, 27 April 2007.
21 Statement of Ken Smith, 5 September 2013, page 2 para 7.
22 A Bligh, "New Director General announced for Department of Premier and Cabinet", *Ministerial Media Statements*, 18 May 2011.
23 Part 3.1.1 of the *Queensland Cabinet Handbook*.
24 *Administrative Arrangements Order (No. 2) 2007*, 13 September 2007.

6.4 The Public Service

The role of departments, chief executives and the public service

6.4.1 Departments are part of the executive arm of government. They are the principal entities through which government administers and implements legislation and policies, delivers public services and conducts the business of government. The senior and accountable officer for a department is its chief executive, usually titled the "director-general" or, for Treasury, the "under treasurer".

6.4.2 Chief executives are responsible for the employment of public service employees of their department.[25] Express statutory responsibilities of chief executives in relation to their departments include:[26]

- establishing and implementing goals and objectives in accordance with government policies and priorities
- managing the department in a way that promotes the effective, efficient and appropriate management of public resources
- designation of roles for departmental public service employees
- adopting management practices that are responsive to government policies and priorities
- promoting continual evaluation and improvement of the appropriateness, effectiveness and efficiency of departmental management
- being subject to the directions of the departmental minister in managing the department (except in relation to individuals and subject to other Acts)[27]
- taking disciplinary action against public service employees[28]
- ensuring public service employees have access to the public service ethics principles and values and the codes of conduct.[29]

6.4.3 The chief executive for racing is the chief executive of the department administering the racing portfolio for the racing Minister, including administering the *Racing Venues Development Act 1982* (Qld), *Eagle Farm Racecourse Act 1998* (Qld) and Racing Act. References in those Acts to the chief executive are references to the chief executive of those departments.

6.4.4 The chief executives, in addition to their residual powers and duties, have express statutory powers and duties under the Racing Act. Those powers and duties are discussed later in this Chapter.

6.4.5 The chief executives during the relevant period are set out below.

Chief executives

6.4.6 Mr Michael Kinnane was the director-general, or chief executive, of DLGPSR administering the racing portfolio from 2006 to 13 September 2007 when responsibility transferred to Treasury.

6.4.7 Mr Gerard Bradley was the under treasurer of Treasury for the relevant period. From 13 September 2007 to 26 March 2009, the racing portfolio was administered by Treasury which meant that Mr Bradley was the chief executive under the Racing Act for this period.

25 *Public Service Act 2008*, reprint No. 2, section 11(1).
26 *Public Service Act 2008*, reprint No. 2, section 98.
27 *Public Service Act 2008*, reprint No. 2, section 100.
28 *Public Service Act 2008*, reprint No. 2, chapter 6.
29 *Public Sector Ethics Act 1994*, reprint No. 6, s. 12I, 12J, 19 and 20.

6.4.8 Mr Peter Henneken was director-general of DEEDI and chief executive under the Racing Act from 26 March 2009 to November 2009. DEEDI administered the racing portfolio and many other much larger portfolios. Mr Henneken reported to four Ministers.

6.4.9 Mr Ian Fletcher was the director-general of DEEDI from November 2009 to April 2012. He was chief executive under the Racing Act during this period.

6.4.10 Dr John Glaister is the present director-general of DNPSR. He was appointed in April 2012 and is the chief executive under the Racing Act.

DPC and Treasury

6.4.11 Departments administering and delivering particular portfolio responsibilities, such as racing, may be referred to in government as "line agencies". In contrast, departments administering whole of government policy functions may be referred to as "central agencies".[30] The two key central agencies relevant to the Commission's Terms of Reference are DPC and Treasury.

6.4.12 DPC has a number of functions relating to its role in providing support to the Premier and Cabinet and as a central agency. A key central agency role of DPC relevant to the Commission's Terms of Reference is set out in the current *Queensland Cabinet Handbook*:

> ***2.3 Policy Division***
>
> *The role of the Policy Division, Department of the Premier and Cabinet is to support the Premier and Cabinet in the provision of coordinated policy advice on matters to be considered by Cabinet.*
>
> *The functions of the Policy Division include:*
>
> - ***consulting with government departments on the policy content** and coordination implications of proposed Cabinet submissions **prior to their formal consideration** by Cabinet and to advise the Premier accordingly;*
> - ***providing advice to the Premier on submissions** formally to be considered by Cabinet once these submissions have been included on the Cabinet agenda;*
> - *monitoring and analysing the implementation of Cabinet decisions; and*
> - *providing advice to the Premier, and through the Premier to Cabinet, on the governments' forward policy agenda (in consultation with relevant departments and other bodies) and the strategic implications of this agenda for the whole of government.*
>
> *In respect of the policy development and coordination role, it is the responsibility of the Director-General of the Department of the Premier and Cabinet to advise the Premier, and through the Premier, the Cabinet, on the coordination of the policy development and implementation program of the government.*
>
> *Departmental officials should consult with the Policy Division as early as possible in the development of proposed Cabinet submissions.*
>
> *An **important feature of the Policy Division's role is to ensure the contestability of policy advice made available to the Premier and to Cabinet**, so that the best possible information is available to Ministers in making decisions. Departmental officials should therefore consult with their Portfolio Contact Officer in Policy Division as early as possible in the development of proposed Cabinet submissions.*
>
> (emphasis added)

30 Statement of Carol Perrett, 30 October 2013, page 11 para 35.

6.4.13 The policy division of DPC provided consultation feedback to the Office of Racing on a number of draft Cabinet and CBRC submissions, including the draft submissions on:

- the establishment of the RICDS in 2009 and its extension in 2011
- Authority To Prepare a Bill and Authority to Introduce a Bill submissions of 2010 to amalgamate the control bodies, including the draft constitution of RQL.

6.4.14 Consultation feedback is intended to give line agencies, including the Office of Racing within the department, the opportunity to amend a draft submission in response, including by:

- further explaining policy positions in light of, or rebutting, concerns that may have been raised by other agencies
- remedying deficiencies
- improving the policy proposals
- providing further supporting information.

6.4.15 The policy division of DPC also provides the Premier with Cabinet in Confidence briefing notes[31] commenting on submissions for the Premier's use in Cabinet and CBRC deliberations.

6.4.16 This process is to ensure the contestability of policy advice provided to the Premier, Cabinet and CBRC.[32]

6.4.17 During the relevant period, Treasury was both a line agency, including for liquor, gaming and racing (ending in March 2009) and a central agency for whole of government fiscal and budgetary policy.

6.4.18 Similar to the policy division of DPC, Treasury officers provided consultation feedback to the Office of Racing on the draft Cabinet and CBRC submissions, including the draft submissions on the establishment of the RICDS in 2009 and its extension in 2011.

6.4.19 Treasury also had a role in implementing the CBRC decisions of 2009 and 2011 to establish and extend the RICDS. A key role of Treasury officials was to brief the Treasurer about the release of RICDS funds to RQL if supporting business cases from RQL were acceptable to Treasury.

The Office of Racing

6.4.20 The Office of Racing is the business area that administers the racing portfolio for government. The Office of Racing has been subject to numerous machinery of government changes. During the relevant period, the Office of Racing has been located within four departments:

- DLGPSR from 2006 to 13 September 2007
- Treasury from 13 September 2007 to 26 March 2009
- DEEDI from 26 March 2009 to 3 April 2012
- NPRSR from 3 April 2012 to present.

6.4.21 On 1 July 2008, Treasury's liquor, gaming and racing functions were integrated to form the Office of Liquor, Gaming and Racing. Less than nine months later on 26 March 2009, these functions were transferred to the new "super" department, DEEDI, and renamed the Office of Liquor and Gaming and the Office of Racing.[33] On 1 March 2011, the liquor, gaming and fair trading functions were transferred to the Department of Justice and the Attorney-General (JAG) with the Office of Racing remaining in DEEDI.[34]

31 The content of final Cabinet In Confidence briefing notes are not generally disclosed to other agencies.
32 *Queensland Cabinet Handbook*, 2.3 Policy Division.
33 Queensland Treasury, *Annual Report 2008–09*, Queensland Government, page 5.
34 *Department of Employment, Economic Development and Innovation Annual Report 2010–2011*, page 79.

6.4.22 Integration of the racing, liquor and gaming functions was never fully realised and tested before being restructured again to form a discrete Office of Racing.

6.4.23 The Office of Racing is comprised of two units, the Racing Science Centre (RSC)[35] and the Office of Racing Regulation. During the relevant period it was a small unit with an executive director, Mr Michael Kelly, a director of investigations and compliance, Ms Carol Perrett, and about six other staff including a veterinarian.

6.4.24 Section 40 of the Racing Act requires a control body to engage an independent and accredited facility for "integrated scientific and professional services". The RSC "provides a suite of independent analytical and scientific services as well as professional and integrity services to the Queensland racing industry...".[36] It is a quality assured accredited facility, funded in full by the racing industry. In 2012-13, the RSC analysed 16,733[37] samples from across all three codes of racing.

6.4.25 The RSC was established in 1987, when responsibility for integrity was transferred from the Queensland Turf Club (QTC) to the Queensland government. The transfer occurred because of perceived deficiencies in the way in which industry was providing scientific services arising primarily from the 1985 "caffeine crisis".[38]

6.4.26 In the other States and Territories across Australia analytical and scientific services are provided to the racing industry through a range of service delivery models including government owned corporations, statutory bodies, and companies.

6.4.27 During the relevant period the Office of Racing Regulation performed a number of functions, including:

- provision of advice on racing issues to the chief executive and Minister
- preparation of Ministerial briefs and correspondence
- preparation of Parliamentary and estimates briefs
- preparation of Cabinet submissions and briefs
- all work associated with developing amendments to racing legislation
- assessment of control body applications
- performance of legislative responsibilities under the Racing Act
- liaising and supporting the Racing Animal Welfare and Integrity Board
- monitoring and liaising with the control bodies
- receiving the annual audit program from the control bodies
- administering funding schemes, including the RICDS and Training Track Subsidy Scheme.[39]

6.4.28 Ms Perrett has described how those functions were undertaken in her statement to the Commission.[40] It was, plainly, a considerable load for a small unit. The Office of Racing also needed to be responsive to numerous concerns from industry participants.

6.4.29 The Racing Act, as is common practice in modern legislation, authorises the minister and chief executive to delegate statutory powers to appropriately qualified persons within the administering department.[41] Permitting statutory powers to be exercisable by departmental

35 See Chapter 10 for a recommendation about the Racing Science Centre.
36 Department of National Parks, Recreation, Sport and Racing, *2012-13 Annual Report*, Queensland Government, page 27.
37 Department of National Parks, Recreation, Sport and Racing, *2012-13 Annual Report*, Queensland Government, page 27.
38 During the caffeine crisis numerous horses were returning a positive test result for the presence of caffeine. Investigation revealed that the sticks used for testing were impregnated with caffeine.
39 Statement of Carol Perrett, 2 August 2013, page 1 para 4.
40 Statement of Carol Perrett, 30 October 2013, pages 3-6 para 10-12.
41 *Racing Act 2002*, section 354(2).

officials has long being recognised as a necessity in modern government.[42] The *Acts Interpretation Act 1954* (Qld) legislatively recognises that the "delegation of a function or power does not relieve" the minister or chief executive of their "obligation to ensure that the function or power is properly performed or exercised".[43]

6.4.30 The delegation of statutory powers and functions should not to be confused with the core role of public service officers within departmental business units to administer portfolio responsibilities, including legislation. Where a statutory power administered by a departmental business unit is required to be exercised and no delegation is held, it is the role of officers in that business unit to brief upwards to an appropriately authorised decision-maker. An appropriately authorised decision-maker may be a senior executive holding a delegation (for example a deputy director-general or director-general) or to the holder of the original power under the Act (either the minister or the chief executive as the case may be).

6.4.31 During the relevant period the Racing Act expressly placed in the chief executive many of the government's administrative and regulatory powers. The minister was made responsible for key decisions including approving audit plans to monitor a control body, disciplining a control body and approving a control body for a code of racing.

6.4.32 Given the many responsibilities of the minister and chief executive, administration of the racing portfolio was and is undertaken by particular public service officers within the Office of Racing.

6.4.33 The various chief executives of departments administering racing over the relevant period have expressly delegated some of their statutory powers to other office holders within their departments, principally to the deputy director-general administering racing (or equivalent deputy under treasurer) and the executive director of the Office of Racing. It was the function of the Office of Racing[44] generally to administer the racing portfolio including the Racing Act, whether delegated or not, by providing briefings to ministers and directors-general with suitable advice and recommendations as required.

The Code of Conduct, the Public Sector Ethics Act and the Public Service Act

6.4.34 The Code of Conduct for the Queensland Public Service (the Code) applies to all employees of all Queensland public service agencies at all times when employees are performing official duties. The purpose of this collection of principles is to promote ethical behaviour, which is understood to be an essential part of maintaining integrity in the public sector.

6.4.35 The foundations of the Code are in the provisions of the Public Sector Ethics Act, specifically Part 3, Division 2 entitled the "ethics values".

6.4.36 Section 6 of the Public Sector Ethics Act provides for "integrity and impartiality". The standards of conduct which facilitate adherence to this principle are a commitment to the highest ethical standards, the successful management of conflicts of interest, contributions to public discussion in an appropriate manner, active participation in external organisations and the demonstration of a high standard of workplace behaviour and personal conduct.

6.4.37 Section 7 concerns the principle of "promoting the public good". The standards of conduct which demonstrate observance of this principle are a commitment to excellence in service delivery, ensuring appropriate community engagement and working as an integrated service.

42 *Carltona Ltd v Commissioners of Works and Others* [1943] 2 All ER 560 per Lord Greene MR at 563.
43 *Acts Interpretation Act 1954*, section 27A(10A).
44 The term "Office of Racing" is used throughout this Report and for simplicity often includes periods where the office formed part of the larger Office of Liquor, Gaming and Racing given the racing function continued to be managed by an executive director for racing.

6.4.38 Section 8 concerns "commitment to the system of government". The standards of conduct which show respect for the system of government are a commitment to the role of the public service, maintaining appropriate relationships with ministerial staff and ensuring proper communication with members of Parliament.

6.4.39 The final principle is in section 9 and concerns "accountability and transparency". Employees of the Queensland public service demonstrate this principle by ensuring diligence in public administration, transparency in all business dealings, that official resources are used appropriately, ensuring official information is both used and disclosed properly and by maintaining a commitment to innovation and continuous improvements in performance.

6.4.40 The Public Sector Ethics Act, like the Code, applies to all public officials of all public sector entities, including public service departments, agencies and offices. Section 12H of the Public Sector Ethics Act states that a "public official of a public service agency must comply with the code of conduct for public service agencies and any standard of practice that applies to the official".

6.4.41 The main purposes of the Public Service Act are, among other things, to establish a high performing apolitical public service, to promote the effectiveness and efficiency of government entities and to provide for the administration of public service and the employment and management of public service employees.

6.4.42 Section 26 of the Public Service Act concerns work performance and the principles of personal conduct. Subsections (l) and (m) state that as public service employment involves a public trust, a public service employee's work performance and personal conduct must be directed, relevantly, towards "observing the ethics principles under the *Public Sector Ethics Act 1994*" and "complying with an approved code of conduct and any approved standard of practice as required under the *Public Sector Ethics Act 1994*".

6.5 Monitoring the control bodies under the Racing Act

Purpose of the Act

6.5.1 The supervisory role and attendant power of the minister, the executive government and chief executive derive largely from the Racing Act.

6.5.2 The goal of the legislative reform process leading to the Racing Act was to remove government from the day to day operations of the racing industry. Its role was to be redefined as focusing on issues of strategic probity and integrity within the regulated codes of racing by ensuring that control bodies properly discharged the regulatory functions imposed on them under the Act and subordinate legislation.[45]

6.5.3 The main purposes of the Racing Act at its commencement were to maintain public confidence in the racing of animals in Queensland for which betting was lawful, to ensure the integrity of all persons involved with racing or betting under the Act and to safeguard the welfare of all animals involved in racing under the Act.[46] These purposes were to be achieved by providing:

a) *the process for approving a suitable applicant as the control body to manage a code of racing;*

b) *the approval of a suitable applicant as the control body to manage a code of racing;*

45 Explanatory Notes, Racing Amendment Bill 2008, 11 March 2008, page 2.

46 A New Management Framework for the Queensland Racing Industry: The Racing Bill 2002 (Qld), Queensland Parliamentary Library, October 2002, page 1.

c) *the performance by each control body of its function under the Act of managing its code of racing;*

d) *controls relating to the welfare of animals involved in racing, including the control of drugs;*

e) *for the establishment the Racing Animal Welfare and Integrity Board and the accreditation of entities in relation to drug testing and related matters;*

f) *for the establishment of the Racing Appeals Tribunal to hear and decide appeals against some decisions under the Act;*

g) *who may carry on bookmaking, including a process for obtaining an eligibility certificate from the gaming executive before a person may be licensed by a control body as a racing bookmaker who may carry on bookmaking at a licensed venue when it is under the control of that control body;*

h) *for the investigation of matters, and enforcement of compliance with the Act by authorised officers, offences and legal proceedings generally;*

i) *offences and legal proceedings generally; and*

j) *how matters under the repealed Racing and Betting Act 1980 would continue to be dealt with under the new Racing Act.* [47]

Control bodies

6.5.4 The Racing Act has very detailed provisions about the way in which a company may be approved as a control body for a code of racing with responsibility for managing the code. That responsibility includes animals, clubs, participants and venues.[48] It also provides for the relationships among the minister, the chief executive and the control body in respect of the particular code of racing.[49]

Appointment of companies as control bodies

6.5.5 To understand the background to the appointment of RQL as the control body for the three codes of racing in 2010, so far as is relevant to this Term of Reference, it is necessary briefly to comment on QRL's appointment and the appointment of GQL and QHRL as the control bodies for thoroughbred, greyhound and harness racing.

6.5.6 On 22 December 2005, the Minister issued a control body approval notice under section 26 of the Racing Act to QRL[50] subject to certain conditions:

a) QRL was to consult about its draft constitution with the proposed members of the company

b) by 1 March 2006, QRL was required to provide a report to the Minister on the results of that consultation

c) by 30 April 2006, QRL was required to adopt the draft constitution with changes (if any) approved by the Minister

d) QRL was required to obtain the Minister's written approval before implementing any amendment to the company's constitution.

47 *Racing Act 2002*, section 4.
48 *Racing Act 2002*, Chapter 2.
49 *Racing Act 2002*, section 7(1)(b).
50 Letter from Robert Schwarten to Queensland Racing Limited, 22 December 2005.

6.5.7 On 1 July 2006, QRL became the control body for the thoroughbred code of racing in Queensland.

6.5.8 The GRA informed the Office of Racing that it had commenced the process to establish a company limited by guarantee for the greyhound code in early 2007. The Office of Racing was involved in assisting the GRA and prepared briefing notes for the Treasurer (as Minister responsible for Racing).

6.5.9 The Australian Securities and Investments Commission (ASIC) issued a Certificate of Registration of a Company for GQL on 18 October.[51]

6.5.10 On 11 November 2007, QRL informed the Office of Racing that on 2 November 2007 the board of QRL had resolved to apply for a control body licence for the greyhound code of racing.[52] The Office of Racing drafted a response (which may not have been sent) stating that the closing date for official objections was 16 November 2007 and that in accordance with sections 15 and 16 of the Racing Act, the objector must lodge the objector's own approval application within 28 days of the closure date.[53] There is no evidence to suggest QRL ever lodged its own approval application to be the control body for greyhounds.

6.5.11 Pursuant to section 26 of the Racing Act, the Minister published the approval notice that GQL was the control body for the greyhound code in the Queensland Government Gazette on 20 March 2008.[54] On the commencement date of the Racing Amendment Act 2008, 1 July 2008, GQL commenced as the control body.

6.5.12 On 7 February 2007, the Office of Racing requested the QHRB to submit a plan for the formation of a company limited by guarantee to manage its code of racing. [55]

6.5.13 Pursuant to section 26 the Minister published the approval notice appointing QHRL as the control body for the harness code in the Queensland Government Gazette on 20 March 2008.[56] On 1 July 2008, the commencement date of the Racing Amendment Act 2008, its appointment commenced.

6.5.14 As will be seen, issues arose in the process for the amalgamation of the three codes and appointment of RQL as the control body. Importantly, a lack of consultation with industry stakeholders and changes to the members of the control body appear to have excluded industry participation. Those issues are discussed further below.

Control body reporting obligations

6.5.15 The Racing Act imposes a number of obligations on a control body about how it should function. For example, a control body is required to have internal controls to separate its commercial operations from its regulatory operations[57] and certain mandatory policies are prescribed.[58] Through these provisions, the Racing Act establishes the obligations of a control body in performing its functions.

6.5.16 There are other provisions that establish reporting requirements for government oversight. As the Racing Act is the main source of oversight for racing, each of these provisions has been examined by the Commission to consider if, over the relevant period, that oversight was sufficient and appropriate.

51 Email from Emmanuel Pappas to Darren Beavis and Carol Perrett, 18 October 2007.
52 Email from Anthony Hanmer to Carol Perrett, 11 November 2007, 1.57pm.
53 Draft email from Carol Perrett to Anthony Hanmer, undated.
54 Queensland Government Gazette No. 73, 20 March 2008, page 1595.
55 Letter from Michael Kelly to Andrew Kelly, 7 February 2007.
56 Queensland Government Gazette No. 73, 20 March 2008, page 1595.
57 *Racing Act 2002*, section 37.
58 *Racing Act 2002*, section 81.

Section 39 – Annual programs

6.5.17 Section 39(1) provides that by 31 December each year, a control body must give to the chief executive (at all relevant times delegated to Mr Kelly) "a copy of its program, for the following year, to audit periodically the suitability of every licensed animal, club, participant and venue to continue to be licensed". Section 39(2) requires the control body to implement the program during the year for which it has been prepared.

6.5.18 To satisfy section 39(1), a control body must submit a Form 9, or Annual Audit Program, which confirms that the documents attached constitute the entirety of the audit program for all licensed animals, clubs, participants and venues regulated by the control body; that the program has been approved by all the directors of the control body; that the control body undertakes to abide by the attached audit program; and that the chief executive will be advised of any variations or non-compliance with the audit program during the year.

6.5.19 During the course of its investigations the Commission obtained copies of the annual audit programs submitted by all codes of racing during the relevant period. A survey of these programs revealed:

DUE DATE	SUBMITTED DATE	AUDIT PROGRAM	WITHIN TIME?	FORM 9?
31 December 2006	20 December 2006	QRL for 2007 (submitted by Andrew Hedges)	YES	NO
31 December 2006	31 January 2007	QHRB for 2007 (submitted by Andrew Kelly)	NO	YES
31 December 2006	2 March 2007	GRA for 2007 (submitted by Darren Beavis)	NO	YES
31 December 2007	27 December 2007	QRL for 2008 (submitted by Andrew Hedges)	YES	NO
31 December 2007	8 January 2008	GRA for 2008 (submitted by Darren Beavis)	NO	YES
31 December 2007	26 March 2008	QHRB for 2008 (submitted by Tracey Harris)	NO	NO
31 December 2008	5 December 2008	QRL for 2009 (submitted by Jamie Orchard)	YES	YES
31 December 2008	30 December 2008	GQL for 2009 (submitted by Darren Beavis)	YES	YES
NO QHRL AUDIT PLAN FOR 2009				
NO AUDIT PLAN FOR ANY CONTROL BODY FOR 2010				
31 December 2010	7 February 2011	RQL for 2011 (submitted by Jamie Orchard)	NO	NO
31 December 2011	25 January 2012	RQL for 2012 (submitted by Jamie Orchard)	NO	NO

6.5.20 Mr Kelly said in his supplementary statement to the Commission that "[e]ach year the control body program required to be provided was received and reviewed".[59] However, strict compliance with section 39 throughout the relevant period occurred only twice out of a possible 12 instances, and in one of those two cases the program to audit the suitability of every licensed animal, club, participant and venue for an entire year was only one page in length.

6.5.21 Ms Carol Perrett said in her supplementary statement to the Commission that "[w]hile the control bodies did not submit all audit plans by the due date, the Office of Racing did send letters to the control bodies reminding them of their obligations".[60] Despite these efforts the control bodies required such reminders year after year. The letters do not mention the other shortcomings of the submissions.

6.5.22 Whilst the Office of Racing could perhaps have pressed the control bodies for better compliance, it is difficult to say that the section 39 oversight function was not sufficiently and appropriately carried out.

Section 41 – Annual Report and eligibility

6.5.23 Pursuant to section 41(1), within 14 days after each anniversary day of the commencement of section 41, a control body must provide to the chief executive a plan for managing its code of racing for a period of at least one year starting on that anniversary day.

6.5.24 Section 41(2) also provided that, within 14 days after each anniversary day of a control body's approval day, the control body must give to the chief executive a notice about whether the control body has been an eligible corporation for the year before the anniversary day and is, on that anniversary day, an eligible corporation.

6.5.25 Those notices must be in the approved form (Form 10) and confirm that the:

a) control body has been an eligible corporation (as defined by section 8) at all times during the past 12 months

b) control body has a plan for managing its code of racing for at least one year

c) directors of the control body have approved that plan

d) control body intends to comply with the attached plan for managing its code of racing and will advise the chief executive of any non-compliance or proposed variation from that plan.

6.5.26 Mr Kelly said in his supplementary statement to the Commission that "[e]ach year the relevant control bodies provided their annual plan for managing their code of racing. The Office of Racing Regulation ensured that these plans were provided in accordance with the requirements of the Act".[61] However, strict compliance with section 41 never occurred throughout the relevant period.

6.5.27 An acceptable submission addressing all of the requirements of section 41 would:

a) contain a completed Form 10

b) attach evidence that it was an eligible corporation, such as an ASIC Historical Extract

c) attach a business plan (for at least one financial year)

d) attach a copy of the board minutes demonstrating that the directors of that control body had approved the business plan

e) be made within time.

59 Statement of Michael Kelly, 27 September 2013, pages 17-18 para 38.
60 Statement of Carol Perrett, 30 October 2013, page 7 para 14.
61 Statement of Michael Kelly, 27 September 2013, page 18 para 38.

6.5.28 The evidence produced to the Commission suggests that the submissions lodged by the control bodies during the relevant period generally failed to meet all of these requirements or did so in a very cursory fashion.

6.5.29 Ms Perrett said in her supplementary statement to the Commission that "[w]hile the control bodies did not submit all notices by 15 July each year as required by section 41, the Office of Racing did send letters to the control bodies reminding them of their obligation".[62] Similarly to the section 39 requirements, the control bodies required prompting every year and the Office of Racing's letters did not raise other shortcomings.

6.5.30 There is no evidence to suggest the Office of Racing did any analysis or review of the annual reports or that any control body ever advised the chief executive of non-compliance or proposed variation from a control body's annual plan for managing its code.

6.5.31 Compliance with section 41 was important as, after the initial approval of a control body, it ensured that the control body remained an eligible corporation or had a plan for managing its code of racing. The lawyers for Mr Kelly and Ms Perrett submited that the non-compliance was, largely, trivial. There is force in that submission as many of the defects in the submissions are minor or procedural in nature.

6.5.32 In the circumstances, whilst the Office of Racing could have pressed the control bodies for better compliance, it is difficult to say that the section 41 oversight function was not sufficiently and appropriately carried out.

Section 42 – Notice about change of executive officers

6.5.33 Section 42 provided:

> *if the chief executive of a control body resigns, or the executive officer's appointment or employment otherwise ends, the control body must give notice about the resignation, or the end of the appointment or employment, to the chief executive.*

6.5.34 The notice must be in the approved form and lodged within 14 days of the end of the person's appointment.

6.5.35 Section 42 also required a control body to give notice of the appointment or employment of an executive officer to the chief executive. Such notice must be accompanied by a consent signed by the person for the person's background to be investigated for the chief executive.

6.5.36 An "executive officer" is a person who is concerned with, or takes part in, the company's management, whether or not the person is a director or the person's position is given the name of executive officer, including all committee and board positions.[63]

6.5.37 As an example, Mr Bentley advised Mr Kelly on 26 March 2012 that Mr Tuttle, Mr Orchard and Mr Brennan, and Ms Reid had tendered their resignations to the board effective on that day.[64] On 30 March 2012, Adam Carter, acting chief executive officer of RQL, sent the required Form 11s or Notice[s] of cessation of an executive officer of a control body on behalf of those executive officers to the Office of Racing, in accordance with section 42.[65]

6.5.38 The Commission has been unable to locate notices relating to the resignations of Mr William Andrews and Mr Michael Lambert from QRL and removal of Ms Kerry Watson from RQL. The evidence produced to the Commission suggests that there was otherwise substantial compliance with this requirement.

62 Statement of Carol Perrett, 30 October 2013, page 7 para 17.
63 *Racing Act 2002*, Schedule 3.
64 Letter from Robert Bentley to Michael Kelly, 26 March 2012.
65 Letter from Adam Carter to Michael Kelly, 30 March 2012.

Sections 43 and 44 – Notice of control body or executive not being eligible

6.5.39 Section 43 provides that, within 14 days after an event happening that makes the control body no longer eligible, the control body must give notice about the event to the chief executive. That notice must be in the approved form and include the control body's plan and timetable for making the company an eligible corporation.

6.5.40 Similarly, section 44 requires that, within 14 days after an event happening that results in an executive officer of a control body no longer being an eligible individual the executive officer must give notice about the event to the chief executive.

6.5.41 There is no evidence to indicate that these provisions were engaged during the relevant period.

Section 45 – Ministerial direction about policies

6.5.42 Section 45 provides that the minister may give a direction to a control body about its policies or rules for one or more of the following reasons:

a) to ensure public confidence in the integrity of the Queensland racing industry

b) to ensure the control body is managing its code of racing in the interests of the code

c) to ensure the welfare of the control body's licensed animals

d) to ensure the control body's actions are accountable and its decision-making processes are transparent

e) to ensure the control body's rules of racing have sufficient regard to the rights and liberties of individuals as mentioned in sections 4(3) of the *Legislative Standards Act 1992* (Qld).

6.5.43 Such a direction can instruct a control body to make a new policy about a matter, review an existing policy, make rules of racing about a matter or review existing rules of racing. This provision became relevant in the aftermath of the announcement of the resignations of RQL's senior executive staff on 26 March 2012.

6.5.44 The Office of the Premier sought urgent advice about what powers were available to the Minister under the Act to direct RQL on policy matters.[66]That advice, in the form of a draft direction, was provided by Crown Law on 28 March 2012. It instructed RQL to review its policy entitled *Policy for Employment of Non-licensed Staff*. It also restricted RQL from terminating the employment of any staff, employing any new staff or making redundancy payments to any staff without the written approval of the chief executive of the department responsible for racing. The advice was that although the direction reflected the scope of section 45 of the Act, it was not immune from being overturned on judicial review.[67]

6.5.45 Because Crown Law did not have instructions on any grounds for disciplinary review under section 52 of the Act, it was considered that the better course was to accompany the section 45 direction with a section 31 notice, or invitation, to approve additional conditions on RQL's control body approval. That notice invited RQL to apply for a condition that RQL must obtain the approval in writing of the chief executive prior to paying any account, debt or other payments in excess of $20,000, terminating the employment of any person employed by RQL, employing any person or entering into any contract or legally binding agreement where the consideration was in excess of $20,000.

66 Email from Paul Leven to Robert Setter, 27 March 2012.
67 Email from Gerard Sammon to Carol Perrett and Michael Kelly, 28 March 2012.

6.5.46 The Deputy Premier and Minister for racing authorised both the section 45 direction and the section 31 invitation to be sent to Mr Bentley with an invitation to make representations to the Minister by 11 April 2012 prior to the review of the policy being finalised.[68] Mr Bentley responded on 5 April 2012 accepting the direction.

6.5.47 The Commission found no other example of any directions given under section 45 during the relevant period. This may be because the Office of Racing had legal advice that suggested the power was limited.

6.5.48 In 2004, the Minister responsible for racing sought advice about the scope of section 45 after receiving complaints from licensed clubs – greyhounds and thoroughbreds – about the exercise of their respective control bodies' powers and function under the Racing Act. The advice, generally, was that the power to direct under section 45(2) was limited by the circumstances in section 45(1); that it was a general power and intended to be employed only in exceptional circumstances; and only to be exercised where it was necessary for the reasons set out in section 45(1).

Section 46 - Audit regime and other investigations

6.5.49 Pursuant to section 46, each year the chief executive must prepare and give to the responsible Minister a program for assessing the suitability of control bodies to manage the relevant codes of racing. The program may focus on a particular control body or on a particular criterion relating to all control bodies. The Minister may approve the program for the year, with or without changes.

6.5.50 The evidence produced to the Commission demonstrates that audits were undertaken every year during the relevant period. The focus of the audit changed from year to year:

a) the 2007 audit concentrated on an emergency response to minimise the risk of an outbreak of Equine Influenza[69]

b) the 2008 audit considered the suitability of each control body's policies under sections 81(g) and (o) of the Racing Act (which required a control body to have a policy about its website and record keeping); the effectiveness of those policies; and each control body's compliance with section 37 (the obligation of a control body to have internal controls to effectively perform its function of managing its code of racing) [70]

c) the 2009 audit assessed the suitability of each control body's policy under section 81(d)(i), which required a control body to provide or participate in an appropriate education and training system for persons who engage, or wish to engage, in activities requiring a license from the control body[71]

d) the 2010 audit focused on the newly established RQL and considered:

   i. RQL's compliance with section 81 (mandated control body policies), including the consultation undertaken with stakeholders as part of its policy development process (section 81(a))

   ii. whether urgent policies made by the board of RQL on 1 July 2010 were reviewed within three months of publication (as if they were not, they would cease to have effect after 31 December 2010)

   iii. whether each of the policies under section 81 met the form as required by section 83[72]

68 Letter from Jeffrey Seeney to Robert Bentley, 28 March 2012.
69 Briefing note, Control Body Assessment Program 2007, 14 June 2007.
70 Briefing note, Control Body Assessment Program 2008, 20 November 2008.
71 Briefing note, Control Body Assessment Program 2009, 9 September 2009.
72 Briefing note, Control Body Assessment Program 2010, 17 December 2010.

e) the 2011 audit sought to ensure that all thoroughbred, harness and greyhound venues at which race meetings were to be conducted were licensed (section 109 of the Racing Act) and to assess how effectively the policy on the standard required of licensed venues, including criteria for different categories of venues under section 81(k) had been implemented[73]

f) the 2012 audit was initially intended to consider whether the process and procedures the control body undertakes in the application and discharge of its integrity functions are best practice. It was amended after the relevant period to assess whether RQL was suitable to manage the codes of racing. [74]

6.5.51 While audits were clearly undertaken, the depth to which the Office of Racing probed is less clear. At the public hearings of the Commission, it was put to Mr Kelly and Ms Perrett that the Office of Racing's monitoring of the suitability of the control bodies to manage their codes of racing lacked independence, objectivity and impartiality, with particular reference to the 2010 audit.

6.5.52 Submissions made to the Commission on behalf of Mr Kelly and Ms Perrett contend that the actions by the Office of Racing were reasonable and sufficient. There is some force in that submission as it related to the 2010 audit. However, more generally:

- Each year (except 2011 and 2012 which are incomplete) there is a minister's briefing note outlining the outcomes of an annual control body assessment report in which the Office of Racing undertook the responsibility of monitoring and assisting control bodies with the implementation of the recommendations made as a result of those audits. The Commission has found no documentary evidence to indicate that the Office of Racing followed up the implementation of the recommendations.
- Each annual audit appears to be treated by both the Office of Racing and the control bodies as a separate exercise and recommendations made are not readily taken up. For example a key recommendation made in the 2009 annual report was that following the amalgamation, all policies should be recorded in board minutes as having been formally made by RQL. If this recommendation had been implemented within a reasonable time, one of the primary aims of the 2010 annual audit, that each section 81 policy meet the formal requirements of section 83, would have been unnecessary. It would have also prevented the discovery on 16 March 2012 that required minimum standards pursuant to section 81(k) of the Act were only in draft, despite having been specifically identified in the 2010 report as requiring immediate review.
- Pre-2010, the assessment process involved visits to control body sites and engagement with some employees. By 2010, the assessment involved only an interview between some senior RQL management staff and the Office of Racing. In 2011, the assessment was entirely on the papers.

6.5.53 As section 46 is the basis for assessing if a control body is suitable to continue as a control body, some greater rigor might have been expected.

6.5.54 In her statement to the Commission, Ms Perrett explained the long-standing approach of the Office of Racing, from well prior to the commencement of the Racing Act, for regular reporting and communication with the control bodies. The monitoring took place on virtually a daily basis and

> *...[w]hen issues arose that needed to be addressed, such as reporting animal welfare incidents, drug testing arrangements, increased consultation with stakeholders, the regulation of the control bodies was undertaken in an educative and conciliatory manner rather than by issuing of directions under the Racing Act.*[75]

73 Briefing note, Control Body Assessment Program 2011, 27 October 2011.
74 Briefing note, Control Body Assessment Program 2012, 30 March 2012.
75 Statement of Carol Perrett, 2 August 2013, page 9 para 48.

6.5.55 This approach would, it may be inferred, have given the employees of the control bodies confidence to approach the Office of Racing. Ms Perrett said that the general manager/CEO and chief steward of the control bodies would contact either Mr Kelly or herself or other officers on contentious/integrity related animal welfare and other relevant issues. Sometimes the chairs of the control bodies would contact Mr Kelly. Ms Perrett said that if the Office of Racing became aware of an issue and had not been advised by the control body, the office would seek a report. If the minister's office became aware of a matter the office would contact Mr Kelly or Ms Perrett for further information and they would contact the control body for a report.

6.5.56 The approach of the Office of Racing to the discharge of its regulatory functions under the Racing Act of encouraging compliance and the offer of assistance is a recognised and acceptable strategy for a regulator.[76] On the whole, the audits conducted were sufficient and appropriate.

Section 47 – Investigations into the suitability of a control body

6.5.57 Section 47 empowers the chief executive to investigate a control body for its suitability for continuing to manage its code of racing. This provision is only engaged if the chief executive suspects the control body is no longer suitable to continue to manage the code of racing or the investigation is undertaken as part of a program approved by the minister under section 46.

6.5.58 The evidence before the Commission suggests that no such investigations were undertaken (or considered) during the relevant period.

Section 48 – Investigation into the suitability of an associate of a control body

6.5.59 Under section 48, the chief executive may investigate a control body associate to decide whether the associate is suitable to be, or continue to be, associated with the control body's operations. The chief executive can only initiate such an investigation where he or she suspects the associate is not, or is no longer, a suitable person to be associated with a control body's operations or the investigation is undertaken as part of a program approved by the minister under section 46. For a company approved as a control body, a business associate is a person whom the chief executive believes is connected with the ownership or management of the company as a control body.

6.5.60 Despite many complaints from industry stakeholders, for example against Mr Bentley, there is no evidence that any such investigations were undertaken (or considered) during the relevant period.

Section 52 – Disciplinary action against control bodies

6.5.61 Pursuant to section 52, each of the following are grounds for disciplinary action relating to an approval of a control body for its code of racing:

a) the control body is not an eligible corporation;

b) an executive officer of the control body is not an eligible individual;

c) the control body is no longer suitable to manage the code;

d) the control body contravenes a provision of the Act (whether or not a penalty is provided for the contravention);

e) the control body fails to comply with a condition relating to its approval;

f) the control body contravenes a direction given to the control body by the Minister under section 45;

76 *Tips and Traps for Regulators*, Second Edition, October 2009, Publication of the Office of the Queensland Ombudsman, page 5.

g) *the control body fails to take disciplinary action under Chapter 3 relating to a licence holder when the control body is required to do so under the chapter and in its approval application; or*

h) *in a notice or other document that the control body is required under the Act to give to the Minister or chief executive, the control body stated something it knew was false or misleading in a material particular.* [77]

6.5.62 This list is expressly exhaustive. If the minister believes that such a ground exists, the minister must give the control body a show cause notice.[78] That notice must state the proposed disciplinary action, the grounds for it, outline the circumstances forming the basis for those grounds and include an invitation for the control body to show why the proposed action should not be taken. The minister must, under section 54, consider all written submissions made by the control body.

6.5.63 Sections 55, 56 and 57 provide that, if after considering any written submissions, the minister still believes a ground for disciplinary action exists, the minister may suspend the approval of a control body, censure a control body, or otherwise direct the control body to rectify the matter.

6.5.64 The evidence before the Commission suggests no consideration was given during the relevant period of utilising these provisions.

Section 59 – CMC referrals

6.5.65 Pursuant to section 59 of the Racing Act,[79] a control body is a unit of public administration for the *Crime and Misconduct Commission Act 2001* (Qld) to the extent of the control body's operations for the purposes of performing its function under the Act. As such, it was possible for the CMC to investigate allegations of "official misconduct" relating to the control bodies' activities where it would otherwise not have been able.

6.5.66 As a result of media speculation, the CMC took an interest in the circumstances surrounding the resignation of four of RQL's executives in March 2012. The CMC investigation was closed on announcement of this Commission and commencement on 1 July 2013.

6.5.67 The evidence produced to the Commission suggests that there was only one referral by government to the CMC during the relevant period. That was in relation to the allegations raised by the Honourable William Carter QC in August 2008 and is discussed in more detail below.

Section 60 – Audit by the Auditor-General

6.5.68 Pursuant to section 60, at the request of the minister, the auditor-general may audit a control body. For the purposes of this section, the control body is taken to have consented to the audit.

6.5.69 On 27 March 2012, the Deputy Premier, in his capacity as the Minister for racing, requested the auditor-general to commence an audit of RQL, as a matter of urgency,[80] into the circumstances in which four of the executives of RQL had resigned.[81]The Auditor-General's Report[82] was tabled in the Legislative Assembly pursuant to section 67 of the *Auditor-General Act 2009* (Qld) in July 2012. These events are discussed in Chapter 7.

6.5.70 There were no other referrals to the auditor-general during the relevant period.

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77 *Racing Act 2002*, section 52(3).
78 *Racing Act 2002*, section 53(1).
79 Now section 32D of the current Racing Act 2002.
80 Letter from Jeffrey Seeney to Andrew Greaves, 27 March 2012.
81 Discussed in Chapter 7.
82 Queensland Audit Office 2012, *Racing Queensland Limited: audit by arrangement – report to parliament 1: 2012-13*, Queensland Government, Brisbane.

Racing Act provisions – conclusion

6.5.71 Whilst the Office of Racing could have pressed the control bodies for better compliance, it would be inaccurate to say that the specific oversight functions under the Racing Act were not sufficiently and appropriately carried out. For the most part, there was, at the least, substantial compliance.

6.5.72 The Office of Racing had both regulatory and policy functions. It is respectfully suggested that policy and regulation functions should be structurally separate. That is discussed below.

6.5.73 During the relevant period government did not (for the most part) exercise its investigatory powers under the Racing Act, notwithstanding numerous suggestions from stakeholders that it do so. The main instances brought to the attention of the Commission and whether they warranted investigation are considered below.

6.6 Application by QRL in 2008 to amend its constitution

Introduction

6.6.1 QRL was required, as a condition of its approval as the control body for thoroughbred racing, to seek the Minister's approval before implementing any amendments to its constitution.

6.6.2 In 2008, QRL resolved to seek the Minister's ratification of amendments to its constitution. The Commission's consideration about how QRL undertook that process, especially the use of a QCRC proxy by Mr Ludwig and the selection of a new director, are discussed in Chapter 4.

6.6.3 This Chapter considers how the government dealt with QRL's application and how it responded to complaints about how QRL went about amending its constitution.

Pre-application dealings

6.6.4 On 3 April 2008, Ms Reid of QRL sent Mr Kelly a copy of a board paper outlining proposed changes to the QRL constitution. The board paper proposed three options for modification of QRL's governance structure. The relevant changes were to:

- change the initial director term from three to six years
- hold elections of directors every two years (not every year) commencing in 2012
- remove the independent recruitment consultant
- have a selection committee comprised of two Class A members, two Class B members (other than director candidates) and one independent nominee selected jointly by the Class A and Class B members
- have a selection process where the above selection committee would prepare a shortlist for consideration by the Class A and Class B members.

6.6.5 On 11 May, *The Sunday-Mail* published an article by Mr Bart Sinclair on a proposal by QRL to "enshrine the incumbent board for a three-year extension to what is already a long spell in power". The article prompted Mr Bentley to hand deliver a letter the next day to the Treasurer, who was then the responsible Minister for racing. Mr Bentley refuted Mr Sinclair's statements as "illogical" and set out the reasons for the proposed changes:

a) it was a *simple matter of a change to the Queensland Racing Limited (QRL) Constitution to simplify and enhance the ongoing management of the Industry*

b) *the industry will vote on the changes through the shareholders*

c) the QRL board *seeks these changes for an extended term in the knowledge of disruption that accompanies elections in this Industry* and referring to the *disruption* of two previous inquiries.

6.6.6 On 14 May, Mr Bentley again wrote to the Treasurer enclosing a matrix of the proposed changes to the QRL constitution "as requested" proposing:

- the initial term be changed from three to six years, moving director selection process from 2009 to 2012
- extending the term of the chair from 2009 to 2012
- director selection process changing from two rotations annually to every two years
- the QRL company secretary to provide a list of suitably qualified candidates instead of an independent recruitment consultant providing a shortlist.

6.6.7 Mr Bentley subsequently obtained a joint opinion from Mr DF Jackson QC and Mr Andrew Herbert of counsel, which was distributed to QRL's Class A and B members in support of the proposed changes. Ms Reid provided a copy to the Treasurer's office.

6.6.8 On 9 July, the Treasurer's personal secretary requested "legal advice on Bob Bentley's latest letter", in addition to other matters, in preparation for a meeting between the Treasurer and Mr Bentley scheduled for 18 July 2008. Mr Kelly was asked to attend the meeting.

6.6.9 On 14 July, Ms Perrett prepared a Treasurer's draft briefing note on the proposed constitutional changes.[83] The same day Treasury's in-house legal unit prepared a Treasurer's draft briefing note including an analysis of the joint advice from Mr Jackson QC and Mr Herbert. As working drafts, neither briefing note is signed.

6.6.10 Ms Perrett's draft briefing note attached the separate in-house legal advice and commented:

> *LSU [Legal Services Unit] has not identified any legal impediment to the proposed amendments to the QRL constitution* ***but raise some issues in relation to whether it is appropriate for the directors of QRL to be appointed for an initial term of six (6) years and suggest that a term of four (4) years may be more appropriate.***
>
> ...
>
> *The removal of [the independent recruitment consultant] requirement has the very real potential to be criticised on the basis that it will undermine the integrity of the requirement system.*
>
> ...
>
> *It has been suggested by LSU that a term of 6 years may have the potential risk of fostering a board which becomes stagnant and without fresh ideas.[84] Whilst that may be true of some boards, the directors of QRL (Bentley, Hanmer, 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. ...*
>
> *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.*
>
> (emphasis added)

6.6.11 In contrast, Treasury's in-house legal services unit expressed concerns about the extended term for directors and provided comparisons with publicly listed companies, government owned corporations and members of statutory regulatory bodies:

> *Publicly listed companies undertaking significant capital intensive projects are required to respond to major policy initiatives generally have board member appointment periods far*

83 Statement of Michael Kelly, 27 September 2013, attachment MK-26.
84 See footnote 86.

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 ...

Continuity and stability of QRL'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****.* [85]

(emphasis added)

6.6.12 Ms Perrett commented in her briefing note:

- "if the members of the company support the proposed amendments, a decision by [the Treasurer] to refuse to grant approval must be made on grounds that can be justified and is able to withstand legal scrutiny"
- "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 such decisions".

6.6.13 Ms Perrett's draft briefing note was amended and dated 15 July 2008. Mr Kelly signed it on 14 or 15 July. In his evidence at the Commission's public hearings, Mr Kelly accepted that he was involved in making changes to Ms Perrett's earlier draft and could have obtained legal advice.

6.6.14 It seems likely that on Mr Kelly's instructions, an important change was made to the briefing note, with the words struck out below being omitted:

LSU [Legal Services Unit] has not identified any legal impediment to the proposed amendments to the QRL constitution ~~but raise some issues in relation to whether it is appropriate for the directors of QRL to be appointed for an initial term of six (6) years and suggest that a term of four (4) years may be more appropriate~~.[86]

6.6.15 Mr Kelly explained at the Commission's public hearings that he was seeking advice about the lawfulness of the QRL proposal and not a merits assessment. Mr Kelly supported the extended director terms but not the removal of the independent recruitment consultant. [87] The briefing note of 15 July for the Treasurer stated that the legal advice was attached.

6.6.16 The briefing notes were not signed by the Treasurer and in his evidence before the Commission he was unable to recall if he had read them in preparation for his meeting with Mr Bentley.[88] The Treasurer accepted the recommendation not to make any decision since there was no application to determine.

6.6.17 This is one example (of many) of where Treasury and the Office of Racing held different views on a matter. It is, of course, critical that the Minister is fully informed of all matters relevant to any decision. There is no evidence before the Commission to suggest that briefings from the Office of Racing deliberately left out material matters for ulterior motives. However, as will become clear, the evidence does suggest that the Office of Racing may not have critically considered proposals such as the amendments to QRL's constitution.

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85 Treasury briefing note to the Treasurer 15 July 2008.

86 The earlier briefing note reference to "LSU", set out above at 6.6.10, advising that there was a risk of "fostering a board which becomes stagnant and without fresh ideas" is correctly removed as this statement was actually made in the joint opinion by Mr Jackson QC and Mr Herbert for QRL and not by LSU as was put to Mr Kelly. See Transcript, Michael Kelly, 2 October 2013, page 43 lines 5-20.

87 Transcript, Michael Kelly, 2 October 2013, pages 42 lines 40-45, page 43 lines 1-2.

88 Transcript, Andrew Fraser, 4 October 2013, page 27 lines 20-24.

QRL's formal application for the Treasurer's ratification

6.6.18 By letters dated 12 August 2008, QRL made formal application to the Treasurer (and copied to Mr Kelly) to ratify proposed changes to its constitution. It informed him that Class A and B members had voted in favour of the constitutional change at a general meeting on 6 August. The proposed changes included:

- extending the initial terms of the directors from three to six years (to 2012)
- removing the requirement for an independent recruitment consultant to prepare a director candidate shortlist; instead a similar role was given to the company secretary
- giving Class A and B members the right to produce two director candidate shortlists each
- a five person selection committee of two Class A members, two Class B members (including the chair) and one independent person jointly agreed by the Class A and B committee members
- giving the company secretary the power to decide the independent person (a solicitor) who would have the deciding selection vote for the director candidate if the Class A and B members did not agree.

6.6.19 The Class A members were industry representatives and the Class B members were the directors of QRL.

6.6.20 On 14 August, the Treasurer's office asked Mr Kelly for a briefing note and a draft reply within 14 days. The brief was to include

> *information on voting system (i.e. Class A vs. Class B voting rights and who holds what) as well as our legislative options (i.e. approve or reject) and the consequences of either action.*

Complaints about the process undertaken by QRL

6.6.21 Prior to the due date for Mr Kelly to provide the brief to the Treasurer, the Treasurer received complaints from Mr Gary Peoples, Clarke Kann Lawyers acting for the QCRC and Mr Carter QC about the "proxy issue". The allegations were that Mr Ludwig, as chair of the QCRC, was not authorised to exercise a vote on behalf of the QCRC at a meeting of the Class A members about the constitutional amendments. This is discussed fully in Chapter 4.

6.6.22 Mr Gary Peoples, as a Class A member representative of the QCRC, complained to the Treasurer:

> *Mr Ludwig has advised me that he did not consult the members of the Country Racing committee as he otherwise satisfied himself as to what position should be taken ...*
> *Bill Ludwig was not elected to take that vote forward but he did and the way he voted was totally opposite to the views of the Country Racing Committee.*

Similar allegations were raised by ClarkeKann Lawyers on behalf of the QCRC

6.6.23 Mr Carter QC challenged:

- the validity of the proxy used by Mr Ludwig on behalf of the QCRC to vote in favour of the resolution at the QRL general meeting
- Mr Parry, as Chair of the Townsville Turf Club, being wrongly excluded from a meeting of the Class A members of QRL prior to the general meeting of QRL
- the presence of Mr Bentley and Mr Ludwig, both Class B members and as proxy holders for Class A members when they had a conflict of interest because the amendment concerned the extension of their terms as directors (this issue had been resolved earlier by QRL obtaining an ASIC exemption). [89]

89 The letter is stamped as received by the Office of the Treasurer on Wednesday, 20 August 2008 and by the Office of the Under Treasurer (the department) on Friday, 22 August 2008.

6.6.24 Mr Carter QC asked the Minister "[to] consider a specific request to the auditor-general under section 60 of the Racing Act to audit the Control Body and in particular the remuneration, expenses and any other amounts paid by the Company or any other person to each Director", as the Class A members were not aware of the amounts. He also urged the Minister to refer the matter to either the CMC or ASIC.

6.6.25 On 21 August 2008, the day after receiving Mr Carter's complaint, the Treasurer's office referred the three complaints to Mr Kelly to "*Pls commence investigation of the allegations ... as discussed*" by 11 September 2008.

6.6.26 Also on that day, Ms Perrett telephoned Mr Barry Dunphy of Clayton Utz lawyers seeking legal advice. Her file note records:

> *I explained to him [Mr Dunphy] that the Minister has to consider an application to ratify amendments to the QRL constitution. I explained that this Office had previously provided a brief to the Minister that raised the issue that* ***one of the proposed amendments*** *that provided for the removal of the requirement for an independent recruitment company to prepare a short list of applicants for director positions* ***was an integrity issue****.*
>
> *I asked Barry whether the Minister could* ***approve part of the resolution, i.e., approve the resolution except for the removal of the requirement for an independent recruitment company*** *to prepare a short list of applicants for director positions.*
>
> *Barry advised:*
>
> - *The Minister must either approve or reject QRL's application. He cannot modify it by approving part of the resolution.*
> - *If the Minister refuses QRL's application, QRL must go through the voting process again and obtain a valid resolution.*
> - *In order to grant approval, the Minister must be satisfied that all procedural matters have been fully complied with.*
>
> (emphasis added)

6.6.27 Notwithstanding the request from the Treasurer's office to investigate the complaints, the Office of Racing prepared a Treasurer's briefing note recommending that the Treasurer refuse to ratify the constitutional amendments based on the removal of the independent recruitment consultant. The briefing not did not comment on:

- the directors' extended terms proposal
- the earlier in-house Treasury legal advice
- the complaints referred to the Office of Racing the previous day for investigation.

6.6.28 The brief was prepared by Ms Perrett on 22 August, endorsed (signed) by Mr Kelly, the deputy under treasurer and under treasurer that day, but not the Treasurer.[90]

6.6.29 Mr Kelly suggested in the public hearings of the Commission that the Ministerial correspondence action sheet requesting the investigation and the Office of Racing briefing note may have "passed themselves in the night"[91]. However, the "as discussed" reference suggests that Mr Lachlan Smith discussed the complaints with Mr Kelly.

90 Further discussed at 6.7.50.
91 Transcript, Michael Kelly, 2 October 2013, page 49 lines 4-8.

6.6.30 In order to brief the Treasurer fully, the briefing note should have:

- attached, or at least included the substance of, the earlier Treasury legal services unit advice to ensure the Treasurer had before him matters relevant to the decision
- informed the Treasurer of the complaints received about the process undertaken by QRL and provided advice on how those complaints impacted on dealing with the application
- addressed how the complaints were to be dealt with given the earlier request to investigate.

6.6.31 It remains unexplained why the Office of Racing advised the Treasurer to refuse QRL's application to amend its constitution, basing the decision only on the removal of the independent recruitment consultant, without first investigating the complaints. There was, no doubt, a benefit in dealing with the application immediately– the complaints would, arguably, become irrelevant if the application was refused for a substantive reason. There is nothing to suggest that the Office of Racing had any improper motive in its action, but this integrity issue was not investigated.

6.6.32 By letter dated 23 August the three complaints were referred by the under treasurer to the CMC for investigation. There had been discussion in *The Courier-Mail* about the complaints.[92]

6.6.33 On Monday, 25 August, Mr Bentley wrote to the Office of Racing complaining about the government's "hasty referral to the CMC" before "establishing the facts", asserting that Mr Carter QC had a "poor record of making vexatious allegations with little regard to the truth". Mr Bentley set out his position on the allegations concerning the exclusion from the meeting of Class A members, but did not mention the allegation that Mr Ludwig invalidly used a proxy for the QCRC.

6.6.34 On 25 August, the CMC formally responded:

> *Having considered section 59 of the Racing Act 2002 and the material provided, I am of the opinion that this matter is* ***not within the jurisdiction of the Crime and Misconduct Commission*** *(CMC). ...*
>
> *The allegations do not concern QRL's operations for the purposes of performing its function as the thoroughbred control body, but rather issues relating to the* ***voting process to amend the corporation's constitution****. In that regard I note that QRL is an 'eligible corporation' registered under the Corporations Act, which is within the jurisdiction of the Australian Securities and Investment Commission (ASIC). I also note that there are provisions under the Racing Act for the chief executive to investigate the suitability of a control body to continue to manage its code of racing.*
>
> *It seems that* ***ASIC and/or the chief executive maybe better placed to deal with the concerns raised****.*
>
> (emphasis added)

6.6.35 Also on 25 August, the CMC published a media release advising that the CMC "will not investigate" and that the allegations "are more properly issues for the Australian Securities and Investment Corporation [sic]".[93] The media release did not refer to the investigatory powers of the chief executive.

92 Lion, P 2008, 'Bill Ludwig faces probe over vote-rorting allegations', *The Courier-Mail*, 23 August, http://www.couriermail.com.au/news/queensland/ludwig-faces-rort-probe/story-e6freoof-1111117276171, viewed 19/11/13; Fraser, A 2008, 'Fraser Confirms Material forwarded to CMC', *Ministerial Media Statements*, 23 August, http://statements.qld.gov.au/Statement/2008/8/23/fraser-confirms-material-forwarded-to-cmc, viewed 20/11/13.

93 Crime and Misconduct Commission, 2008, 'Allegations against directors of Queensland Racing', 25 August, http://www.cmc.qld.gov.au/news-and-media/media-releases/media-releases-2014-6-august-2008-2013-23-june-2009/media-release-25.08.2008-allegations-against-directors-of-queensland-racing.asp-pgid-10814-cid-5201-id-1210, viewed 20/11/13.

6.6.36 Mr Kelly said he did not see the letter from the CMC and the evidence suggests that this is likely to be correct. However, the evidence also suggests that Mr Kelly and the Office of Racing were generally made aware that the CMC had declined to investigate because of its jurisdiction and had suggested that ASIC could investigate.

6.6.37 On 26 August, the Treasurer "noted" but did not approve Treasury's briefing note of 22 August and commented that he would "formally consider once matters of process have been investigated and assessed".

6.6.38 On 26 August, the Treasurer stated in Parliament that:

> *The CMC believes that it does not have jurisdiction over the matter. In relation to the issues, because they relate to the way that the corporation, QRL, is constituted, they are relevant to ASIC. Therefore, ASIC will be the body which investigates those matters.*[94]

6.6.39 The under treasurer referred the allegations to ASIC on 26 August.[95]

6.6.40 On 8 September, Ms Perrett sent an email to Mr Dunphy revisiting the question of how the Minister might approach the exercise of his discretion about the amendment of QRL's constitution:

> 1. *Can the Minister decide to approve the application to amend the QRL constitution if the Queensland Country Racing Committee (the Committee) has not followed the process contained in the Racing Act 2002 (see section 76).*[96]
>
> ...
>
> 2. *Can the Minister refuse the application on the ground that the removal of an independent recruitment company to prepare a short list of directors has the potential to undermine the integrity of the recruitment system?* [97]

6.6.41 It seems that Ms Reid, the company secretary for QRL, had admitted to the Office of Racing that Mr Ludwig likely did not comply with the requirements of section 76 of the Racing Act before exercising a vote on behalf of the QCRC.[98] Ms Perrett's instructions to Mr Dunphy are consistent with that admission and with Mr Kelly's evidence in the Commission's hearings that the possible non-compliance was an "administrative stuff up".[99]

6.6.42 Clayton Utz was not instructed to provide advice on whether the possible non-compliance with the Racing Act was a breach of the Act that could enliven regulatory action against Mr Ludwig or QRL. Accordingly, no such advice was given. This omission was significant as the Treasurer, and likely other senior executives, thought that Clayton Utz's advice was comprehensively dealing with all issues concerning non-compliance with the Racing Act, not just administrative decision-making on the application.

6.6.43 On 15 September, Clayton Utz provided its legal advice. It is comprehensive but, consistently with the instructions, only dealt with the administrative law questions. The Clayton Utz advice provided that:

a) the "proposal to amend the Constitution of QRL is a matter that in our view should have been formally considered by the QCRC whether at a meeting or by way of a written resolution in accordance with s.76 of the Racing Act"

---

94 Queensland Parliament, *Hansard*, "Questions Without Notice", 26 August 2008, page 2225.
95 Letter from Maree Blake (ASIC) to Gerard Bradley, 22 October 2008.
96 This and the surrounding provisions relate to Country Racing representation and were deleted in the 2010 Racing Act amendments which abolished that association.
97 Email from Carol Perrett to Barry Dunphy, 8 September 2008, 11.04am.
98 Transcript Michael Kelly, 2 October 2013, page 52 lines 33-44.
99 Transcript Michael Kelly, 2 October 2013, page 55 lines 28.

b) there was "statutory non-compliance with s.76" of the Act

c) there were three possible outcomes from ASIC's assessment of the allegations, including that ASIC would consider that the matter "did not fall within ASIC's jurisdiction"[100]

d) a decision could be made by the Treasurer either:

i. by dealing with the *merits* and refusing to ratify the proposed amendments for sound policy reasons, including the concern expressed by the Office of Racing on 22 August about the removal of the independent recruitment consultant

ii. by dealing with the *process* by refusing to ratify because of the non-compliance with the Racing Act

e) A third option, to ratify the amendments, would be vulnerable in judicial review proceedings because of the non-compliance with the Racing Act.

6.6.44 On 17 October, ASIC representatives met with Treasury representatives and with Mr Kelly to provide preliminary information on their assessment of the complaints. The details of that meeting were recorded in an email to the under treasurer from Mr David Ford, the deputy under treasurer:

> *Key outcomes were –*
>
> - *the assessment (which is the precursor in ASIC processes to a formal investigation) identified no* ***breaches of the Corporations Law****.*
> - *therefore, there would be* ***no formal investigation*** *launched.*
> - *there were a number of elements of the process, especially around the* ***use of Queensland Country Racing's proxy, which raised ethical questions and a lack of transparency****. These were* ***not issues within ASIC's remit****.* [101]
>
> (emphasis added)

6.6.45 Mr Ford recorded:

> *We discussed next steps for the Treasurer. Options seemed to be –*
>
> - *to refer the matter back to QRL on the basis of the concerns about transparency, etc and direct that they pass the proposed constitution changes through the process again this time with proper independent audit supervision.*
> - *to reject the proposed changes on the basis of concerns with their content (especially the elimination of the requirement that an independent executive search process be included in the appointment process for the Board), thus ensuring that should QRL wish to proceed with the changes or a sub-set of them, the process would have to be conducted again. This is the basis on which Office of Racing has prepared briefing material.*

6.6.46 There was no suggestion that there should be an investigation into the ethical concerns about Mr Ludwig's use of the QCRC proxy. The recommended options are consistent with what was proposed by the Office of Racing on 22 August, the instructions to Clayton Utz on 8 September and the advice from Clayton Utz on 15 September. That is, that the Treasurer should deal with the matter as one of administrative law. There is no evidence that any consideration was given to using, on integrity grounds, the chief executive's investigative powers under the Racing Act to review Mr Ludwig's use of the QCRC proxy.

100 Letter from Maree Blake to Gerard Bradley, 22 October 2008, page 2.
101 Email from David Ford to Gerard Bradley, 17 October 2008, 3.05pm.

6.6.47 Mr Kelly confirmed by email later that afternoon to Mr Ford that he would update and progress the Treasurer's briefing note including the "detailed legal advice that outlines the options available to [the Treasurer] and implications/risk associated with each possible course of action". Mr Ford replied that the Treasurer's office supported that approach.

6.6.48 ASIC formally responded by letter of 22 October. The ASIC letter is consistent with the earlier meeting, although express statements relating to "ethical questions and a lack of transparency" about Mr Ludwig's use of the QCRC proxy were not included. The important findings were:

> *ASIC's decision not to commence a formal investigation* ***should not be interpreted as a conclusion that no misconduct can be made out or that ASIC has in some way approved the conduct.***
>
> *...*
>
> *Director duties considerations*
>
> *...*
>
> *ASIC notes the legal relationship between an appointed proxy holder and the person giving the proxy is one of agency. As such, the exercise of directed proxies as agents is not regarded as conduct in the role of a Director and therefore it is not a breach of the law that ASIC regulates.*
>
> *ASIC has viewed the proxy forms that were given by A Class Members and there appears to be no evidence to –suggest that these proxies were not exercised at the meeting in accordance with the directions given in the proxy forms. ASIC has decided not to formally investigate the allegations.*
>
> *Queensland Country Racing Committee Proxy*
>
> *...*
>
> ***As you will be aware, QCRC is a committee established pursuant to section 66 of the Racing Act 2002*** *(Qld) ('the Racing Act'). The operation, functioning and management of QCRC are* ***not matters that fall within the laws that ASIC regulates. As such, ASIC does not have jurisdiction*** *to consider alleged misconduct of persons acting in their capacity as QCRC members.*
>
> *....*
>
> *Townsville Turf Club*
> *Concerns have been raised regarding the exclusion from voting at the A Class Members Meeting of the Townsville Turf Club ("TTC"). It is noted that the TTC representative did not take issue with the exclusion at the time and that TTC does not appear to have taken any further action in relation to the issue. While QRL's Constitution appears to permit a member to vote in person or by proxy, ASIC will not pursue this matter as* ***remedies are available for the effected parties to pursue privately****.*
>
> *Directors Remuneration*
> *Mr Carter QC raises concerns that the fees of Directors of QRL have not been approved in accordance with the QRL Constitution ("the Constitution'). **ASIC does not have a role in adjudicating the internal management of companies that are governed by constitutions**. A company's constitution has the effect of a contract between the company and each member, and between the company and its directors and secretary. As such, any **alleged non-compliance with the Constitution should be resolved between QRL and its members** or in the absence of a resolution between the parties, it is a matter for an effected person to consider making an **application to the Court for adjudication**.*

The proposed amendments to the Constitution of QRL

Specific concern has been raised with the proposed amendments to the Constitution. This includes the length of ***uncontested terms*** *of the current and any future Directors of QRL.* ***This matter does not specifically raise an issue of misconduct for ASIC to action****. … As you will he aware, this [ratification by the Minister] is a condition of the Control Body Approval Notice given to the QRL pursuant to section 26 of the Racing Act. As such, despite the apparent approval of the members of QRL,* ***ratification or otherwise remains a matter for the Treasurer****.*

(emphasis added)

6.6.49 On 28 October the ASIC letter was tabled in Parliament by the Treasurer and published on the Parliament's website.

6.6.50 The Office of Racing progressed a briefing note to the Treasurer on 24 October recommending that the Treasurer

> *…do[es] not ratify the proposed amendments to the QRL constitution on the basis that removal of the requirement for an independent recruitment consultant to prepare a short list of applications for director positions has the potential to diminish the transparency of the recruitment system.* [102]

6.6.51 The briefing note:

- enclosed and relied upon the earlier legal advice of Clayton Utz
- advised that "in reviewing the proposed amendments to the constitution, the only issue of concern that has been identified is the proposal regarding the removal of the independent recruitment consultant"
- attached the earlier complaints by Mr Carter QC, Mr Peoples and ClarkeKann lawyers and noted in particular the allegations the chair of the QCRC failed to follow the due voting process
- in relation to the complaints, advised on "25 August 2008, the CMC indicated that it had assessed the matter and would not be reviewing it as these were matters more properly in the jurisdiction of … ASIC" but did not attach the correspondence from the CMC or ASIC
- also in relation to the complaints "ASIC has advised that an assessment had been conducted and no breaches of the Corporations Act had been identified, therefore no formal investigation would be undertaken"
- attached "legal advice has been obtained from Clayton Utz on the Minister's options in deciding whether or not to ratify the proposed amendments to the QRL constitution"
- said "while a formal investigation has not been conducted, information provided by the Secretary and the Chair of QRL indicates that in casting the vote on behalf of the [QCRC] at the Class A members meeting, there was non-compliance with section 76 of the Racing Act, as no meeting of the Committee had been held and only verbal approval to cast the vote had been obtained".

6.6.52 Treasury's in-house legal advice, mentioned above, had identified other issues of concern with the directors' extended terms relevant to the Treasurer's decision. There was no reason to omit mentioning it.[103] It may well have been thought to have been subsumed by the events that followed.

102 Briefing note from Gerard Bradley to the Treasurer, 24 October 2008, para 23.
103 This was put to Michael Kelly by counsel assisting the Commission – Transcript, Michael Kelly, 2 October 20013, page 63 lines 10-25.

6.6.53 The briefing note did not accurately explain ASIC's position that some matters were outside its jurisdiction and therefore would not be investigated. There was some risk that a reader may, mistakenly, have inferred that ASIC had fully investigated the complaints and found no wrongdoing. Ultimately, the Treasurer must have read ASIC's letter and understood the true position as he tabled the letter in Parliament.

6.6.54 No further advice or recommendation was given to the Treasurer about dealing with the breach of section 76 or the "ethical questions and a lack of transparency" concerns raised by ASIC.

6.6.55 The briefing note accepted Ms Reid's statements that the QCRC members had been consulted and had endorsed the proposed constitutional changes. Those statements were incorrect- no QCRC member had been consulted, no agreement had been reached, and Mr Ludwig as chair had not sought (and never believed he was required to seek) the consent of the QCRC to exercise his proxy vote.[104]

6.6.56 The Office of Racing was unaware of the full extent of these shortcomings. However, it was not inappropriate for the Office of Racing to rely on the express representation of QRL's corporate counsel, a solicitor admitted to practice, that there had been only a technical breach of the voting process.

6.6.57 The Treasurer accepted the recommendations in the briefing note and QRL's application for ratification of the proposed constitutional amendments was refused. Mr Fraser gave evidence in the Commission's public hearings that he relied heavily on both the brief and the attached legal advice from Clayton Utz.[105] He believed his decision to refuse QRL's application would put an end to the matter.[106]

6.6.58 The Treasurer announced the decision in Parliament on 28 October:

> ...
>
> *ASIC has decided not to pursue action against QRL or its directors. This matter has now been the subject of assessment by both the CMC and ASIC and no further action is being pursued by either body.*
>
> ...
>
> *I have decided to reject the substantive amendments submitted by QRL on the ground that it does not appropriately provide for independent selection of directors. The capacity for independent selection was a clear condition of original approval for Queensland Racing and I similarly insisted upon such conditions for both the greyhound and harness racing codes upon corporatisation earlier this year.*
>
> *In light of the conclusion of the inquiries made by the CMC and ASIC and my decision about the proposed constitutional change to QRL, I consider this matter to be closed. The board of QRL retains my confidence, and I table the result from ASIC.* [107]

6.6.59 Mr Carter QC was dissatisfied with the decisions by the CMC and ASIC not to investigate the QCRC proxy complaint. By letter dated 5 November 2008, he again wrote to the Treasurer, with a copy to the Premier, making similar allegations about the QCRC proxy. He asked that the matter be referred to the Queensland Police Service (QPS) to investigate possible fraud under the Criminal Code.

104 This is discussed fully in Chapter 4.
105 Transcript Andrew Fraser, 4 October 2013, page 10 lines 5-35.
106 Transcript Andrew Fraser, 4 October 2013, page 33 lines 10-12.
107 Queensland Parliament, *Hansard*, Andrew Fraser, "Ministerial Statements, Queensland Racing Ltd", 28 October 2008, page 3106.

6.6.60 The Treasurer's office responded by letter of 7 November recommending he contact the QPS directly. The Treasurer's office letter was copied to the Commissioner of Police. It is the only document which the Commission has identified referring the complaint to the QPS for investigation.

6.6.61 On 8, 11 and 15 December 2008, the QPS obtained statements from Mr David Grace, QRL's solicitor, Ms Reid and Mr Bentley. On 13 February 2009, the QPS issued a media release:

> *The Queensland Police Service has concluded its investigations into allegations of voting anomalies at Queensland Racing Limited.*
>
> ...
>
> *The investigation found insufficient evidence to pursue charges against anyone involved.* [108]

6.6.62 The QPS investigation concerned allegations of criminal conduct, that is, possible offences under the Queensland Criminal Code which have the high burden of proof "beyond reasonable doubt". It was not an investigation into possible statutory non-compliance under the Racing Act.

6.6.63 On 17 February 2009, Mr Bentley distributed a letter to industry stakeholders, with a copy to Mr Kelly, stating, among other things:

> *The CMC wrote back ... advising the issue had nothing to do with them and, in addition,* ***advised the CMC found no fault with the actions of Bill Ludwig****.*
>
> (emphasis added)

6.6.64 Plainly, the CMC did not clear Mr Ludwig. Mr Bentley continued:

> *ASIC considered the matter and advised six weeks later on October 22, 2008, that it had no issues with the action taken by Bill Ludwig or the proposed amendments.*

6.6.65 Similarly, ASIC had not made statements to this effect. ASIC had informed Treasury officials that Mr Ludwig's actions "raised ethical questions and a lack of transparency". The statements in Mr Bentley's letter were misleading to industry stakeholders.

6.6.66 On 23 February 2009, before any formal response was given by the Treasurer's office to the complainants, Queensland entered the 2009 State election campaign.

6.6.67 The Labor government was returned to office on 21 March 2009. It introduced significant machinery of government changes with 23 government departments amalgamated into 13 departments. Relevantly, the Office of Liquor, Gaming and Racing transferred from Treasury to the new DEEDI. [109] Minister Lawlor assumed responsibility for the racing portfolio.

6.6.68 By letters dated 29 April 2009 prepared by the Office of Racing, Minister Lawlor and his office formally replied to the August 2008 letters of complaint from Mr Carter QC, ClarkeKann Lawyers and Mr Peoples. The letters said:

a) *The CMC reviewed the material and was of the opinion that it was outside the jurisdiction and was more properly a matter for the Australian Securities and Investment Commission ("ASIC").*

b) *After reviewing the material and undertaking its own enquiries, ASIC decided not to pursue a formal investigation of this matter.*

c) *I believe the matter has now been resolved.*

---

108 Queensland Police Service media release, 13 February 2009.

109 *Public Service Departmental Arrangements Notice (No.2)* 2009 published in the *Queensland Government Gazette* on 26 March 2009 at page 1347; *Administrative Arrangements Order (No. 1)* 2009 published in the Queensland Government Gazette on 26 March 2009 at page 1316.

6.6.69 For these complainants, their primary concern had been the exercise of the QCRC proxy by Mr Ludwig. ASIC had advised that this issue was outside its jurisdiction rather than, as may have been incorrectly inferred from the Minister's letter, that it declined to investigate further because the allegations were unsubstantiated. Prior to this Commission of Inquiry, it is reasonable to conclude that it was unknown outside ASIC and Treasury that ASIC had "raised ethical questions and a lack of transparency" about Mr Ludwig's use of the QCRC proxy. These questions were not investigated.

6.7 Director selection process for QRL's 2009 annual general meeting

6.7.1 QRL's constitutional amendments to extend the director terms were not ratified in 2008 and the initial term of the appointments were to expire at QRL's AGM in late 2009. QRL's constitution required two of the founding directors to make their positions vacant. Mr Andrews (who was selected by Mr Bentley as the director to retire) wished to stand again. Mr Lambert had decided not to seek re-election. Mr Andrews was not shortlisted by the recruitment firm as a candidate to be considered for the position.

6.7.2 How QRL managed this process and the conduct of its officers throughout this process is discussed in Chapter 4. The discussion in this Chapter is concerned with the response of government when it became aware of allegations of impropriety.

6.7.3 On 6 August 2009, Mr Carter QC wrote to Minster Lawlor raising concerns about the director selection process employed by QRL. Mr Carter made reference to comments by Minister Lawlor at a Parliamentary Committee hearing on 22 July 2009:

> *Decisions on the process to be followed for the selection and appointment of directors to Queensland Racing are not matters which the Minister has any involvement in.*
>
> *... whilst I may be concerned about it [the process], I do not have any control over it and I will not interfere in the process.*[110]

6.7.4 Mr Carter QC agitated for the Minister to intervene using powers under the Racing Act or otherwise, on the basis that QRL's control body approval was subject to the condition that any changes to the constitution required the Minister's consent. Mr Carter QC suggested to the Minister that he should ensure that the constitution was adhered to.

6.7.5 Mr Bentley wrote to Minister Lawlor on 10 August, suggesting that Mr Carter's motives for writing to the Minister were other than honourable. Mr Bentley outlined previous complaints by Mr Carter QC and asserted that Mr Carter's letter of 6 August was simply "his latest attempt to again disrupt the industry".[111] Mr Bentley said that:

> a) *"the [selection] process [for the new directors] was independent of QRL"*
>
> b) *The final decision was that of the [independent recruitment consultant]. No guidance or direction was given to the IRC by QRL*
>
> c) *These are matters [Mr Carter's purported representation of the racing industry] of considerable concern given the history of complaining that is a* ***matter of public record*** *by Bill Carter and the cost to which he has put industry, to demonstrate that there have been* ***no transgressions of the law on any occasion****.*
>
> (emphasis added)

110 Estimates Committee F – Tourism and Fair Trading, 22 July 2009, page 13.
111 Letter from Robert Bentley to Peter Lawlor, 10 August 2009, page 3.

d) Mr Bentley gave his version of the background to Mr Carter's complaints and concluded:

QRL is not subject to the CMC as demonstrated in the Bill Ludwig issue of the application of the constitution.

...

QRL requests that you advise Bill Carter that if he has any evidence of wrong doing or illegal actions in the latest matter or any future matter he refer the issue to the relevant authority personally, and in this latest fishing expedition the authority is ASIC.

6.7.6 The Office of Racing prepared a briefing note on Mr Carter's complaint, and Mr Bentley's letter for Minister Lawlor[112]. The briefing note:

- does not challenge or critically assess any of the claims made by Mr Bentley
- described Mr Carter QC as a person who "has a history of raising concerns regarding the governance and management of the thoroughbred racing industry by Queensland Racing", but fails to mention that Mr Carter's previous complaint (about the use of the QCRC proxy) was justified
- recommended that Mr Carter QC be advised

that the issues he has raised are not the responsibility of the Minister responsible for racing and that if he wishes to pursue these matters he should seek to address them with the Australian Securities and Investment Commission.

6.7.7 Mr Lawlor told the Commission that he relied upon the assertion in the briefing note that the matter fell within the jurisdiction of ASIC.[113] ASIC had made it clear in its letter of 22 October 2008 that compliance with a company's constitution was not a matter not for it. The Office of Racing's position meant that there was effectively no authority regulating QRL's compliance with its constitution.

6.7.8 Mr Lawlor also relied on the advice about the appropriate response to Mr Carter's letter.[114] By letter dated 17 August, the Minister wrote to Mr Carter QC advising that:

The issues you have raised are all matters that fall within the authority of the Australian Securities and Investments Commission (ASIC), and are not the responsibility of the Minister responsible for racing. If you wish to pursue these issues further, you should address your concerns direct to ASIC.

6.7.9 Mr Andrews was successful in proceedings in the Queensland Supreme Court against QRL and Mr Bentley alleging that the director selection process was not undertaken in accordance with clause 17 of the constitution.[115] The Supreme Court found that, contrary to QRL's constitution, an instruction was given to the independent recruitment consultant by QRL to limit the shortlist of names.

6.7.10 Following the *Andrews* litigation, Mr Bentley referred Mr Andrews to ASIC on the basis that Mr Andrews had received funding from some Class A members of QRL to assist him in the litigation.[116] Mr Bentley also made submissions to government in the document *QRL Constitution, The Case for Change* (The Case for Change) recommending the removal of Class A members on the basis that they created an integrity threat, citing the funding of Mr Andrews's litigation against QRL as justification. Those submissions are discussed below.

112 Minister's brief note prepared by acting director-general, Office of Racing, 13 August 2009.
113 Transcript, Peter Lawlor, 14 October 2013, page 26 lines 1-4.
114 Transcript, Peter Lawlor, 14 October 2013, page 25 lines 37-44.
115 *Andrews v Qld Racing Ltd* [2009] QSC 338 at [27].
116 Letter from Robert Bentley to Maree Blake, 27 November 2009.

6.7.11 As evidenced by his response to Mr Carter QC on 17 August, the Minister did not understand that he was responsible for, or had the power under the Racing Act to intervene in the process. The possibility of using those powers was never suggested to him.

6.8 Should the government have used its investigatory powers in relation to these issues?

6.8.1 The relevant investigatory powers of the chief executive are in sections 47 and 48 of the Racing Act. As explained above, the chief executive did not use these powers during the relevant period At the times relevant to the proxy issue those powers were delegated to Mr Kelly.

6.8.2 The Racing Act has been amended at various times to broaden the investigatory powers of the chief executive compared with the powers that existed in 2008. In 2008, section 48 required the chief executive to form a subjective suspicion that the control body associate was not, or was no longer, a suitable person to be associated with a control body's operations, prior to commencing any formal investigation. A similar precondition applied to any investigation into whether QRL was suitable to manage the thoroughbred code under section 47.

6.8.3 Counsel for Mr Kelly submitted that, right or wrongly, Mr Kelly's view of the proxy issue as an "administrative stuff up" rather than a more serious integrity matter was also shared by other senior Treasury officers. However, it was a core function of the Office of Racing to administer the Racing Act. It was expected to have expert knowledge of the Act, its powers, regulatory responsibilities and to provide advice to senior executives and the Minister accordingly.

6.8.4 The evidence before the Commission suggests that Mr Kelly did not consider investigating the allegations against Mr Ludwig, particularly as he:

- was simultaneously advocating for the directors of QRL, including Mr Bentley and Mr Ludwig, to be given extended terms and had endorsed their performance to the Treasurer
- accepted the explanation from Ms Reid about the limited extent of the non-compliance with section 76
- held the view that the "administrative stuff up" was not as important as matters he generally considered relevant to suitability of the control body, such as managing crises including the then recent equine influenza outbreak, and safeguarding animals and people on racecourses to prevent deaths and serious injury.

6.8.5 Mr Kelly told the Commission in oral evidence that he considered matters relevant to suitability to be more focused on the management of the code of racing.[117] There is no doubt that a large part of a control body's role is directed to this.

6.8.6 The Commission accepts that Mr Kelly honestly held the above view and did not have suspicions about the suitability of QRL or Mr Ludwig that would warrant an investigation under sections 47 or 48 of the Racing Act. However, on the evidence before the Commission it would have been open, objectively, for a person to form the necessary suspicion on the grounds of Mr Ludwig's conduct and QRL's then statutory responsibilities to the QCRC, to commence an investigation under the Racing Act.

6.8.7 The government mistakenly held the view that it was ASIC's function to regulate a control body's compliance with its constitution. The origins of this mistaken belief may be the outcome of the Ministerial review in 2001 where it was recommended that a control body for a racing code be a company limited by guarantee created under the Corporations Act and regulated by ASIC.

117 Transcript, Michael Kelly, 3 October 2013, page 30 lines 20-41.

6.8.8 The government, including the Office of Racing, continued to hold that mistaken belief even after ASIC made its position known in 2008. QRL was only held accountable for its failure to comply with its constitutional obligations in the *Andrews* litigation. Otherwise, QRL would have been essentially unaccountable if it chose not to follow its constitution.

6.8.9 The constitution of a corporate control body is a key consideration for the chief executive's assessment of its suitability to manage its code of racing. [118] The Act expressly permits the minister to impose conditional approval on a control body that it amend its constitution in a stated way.[119] For example, QRL's conditioned approval required it to seek the minister's ratification of any changes to its constitution.

6.8.10 Given that the constitution of the control body is fundamental to its suitability to manage its code of racing, non-compliance with it would permit an investigation under section 48. However, the government's position was to refer such matters to ASIC.

6.8.11 These issues became more pronounced when the constitution of RQL, as the amalgamated control body, was approved by the Minister in mid 2010. They are discussed in more detail below.

6.9 Amalgamation of control bodies and approval of RQL's constitution

6.9.1 On 1 July 2010, RQL became the amalgamated control body for all 3 codes of racing. The process leading to amalgamation and the approval of RQL's constitution raises a number of oversight issues:

- the lack of consultation with industry stakeholders
- whether the constitutional changes were in the interests of the racing industry
- the depth of consideration of issues by Office of Racing, and whether Ministers were briefed fully.

6.9.2 It is not possible, nor necessary, to set out in this Report all of the steps leading to amalgamation and the approval of RQL's constitution. A summary of the most significant is set out below.

6.9.3 The pre-amalgamation constitution provided for Class A members and Class B members. The Class A members were industry stakeholders and the Class B members were the directors. The structure of the control bodies before amalgamation gave the industry stakeholders a contractual right to take court action against the company and the directors to compel compliance with the constitution if the government failed to intervene.

6.9.4 In December 2009 Mr Bentley submitted The Case for Change. Mr Bentley argued that Class A members were an integrity risk rather than an integrity safeguard. The government accepted that submission. The constitution of RQL did not provide for any Class A members. Its only members were the directors. The result was that RQL was effectively accountable only to its own directors for compliance with its approved constitution.

6.9.5 Whilst it did not address amalgamation, Mr Bentley's *Queensland Racing Industry Issues Paper* (the Issues Paper) submitted to Minister Lawlor on 25 May 2009 appears to have started the amalgamation process. The Issues Paper requested government to redirect up to 50 per cent of wagering tax revenue to the Queensland racing industry over a period of 12 years, to be utilised on infrastructure initiatives.

118 *Racing Act 2002*, sections 11(1)(c), 20(3)(a).
119 *Racing Act 2002*, section 25(3).

6.9.6 The origins of amalgamation are unclear, but in his statement to the Commission Mr Henneken says that he strongly supported the idea of amalgamation

> *...as it would [make] the industry more efficient, focused on the optimal use of facilities and given it a single voice in negotiations with holders of wagering licences.*[120]

6.9.7 In his statement to the Commission, Mr Lawlor said he supported the proposed amalgamation as it was

> *...likely to result in a reduction in administrative duplication across the codes with consequent cost savings for the industry.*[121]
>
> and
>
> *...because the policy change was driven by QRL, it was a reform in the best interests of the industry as a whole.*[122]

6.9.8 The Office of Racing was requested to prepare a draft CBRC submission on QRL's submission.[123] Numerous drafts of this submission were prepared before a final version was submitted.

6.9.9 On 21 October 2009, Ms Perrett received Crown Law advice that if the control bodies did not agree to amalgamate the government could enact legislation to vest the assets and liabilities of QRL, QHRL and GQL in a new amalgamated control body for all codes of racing. The advice also discussed section 413 of the Corporations Act,[124] which enabled an application to be made to the court for approval of a scheme for the amalgamation of companies.

6.9.10 On 27 October 2009, Premier Bligh, Treasurer Fraser, Mr Ken Smith, Mr Mike Kaiser, Mr Lachlan Smith, Mr Bentley and Mr Ludwig met to discuss the proposed amalgamation.[125] At the Commission's public hearings, Mr Fraser acknowledged that Mr Ludwig played a role in organising meetings between the government and QRL. He rejected the proposition that it was unusual for the Premier, Deputy Premier, Treasurer and a Minister to meet with industry representatives for a briefing and suggested this was ordinary practice.[126]

6.9.11 At this meeting Mr Bentley raised the need for a new governance model for the racing industry.[127] According to Mr Ken Smith's recollection, Mr Bentley and Mr Ludwig saw the requirement for rolling elections as not providing for stable governance for the industry. [128]

6.9.12 At the conclusion of the meeting, Premier Bligh asked Mr Bentley to provide further advice to Mr Lachlan Smith and Mr Ken Smith regarding options for a new governance model for the racing industry.[129]

6.9.13 On 3 November, Mr Ford informed Minister Lawlor's office that agreement had been reached between the Treasurer and the Premier for the government to provide funding to the racing industry conditional upon the amalgamation of the three control bodies.[130] Ms Perrett updated the draft CBRC submission to reflect this as the preferred option.[131]

120 Statement of Peter Henneken, 24 September 2013, page 9 para 41.
121 Statement of Peter Lawlor, 23 August 2013, page 2 para 9.
122 Statement of Peter Lawlor, 23 August 2013, page 2 para 9.
123 Statement of Michael Kelly, 16 September 2013, page 2 para 10.
124 Letter from Christopher Maxwell to Carol Perrett, 21 October 2009, page 4.
125 Statement of Kenneth Smith, 5 September 2013, page 3 para 12.
126 Transcript, Andrew Fraser, 4 October 2013, page 18 lines 32-36, page 19 lines 6-11.
127 Statement of Kenneth Smith, 5 September 2013, page 3 para 12.
128 Statement of Kenneth Smith, 5 September 2013, page 3 para 12.
129 Statement of Kenneth Smith, 5 September 2013, page 4 para 12.
130 Email from David Ford to Louise Foley cc: Carol Perrett, 3 November 2009.
131 Email from David Ford to Louise Foley cc: Carol Perrett, 3 November 2009; CBRC Submission, 4 November 2009, page 2.

6.9.14 On 10 November 2009, Mr Bentley wrote to Mr Ken Smith enclosing the *The Case for Change* which he had largely authored. It recommended:

- the amalgamation of the three racing codes into a single control body structure
- the removal of Class A members because the involvement of race club members, licensees or industry participants in the selection/election of control body directors was a serious integrity threat.

6.9.15 Mr Bentley contended that directors were not necessarily appointed on merit, but on the sectional interests of the club system. However, he failed to recognise the constitutional role of the independent recruitment consultant to shortlist candidates on merit and to exclude nominees without merit. In the *Andrews* litigation, Mr Wilson of Northern Recruitment (the independent recruitment consultant) specifically said in his evidence that he had considered the candidates' ability to understand "the importance of being independent and being seen to be independent if they were successful in achieving their nomination to the Queensland Racing Board".[132]

6.9.16 Mr Bentley described the orders made against QRL in the *Andrews* litigation– "the 2009 election process has seen the start of the prostitution of the current constitutional voting process".[133]

6.9.17 Mr Bentley did not mention that the court's findings were based on QRL's failure to follow its constitution and did not concern the voting power of the Class A members. The 2009 director election process reflected poorly on QRL's ability to follow its constitution. It was not a legitimate reason to remove Class A members, not only from the director selection process, but from the constitution entirely. The Supreme Court made no adverse findings against Mr Andrews or Class A members.

6.9.18 At the Commission's public hearings, Mr Lawlor agreed that the proposal to exclude Class A members should have been investigated further.[134] There is no evidence that any meaningful assessment was undertaken.

6.9.19 In *The Case for Change*, Mr Bentley referred to Australian Rules of Racing (AR.1) which relevantly provided that direct government appointments to a control body were not permitted.[135] He contended that strict adherence to AR.1 rule was no longer required, which allowed for the appointment of directors without industry input. Mr Bentley was then a director of the Australian Racing Board (ARB) the administrator of the Australian Rules of Racing.

6.9.20 The *Case for Change* did not provide any supporting evidence for the relaxation of AR.1. Mr Kelly checked the status of AR.1 with the CEO of the ARB, Mr Andrew Harding.[136] On 7 May 2010 Mr Harding affirmed that the long standing policy found in AR.1 remained unchanged.

6.9.21 Mr Kelly did not investigate the representations made about the *Andrews* litigation, either administratively or using the investigatory powers under the Racing Act. As a consequence, the representations made by Mr Bentley to government in The Case for Change were not brought to the Premier's attention through the briefing process.[137]

6.9.22 Mr Nicholas Lindsay of DPC asked Ms Perrett to provide comments on The Case for Change, including key issues that should be brought to Mr Ken Smith's attention and to make recommendations.[138] Ms Perrett sent her comments to Mr Lindsay on 17 November. They did not

132 *Andrews v Queensland Racing Ltd* [2009] QSC 338 at [47].
133 QRL Constitution: The Case for Change, 10 November 2009, page 6.
134 Transcript, Peter Lawlor, 14 October 2013, page 30 lines 9-20.
135 AR.1; QRL Constitution: The Case for Change, 10 November 2009, page 22.
136 Transcript, Michael Kelly, 3 October 2013, page 15 line 45 – page 16 line 3.
137 Transcript, Michael Kelly, 3 October 2013, page 18 lines 30-34.
138 Email from Nicholas Lindsay to Carol Perrett, 16 November 2009.

provide any objective scrutiny of The Case for Change and appear to have accepted Mr Bentley's position on every point. For example:

> *As the control body is a regulator, it is not appropriate for the members of the control body company to be licensees that the control body regulates. The involvement of race club members, licensees or industry participants in the selection/election of control body directors is a serious integrity threat.*

6.9.23 In contrast, a DPC briefing note dated 19 November identified a number of issues with the proposals suggested by QRL, the most significant of which was that the merit of the specific reforms was unclear and that further consideration of the proposals, in consultation with the existing control bodies, was required. Those observations by DPC do not appear in written briefings to Minister Lawlor from the Office of Racing.

6.9.24 On 20 November, Mr Ken Smith and Mr Lachlan Smith met with Mr Bentley and Mr Ludwig to discuss amalgamation.[139] Mr Bentley "raised an issue with the election process for the control bodies and the fact that Bill Ludwig was up for election in March of the next year".[140] Mr Bentley does not appear to have mentioned that another director, in addition to Mr Ludwig, would have to retire and face an election the following year.

6.9.25 On 26 November, CBRC approved the redirection of wagering tax revenue to the Queensland racing industry over a period of four years, to a total of $85 million.[141] The accompanying submission noted that

> *... the issues of structural reform, including control body amalgamation and governance, will be the subject of ...[a] submission that will be submitted to Cabinet as soon as possible.*

6.9.26 According to Mr Fraser, an overarching concern of the government regarding the amalgamation was pushing public expenditure to combat the effects of the global financial crisis

> *... we were certainly keen to see the investment take place for broader economic reasons, and because of industry infighting, it simply wasn't taking place.*[142]

6.9.27 On 18 December 2009, Mr Ken Smith convened a meeting with several senior government employees and Mr Bentley, Mr Lette (as QHRL chair) and Ms Watson (as GQL chair). The proposed amalgamation was discussed. There was in-principle support for the changes, although there were outstanding issues relating to board composition.[143] Government was seeking a response from the control bodies by 4 January 2010 and the preferred outcome was, clearly, for the amalgamation to proceed.[144] Mr Ford's contemporaneous notes of the meeting record that it was collectively agreed that consultation about the amalgamation would occur only at board level.[145]

6.9.28 On 23 December 2009, Mr Kelly and Ms Perrett attended a meeting at Deagon with the chairs and CEOs of the three codes of racing: Mr Bentley, Mr Lette, Ms Watson, Mr Tuttle, Mr Michael Godber and Mr Beavis to discuss the proposed amalgamation in further detail.[146] Mr Bentley tabled a paper outlining key constitutional issues.[147] The paper suggested that the founding directors of the new control body would be the five directors from QRL and one director each from QHRL and GQL.

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139 Statement of Ken Smith, 5 September 2013, page 5 para 17.
140 Statement of Ken Smith, 5 September 2013, page 5 para 17.
141 This funding to industry is discussed in Chapter 9.
142 Transcript, Andrew Fraser, 4 October 2013, page 22 lines 5-7.
143 Statement of Ken Smith, 5 September 2013, page 5 para 21; Statement of Michael Kelly, 1 October 2013, page 1 para 1.
144 Statement of Michael Kelly, 1 October 2013, page 1 para 1; Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 1.
145 Statement of David Ford, 16 September 2013, attachment DF-15.
146 Statement of Michael Kelly, 1 October 2013, page 2 para 4; Minutes of 3 Codes Chairman's Meeting, 23 December 2009.
147 Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 2.

6.9.29 Mr Lette was concerned about this board composition. He said the greyhound and harness codes should each have two directors.[148] Mr Lette supported the appointment of an independent chair to the board,[149] but Mr Bentley and Ms Watson did not support this. Mr Bentley is recorded in the minutes as saying that

> *...the notion of seeking an independent chairman from outside the industry is a ridiculous proposition.*[150]

6.9.30 Mr Bentley advised Mr Lette that "there was no rationale or reason for Harness and Greyhounds to have 2 directors each" because the thoroughbred code produced in excess of 75 per cent of the racing industry revenue, the ratio of proposed directors was consistent with commercial reality and that the ASX and Institute of Company Directors recommend that the optimum number of board members was seven.

6.9.31 Mr Bentley's proposal was supported in a subsequent Cabinet document dated 16 February 2010:

> *The thoroughbred code has been allocated more founding directors than the harness and greyhound codes for the following reasons:*
>
> - *As at 30 June 2009, the thoroughbred code generated 78.7% of wagering turnover, the harness code generated 10.6% and the greyhound code 10.8%.*
> - *The thoroughbred code has 109 race tracks, the greyhound code has seven and the harness code has four race tracks.*
> - *The Australian Racing Board, the peak national body for thoroughbred racing, would not accept a model with less thoroughbred representation.*

6.9.32 After discussion, Ms Watson agreed to the board make up proposed by Mr Bentley. Mr Lette stated he would confer with his board and advise his position.

6.9.33 Mr Lette raised concerns about the potential sale of Albion Park by an amalgamated control body. Mr Bentley is recorded as saying "he would be prepared to advise the minister ... that there is no agenda to sell Albion Park" and that

> *...the new control body would give a commitment to allocate up to $14m to a maximum of $18m on infrastructure at Albion Park from the proposed funding package.*

6.9.34 Ms Watson also sought assurances in relation to the proposed Logan greyhounds complex. Mr Bentley is recorded as giving those assurances:

> *Provided the project received all necessary construction and building approvals from council and state government then the new control body would allocate up to $10m from the proposed government funding.*

6.9.35 At the Commission's public hearings, Mr Kelly accepted that these assurances by Mr Bentley in relation to Albion Park and Logan secured Mr Lette's and Ms Watson's vote in favour of amalgamation.[151]

6.9.36 On 29 December, Mr Bentley sent Premier Bligh a copy of the minutes of the meeting (which Mr Bentley prepared), a draft organisational structure and a draft constitution of the amalgamated control body and a comparative chart of the size and relativity of each code. The minutes inserted a reference to an academic paper Mr Bentley had located to support his assertion that an independent chair was not necessary and did not enhance board effectiveness.[152]

148 Statement of Michael Kelly, 1 October 2013, page 2 para 6; Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 2.
149 Statement of Michael Kelly, 1 October 2013, page 2 para 6; Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 2.
150 Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 2.
151 Transcript, Michael Kelly, 3 October 2013, page 26 lines 40-45, page 27 lines 13-15.
152 Westphal 2002 in Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 2. The reference was not otherwise identified.

6.9.37 On 4 January 2010, Mr Bentley, Mr Lette and Ms Watson met with the Treasurer, Minister Lawlor and other government representatives. It was agreed that the initial term of directors would align with the expiry of the Product and Program Agreement (PPA) and that the government would provide funding of $85 million over four years if the racing industry restructured its control bodies.[153] Mr Bentley proposed that there was no need for more consultation over amalgamation.[154]

6.9.38 On 5 January 2010, Mr Bentley wrote to the Treasurer urging him to proceed with the amalgamation of the three codes of racing:

> *The decision by the Harness board to procrastinate, delay and seek unrealistic outcomes is most unfortunate and will cause the minor codes to suffer to a degree that would otherwise not happen with an amalgamated board and funding package.*

6.9.39 Mr Lette wrote to the Treasurer on 6 January outlining QHRL's concerns about the proposed amalgamation and in particular the proposed board makeup of RQL. He suggested that two independent board members should replace two of the thoroughbred directors to ensure independence, accountability and transparency. Mr Lette suggested that the government should provide funding beyond the four year time frame on the basis that:

> *The removal of Class A members as share holders and their voting rights for Board appointments will be considered a high price to pay and could only be justified with ongoing funding.*

6.9.40 Ms Watson informed the Treasurer on 7 January that GQL supported the amalgamation

> *...providing the safeguards as previously outlined in correspondence and minutes are honoured.*

6.9.41 The following day, Mr Bentley and Ms Watson jointly wrote to the Treasurer saying that the thoroughbred and greyhound codes were in agreement about the details of the proposed amalgamation and composition of the new board. Mr Bentley, on behalf of QRL, issued a media release on 8 January to that effect.[155]

6.9.42 On 8 January, Minister Lawlor advised Mr Lette that the government was keen to progress discussions with QHRL about achieving an integrated control body.

6.9.43 On 13 January, Mr Kevin Seymour of QHRL met with Mr Ford to discuss his concerns and those of the harness racing code about the amalgamation. They were:

- the composition of the proposed board – he believed two independent directors should be included
- Mr Bentley's independence because of his position at Tatts Group
- there was to be no industry representation under the proposed model as the directors of the company would be the only members of the company
- the proposed initial term of five years for the directors was too long
- there had been no consultation undertaken with the harness board in relation to the proposal
- no cost/benefit analysis of the proposed amalgamation had been undertaken.

153 Statement of David Ford, 16 September 2013, page 9 para 45, attachment DF-16.
154 Statement of David Ford, 16 September 2013, attachment DF-16.
155 QRL, Media Release, 'Changes welcomed by the thoroughbred and greyhound racing industry', 8 January 2010.

6.9.44 A briefing note conveyed these matters to the Minister.[156] Mr Seymour's concerns aligned with the concerns earlier identified by DPC in the briefing note to Mr Ken Smith. However, the Office of Racing does not appear to have considered them further.

6.9.45 On 15 January 2010, Minister Lawlor wrote to Mr Lette and:

- said that the government was committed to providing funding to a single control body
- asked whether the harness control body agreed to an amalgamated control body with five directors from the thoroughbred control body, one from the greyhounds and one from harness
- nominated a deadline of 22 January (a date suggested by Mr Bentley) as being necessary because of the considerable legislative change required to create a new control body structure.

6.9.46 On 20 January, Mr Lette wrote to Minister Lawlor expressing his concern about the proposed board composition and the lack of a cost/benefit analysis as previously raised by Mr Seymour. QHRL was given an extension to 25 January to advise its position on amalgamation.

6.9.47 Minister Lawlor advised Mr Lette on 21 January that the composition of the founding board of the amalgamated control body would be as agreed to by the chairs of the merging control bodies.

6.9.48 On 25 January, Mr Lette advised Minister Lawlor that the Class A members of QHRL had agreed in-principle to amalgamation provided the following matters were addressed

> *...the long term guarantee of Albion Park as the home and racing headquarters for harness racing has been agreed. Confirmation should be provided that "long term" is at least 30 years*
>
> *...any ongoing income stream generated by Clubs from future investments of their funds will be retained by the Clubs (eg catering operations)*
>
> *...in the event that Government determines that harness racing should be relocated from Parklands, the present day value of harness racing's investment in that track be returned to the harness sector or invested in a replacement facility for harness racing.*

QHRL also sought an assurance from government that it would

> *...monitor the operation and performance of the proposed new control body, particularly in terms of the exercise of genuine independence of Board members and the protection of the interests of the minority stakeholders in the Greyhound and Harness Racing codes.*

6.9.49 On 28 January, Minister Lawlor advised Mr Bentley, Mr Lette and Ms Watson that QHRL had agreed to amalgamation and he would proceed to introduce legislation into Parliament to amend the Racing Act.

6.9.50 Minister Lawlor further advised Mr Lette that the issues the Class A members of QHRL wished to have addressed were "matters for the new control body to deal with and no guarantees can be given by Government on these matters" adding

> *...amendments to the Racing Act 2002 will provide significant safeguards for each individual code of racing by ensuring that the new control body must make decisions that are in the best interests of all of the codes as a whole, while still having regard to the continued existence and welfare of each individual code.*

156 Minister's briefing note, 'Proposed amalgamation of racing industry control bodies', 14 January 2010.

6.9.51 By letter dated 8 February Mr Lette advised Minister Lawlor that:

> *In light of your advices, that you intend to legislate for the merger of the three codes and in particular of the adverse impact on the code as pointed out in your letter if harness racing stood outside the merger, the Board has resolved to support the merger of the three codes into one control body.*
>
> *In reaching this decision, the Board was cognizant of the assurances made by you and Mr Bentley in correspondence over the past month in relation to the merger.*

6.9.52 Notwithstanding this agreement, the path to legislative amalgamation was not smooth.

6.9.53 The purpose of the Racing and Other Legislation Amendment Bill 2010 was to amend the Racing Act 2002 to:

> *(1) establish one control body for the three codes of racing (thoroughbred harness and greyhound)*
>
> *(2) ensure that the control body has the necessary powers to manage the three codes of racing*
>
> *(3) abolish entities established under the Racing Act that can be established administratively by the control body*
>
> *(4) clarify provisions relating to taking and dealing with samples from licensed animals for analysis.*[157]

6.9.54 Amendments to the Act were required to transfer staff, assets, liabilities and responsibilities from the three control bodies to an amalgamated control body.[158] The proposed control body model was expected to reduce administrative overheads and provide "a unified commercial focus" to the Queensland racing industry.[159]

6.9.55 Consultation was undertaken with the chairs of QRL, QHRL and GQL about the proposed amalgamation and constitution. However, there was no community consultation or consultation with other racing industry stakeholders.[160] DPC held significant concerns about the lack of industry consultation on the reforms. These concerns were raised with Ms Perrett on numerous occasions.

6.9.56 At the Commission's hearings, Mr Fraser said that the three codes had their interests represented during the amalgamation process despite the lack of industry consultation

> *... when we were in that change process, the three codes were represented and they were agreeing amongst themselves who they would be. So that was the industry involvement.*[161]

6.9.57 Mr Fraser stated that he may have been unaware of the extent of stakeholder unrest because of his other duties:

> *I remember [stakeholder unrest] subsequently, in the broadest of terms, but it's fair to say at this time I was in the middle of the privatisation program of QR National in particular and frankly ... that nearly took me out.*[162]

6.9.58 At the Commission's hearings, Mr Lawlor said that wide consultation was impractical as agreement was unlikely to be reached, given the factional nature of the industry.[163]

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157 Explanatory Memorandum, Racing and Other Legislation Amendment Bill 2010, page 1.
158 Explanatory Memorandum, Racing and Other Legislation Amendment Bill 2010, page 2.
159 Explanatory Memorandum, Racing and Other Legislation Amendment Bill 2010, page 2.
160 Transcript, Michael Kelly, 3 October 2013, page 32 lines 17-18; Transcript, Andrew Fraser, 4 October 2013, page 7 lines 4-6.
161 Transcript, Andrew Fraser, 4 October 2013, page 6 lines 38-42.
162 Transcript, Andrew Fraser, 4 October 2013, page 26 line 46 – page 27 line 12.
163 Transcript, Peter Lawlor, 14 October 2013, page 33 lines 38-42.

6.9.59 Mr Kelly and Ms Perrett have submitted that the decision to consult with only the chairs and executives of the three control bodies was made "at a higher level [than the Office of Racing] within government" at the beginning of the amalgamation process in 2009.[164] Ms Perrett specifically recalled Mr Kelly advising her

> *...on a number of occasions that the decision to consult with only the chairs of the three control bodies was made at the meeting on 18 December 2009.*[165]

6.9.60 At the Commission's public hearings Mr Kelly said that limited consultation was not his view but a departmental view:

> *I would have imagined that would have been discussed with the Department and that would've been the view of the Department. ... I wouldn't have just decided myself.*[166]

6.9.61 Mr Kelly's comments are consistent with Mr Ford's notes taken during the meeting on 18 December 2009. These notes reflect that the decision to consult with only the chairs of the three control bodies was reached at that meeting at the suggestion of Mr Bentley.[167]

6.9.62 On 13 April 2010, the Bill amending the Racing Act was introduced into Parliament and on 20 May it was passed by Parliament.[168]

6.9.63 Following the passage of the Bill, the Governor requested a briefing about the legislation before giving her assent.[169] According to Mr Ford, this was a straightforward, but uncommon process.[170] The Governor was particularly interested in the level of consultation which had occurred with representatives of the racing industry in the drafting of the amendments and the timeframes used in preparing the legislation for assent.[171]

6.9.64 The Office of the Governor had

> *...received a number of individual petitions from various areas of the racing industry protesting about the lack of consultation and the 'undue haste' with which the [Racing and Other Legislation Amendment Bill 2010] has been processed.*

6.9.65 Between December 2009 and June 2010, Minister Lawlor's office had also received correspondence from many racing industry participants who were concerned about the lack of consultation undertaken in relation to the amalgamation. It was plain that industry consultation was an issue for stakeholders.

6.9.66 In relation to the limited time allowed for preparing the legislation, Mr Kelly said that:

> *There was a real sense of urgency surrounding finalizing the drafting instructions as it was recognised that there was a large amount of work to be done in developing a draft Bill and Authority to Introduce Cabinet submission.*[172]

6.9.67 Several draft versions of the Governor's briefing note were prepared by the Office of Racing in consultation with DPC. In response to the Governor's concerns, the Premier's office specifically asked for additional detail to be included in the briefing note in relation to the clubs, peak bodies and individuals consulted in relation to the amendments.[173]

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164 Submission, Michael Kelly and Carol Perrett, 31 October 2013, page 30 para 97; Statement of Carol Perrett, 30 October 2013, page 12 para 42.
165 Statement of Carol Perrett, 5 November 2013, page 1 para 2.
166 Transcript, Michael Kelly, 3 October 2013, page 82 lines 39-40.
167 Statement of David Ford, 16 September 2013, attachment DF-15.
168 *Parliamentary Debates*, Queensland Legislative Assembly, 20 May 2010, page 1799.
169 Statement of Justin Murphy, 2 September 2013, page 7 para 33; Statement of Nicholas Lindsay, 2 September 2013, page 5 para 28.
170 Statement of David Ford, 16 September 2013, page 10 para 56.
171 Email from Mark Gower to Patrick Vidgen cc: Anthony Crack, Leighton Craig, Cecily Pearson, 24 May 2010.
172 Statement Michael Kelly, 1 October 2013, page 6 para 18.
173 Email from Justin Murphy to Michael Kelly cc: Carol Perrett, Nick Williams, David Hourigan, Nicholas Lindsay, 27 May 2010.

6.9.68 A briefing note was provided to the Governor.

6.9.69 The Commission may not engage in any analysis of the information included in that note. To do so would trespass impermissibly into the realm of Parliament and its privileges.

6.9.70 In *Prebble v Television New Zealand Limited*[174] the Privy Council said "...it would be a breach of privilege to allow what is said in Parliament to be the subject matter of investigation or submission"[175].

6.9.71 Section 8(1) of the *Parliament of Queensland Act 2001* (Qld) provides that:

> *The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.*

This provision is expressly intended to have the same effect as Article 9 of the Bill of Rights (1688).[176]

6.9.72 Section 8(2) defines "proceedings in the Assembly" to include

> *... all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly ...*

6.9.73 Section 2 of the *Constitution of Queensland Act 1867* (Qld) empowers the Governor as representative of the Queen "with the advice and consent of the ... Assembly to make laws ..."

6.9.74 Section 2A provides that the Governor, when giving assent, is a constituent part of the Parliament of Queensland. Every bill after its passage through the Parliament must be presented to the Governor for assent and "shall be of no effect unless it has been duly assented to ...".[177] When the Governor assents it is the final step in bringing a bill into law as an Act of the Parliament.[178]

6.9.75 In *Prebble v Television New Zealand Ltd*[179] the Privy Council observed that Article 9 of the Bill of Rights, in the Westminster tradition of parliamentary democracy, forms part of a wider principle of law regarding judicial non-intervention in parliamentary proceedings. Their Lordships referred to Blackstone[180]

> *"...[t]he whole of the law and custom of Parliament has its origin from this one maximum, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'..."*[181]

6.9.76 The question whether the Governor was briefed with correct information is a matter for the Parliament and not for this Commission.

6.9.77 The Racing and Other Legislation Amendment Bill 2010 received Royal Assent on 7 June 2010 and changes to the Racing Act commenced on 1 July 2010.

6.9.78 The Racing and Other Legislation Amendment Bill proposed in clause 23 that the Minister must give a control body approval to RQL on 1 July 2010. In practice this meant that RQL would not be subject to an application and assessment process under the Racing Act as occurred previously for QRL, QHRL and GQL.

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174 [1995] 1 AC 321.
175 At page 333.
176 *Parliament of Queensland Act 2001*, section 9(1).
177 *Constitution of Queensland Act 1867*, section 2A(2).
178 In *Westco Lagan Ltd v Attorney-General and anor* [2001] 1 NZLR 40 Justice McGechan in the New Zealand High Court, in the course of ruling whether the court could restrain the Clerk of the Parliament from presenting a bill for royal assent, concluded that the expression "proceedings of Parliament" in Article 9 of the Bill of Rights did not extend outside the Houses of Parliament proper to include the monarch and royal assent. The Speaker of the New Zealand Parliament referred the question to the Privileges Committee of the Parliament. The report and debate in the parliament did not support the judge's conclusion. In the ensuring debate, the New Zealand Attorney-General observed that the transitioning a bill from one part of the parliament to another part of parliament was a proceeding in parliament, Hansard New Zealand, 28 March 2001.
179 [1995] 1 AC 321.
180 *Commentaries on the Laws of England*, 17th edition (1830), Vol 1, page 163.
181 [1995] 1 AC 332.

6.9.79 Nonetheless, there was still an opportunity provided for in clause 23 for the minister to consider imposing conditions on RQL's approval. Similar conditional approval powers under section 25 of the Racing Act expressly provide that the minister may require amendments to the control body constitution.

6.9.80 Because of time constraints RQL needed to draft its proposed constitution in the first half of 2010.[182] The Office of Racing engaged with RQL during the drafting process to ensure government policy was properly reflected in the draft constitution and to ensure that the minister could be briefed on approval conditions.

6.9.81 On 19 December 2009, Mr Bentley emailed a draft constitution to Ms Reid and Mr Grace. It included the following essential terms:

- the directors would be the only members of the company
- there would be a minimum of seven directors for the initial term
- the board would comprise the current five directors from QRL, one director each from GQL and QHRL
- the directors would hold office for an initial term of five years
- the control body would be created under the Corporations Act and subject to the provisions of the Racing Act.[183]

6.9.82 At the meeting on 23 December 2009 with the chairs of the three codes, Mr Kelly outlined the government's key elements regarding the amalgamated control body:

- *Fixed terms*
- *Directors to be drawn from the existing code boards [there will not be a new round of elections]*
- *Limited liability Company*
- *Directors to be members*
- *Board make up to represent the codes relevance*
- *No industry representation*
- *Security of employment for all staff*
- *Consultation to be restricted to individual board members*
- *Final decision by the individual code chairs*
- *Decision by 4 January, 2010* [184]

6.9.83 Following that meeting, on 29 December, Mr Bentley sent Premier Bligh a draft constitution of the amalgamated control body also proposing:

- that the founding directors would be Mr Bentley, Mr Hanmer, Mr Ludwig, Mr Milner, Mr Ryan, Ms Watson and a person invited from the QHRL
- a selection panel consisting of the chairman, or in his absence the deputy chairman, one person who was a Fellow of the Australia Institute of Company Directors and a sitting director of an ASX Top 200 listed company and one person appointed by the Director-General of the department responsible for racing, would appoint directors from a shortlist prepared by an independent recruitment consultant.

182 RQL was incorporated on 25 March 2010.
183 Email from Robert Bentley to Shara Reid, David Grace, 19 December 2009, 5.19pm.
184 Minutes of 3 Codes Chairman's Meeting, 23 December 2009, page 2.

6.9.84 On 22 February 2010, Cabinet decided

> *...[t]o note that it is proposed to bring the Authority to Introduce submission, accompanied by a draft constitution of Racing Queensland Limited, to Cabinet in April 2010.*

6.9.85 The accompanying Policy Submission/Authority to Prepare said that "[t]he constitution of Racing Queensland Limited will be developed by the founding directors and must be approved by the Minister" and that:

- the directors would hold office for an initial term of five years (until 2015) and after the initial term two of the directors would retire every two years
- a period without elections would significantly contribute to the stability of the board, which was critical for the renegotiation of the PPA in 2014
- the directors of the company would be the only members of the company because stakeholder membership of the control body company was thought to be an integrity threat
- the control body must have regard to the best interests of the three codes of racing as a whole and the continued existence and welfare of individual codes "to ensure that the directors do not have unfettered power" and to protect the minor codes of racing.

6.9.86 The submission did not include any critical analysis of the draft constitution.

6.9.87 The draft constitution of RQL was developed by Mr Bentley and Cooper Grace Ward with assistance from the Office of Racing.[185]

6.9.88 On 5 March 2010, Ms Perrett sent Mr Grace an outline of amendments approved by Cabinet.[186] The amended provisions were:

> *a) The initial term of directors is to expire on 30 June 2014. Note: the initial term is not to expire at the conclusion of the AGM in 2014 – must expire on 30 June 2014.*
>
> *b) The remuneration of the directors is to be recommended by an independent consultant who has expertise in remuneration of public company directors and it must be approved by the Chief Executive Officer of the Department responsible for racing.*
>
> *c) In making decisions, the control body is to have regard to the best interests of the thoroughbred, harness and greyhound codes as a whole, and the continued existence and welfare of each individual code.*
>
> *d) The constitution is to provide for the establishment of committees for non-TAB racing that will be responsible for providing advice and recommendations to the control body.*
>
> *e) The current chairs of the eight Country Racing Associations will form an advisory committee to provide advice and recommendations to[RQL]on non-TAB thoroughbred racing issues. Detailed provisions regarding the role and operations of this body are to be included in [RQL's] constitution.*

6.9.89 Following further development of RQL's constitution, on 12 April Cabinet decided

> *...[t]o note that that the Minister for Tourism and Fair Trading intends to approve the proposed constitution of [RQL].*[187]

185 Statement of Michael Kelly, 1 October 2013, page 3 para 10, attachment MK-4; Transcript, Carol Perrett, 3 October 2013, page 79 lines 40-41.
186 Statement of Michael Kelly, 1 October 2013, page 8 para 23; Email from Michael Kelly to David Ford cc: Carol Perrett, Claire Maconachie, Ian Fletcher, Sandy Williams, 24 February 2010; Email from David Ford to Michael Kelly cc: Carol Perrett, Clare Maconachie, Ian Fletcher, Sandy Williams, 24 February 2010.
187 Cabinet 2010, *Racing and Other Legislation Amendment Bill 2010*, Decision No: 9300, 12 April.

6.9.90 The need for an initial term for RQL directors was considered important by government and Mr Bentley to provide stability to the board during the period required to amalgamate the control bodies and to ensure that experienced directors were able to negotiate a new PPA with TattsBet.

6.9.91 Mr Bentley had first proposed that the directors of RQL would hold office for an initial term of five years until 2015.[188] This was rejected by Cabinet and the term was specified to finish when the PPA expired on 30 June 2014.[189] The Office of Racing agreed that the initial term should end at the close of the next annual general meeting which occurred after 30 June 2014.[190]

6.9.92 The provision for a substantial initial term for the founding directors, all of which were existing directors of the current control bodies, should have been subject to rigorous examination by government. The new term delayed, by some years, scrutiny of the performance of a number of directors whose terms were soon to expire, including Mr Bentley and Mr Ludwig.

6.9.93 The position is particularly stark for Mr Bentley. He was appointed as chair of the QTRB on 5 April 2002 and was due to retire (and perhaps seek reappointment) as a director no later than the annual general meeting in late 2011. His proposal for a further term until 2015 meant that he would not be subject to any merits selection process for over 13 years. Perhaps in recognition of this the constitution of RQL specified that Mr Bentley was required to retire at the first AGM following the initial term.[191]

6.9.94 At the Commission's public hearings, Mr Fraser accepted that Mr Bentley's tenure as a director was extensive.[192] Although Mr Fraser was conscious of Mr Bentley's position on the board of Tatts Group, he conceded that the government may have not considered Mr Bentley's conflicted position in relation to the renegotiation of the PPA in 2014.[193]

6.9.95 A Cabinet document dated 16 February 2010 stated that

> *...[w]hile there will be no members who are not directors under the amalgamated control body model, there are safeguards in place to ensure that the directors do not have unfettered power ...*
>
> *The constitution of [RQL] will provide that the objects of the company include exercising the powers and performing the functions of a control body for the thoroughbred, greyhound and harness codes of racing, having regard to the best interests of the three codes as a whole and the continued existence and welfare of the individual codes.*

6.9.96 Ms Perrett advised Mr Lindsay that the purpose of the "best interests" amendment was to provide protection for the two minor codes.[194] However, a file note of Mr Grace dated 11 March records that at a meeting between Mr Grace, Mr Kelly and Ms Perrett it was agreed that that statement "is intended to be a motherhood statement and there is no further significance than that".

6.9.97 At the Commission's public hearings, Ms Perrett understood the meaning of "motherhood statement" but could not recall attending the meeting on 11 March.[195] Mr Kelly described the meaning of "motherhood statement" as

> *...a statement that's just said for the purposes of having some words there* [196]

188 Statement of Michael Kelly, 1 October 2013, page 4 para 12.
189 Statement of Michael Kelly, 1 October 2013, page 4 para 12.
190 Letter from David Grace to Michael Kelly, 16 March 2010.
191 Statement of Michael Kelly, 1 October 2013, page 7 para 21.
192 Transcript, Andrew Fraser, 4 October 2013, page 7 lines 23-27.
193 Transcript, Andrew Fraser, 4 October 2013, page 7 line 43, page 8 line 26.
194 Email from Carol Perrett to Nicholas Lindsay cc: Justin Murphy, 3 February 2010.
195 Transcript, Carol Perrett, 3 October 2013, page 79 lines 4-32.
196 Transcript, Michael Kelly, 3 October 2013, page 38 lines 26-27.

6.9.98 There was much email communication over the expression "best interests" between DPC and the Office of Racing including whether there should be equitable funding and support to each code. Mr Kelly wrote to Mr Lindsay:

> ....
>
> *There is no intention to provide equitable funding to any code – fund[ing] goes to the one control body NOT a code. Are you suggesting that each code get 33.3% of revenue because that is what equitable funding means. We can waste no more time on this.*
>
> *David/Mark – I am finished with this – over to you pls because we are going nowhere on this. Be aware that what Nick L seems concerned about is 100% against what the Minister wants and what he said Cabinet discussed and agreed. Until told differently I will reflect Minister/Cabinet intent not Nick's.*[197]

6.9.99 When questioned about his email at the Commission's public hearings, Mr Kelly said there were "very firm timeframes" to lodging Cabinet submissions:

> *I got to the end of being able to try to address [Mr Lindsay's concerns] ... And that's where I escalated it to my boss and into the Ministerial advisory area, and for them to look at it at their level.*[198]

6.9.100 The concerns about the enforceability of the best interests statement were valid given that the *industries* of the three separate codes of racing were not amalgamating even though the control bodies were to be. Furthermore, the composition of the amalgamated control body board meant that it was important for the two minor codes that decisions were genuinely made with the continued existence and welfare of the individual codes as well as the best interests of the codes as a whole. The extent to which this expression might be called in aid to challenge a decision by RQL was never addressed.

6.9.101 Minister Lawlor relied upon the advice and recommendations provided to him by departmental staff through briefing notes.[199] He approved the draft constitution of RQL on 22 June.[200]

6.9.102 The relevant Office of Racing briefing note dated 11 June did not provide any objective scrutiny of RQL's proposed constitution and did not offer any proposed conditions. At the Commission's public hearings, Ms Perrett accepted that the attachment to the Minister's briefing note was only a summary of RQL's draft constitution and did not identify any issues for Minister Lawlor's consideration.

6.9.103 When asked if the fact that the founding directors of RQL had already been in office for some time had been considered, Ms Perrett responded

> *...[i]t may have been considered but I think the decision had been made within government that's that what would be happening.*[201]

6.9.104 This suggests Ms Perrett did not understand that there was any purpose to be served in questioning the proposed initial term for the directors because government had already decided that a substantial term would be approved.

6.9.105 More importantly, briefing notes prepared by the Office of Racing to Minister Lawlor should have considered Mr Bentley's inability to participate in the future PPA negotiations because of his conflicted position on the board of Tatts Group. Such a consideration was especially relevant since participation in the renegotiation of the agreement was given as the main reason for a substantial initial term.[202]

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197 Email from Michael Kelly to Nicholas Lindsay, Justin Murphy, David Ford cc: Carol Perrett, Mark Biddulph, 31 March 2010.
198 Transcript, Michael Kelly, 3 October 2010, page 36 lines 8-36.
199 Transcript, Peter Lawlor, 14 October 2013, page 25 lines 37-44; Submission of Peter Lawlor, 21 October 2013, page 9 para 41.
200 Minister's briefing note, Control body approval – Racing Queensland Limited, 11 June 2010.
201 Transcript, Carol Perrett, 3 October 2013, page 74 lines 19-20.
202 Statement of Michael Kelly, 1 October 2013, page 4 para 12.

6.9.106 The Office of Racing was well aware of Mr Bentley's conflict, having obtained advice from Clayton Utz on 13 March 2006 as to whether Mr Bentley would be regarded as having a conflict of interest by holding the positions of chairman of QRL and director of Tatts Group.[203]

6.9.107 Mr Kelly acknowledged that the Office of Racing was still conscious of this at the time of amalgamation,[204] but nonetheless did not draw the issue to the Minister's attention.

6.9.108 On 22 June 2010, Minister Lawlor approved RQL as the control body for thoroughbred, harness and greyhound codes of racing in Queensland subject to the following conditions:

> *(1) By 25 June 2010, Racing Queensland Limited must adopt the draft constitution ...*
>
> *(2) Racing Queensland Limited must obtain the ratification in writing of the Chief Executive Officer of the Department responsible for racing before implementing any amendment to the company's constitution referred to in 1. above.*
>
> *(3) Racing Queensland Limited must hold, in conjunction with its Annual General Meeting, an annual public meeting to provide an industry update.* [205]

6.9.109 On 2 July 2010, the notice of approval appeared in the Queensland Government Gazette.[206]

6.9.110 The requirement to obtain the ratification in writing of the chief executive before implementing any amendment to the company's constitution was to provide

> *...a safeguard to ensure that the control body could not change its constitution without providing justification to government for the change.*[207]

6.9.111 The practical effect was that the Office of Racing, which would likely have the delegated authority of the chief executive, would be considering any proposed amendments. This removed a layer of scrutiny that ministerial oversight had given.

6.9.112 RQL adopted the draft constitution approved by Minister Lawlor on 25 June 2010 and on 14 July it was lodged with ASIC.

6.9.113 Amalgamation was unpopular within the racing industry. Concerns arose that RQL did not act in the best interests of all of the codes and also about the actions of its directors. It cannot be said that consultation with the industry prior to amalgamation would have prevented these issues arising, but there would have been some semblance of a democratic process at work which may have led to acceptance.

6.10 QRL/RQL's Purchasing Policy

6.10.1 There was a widely held view in QRL/RQL and the Office of Racing that the purchasing policy of those control bodies, at least until accessing government funds from the RICDS, was an internal policy and not a mandatory policy under section 81 of the Racing Act requiring scrutiny.

6.10.2 In his statement to the Commission[208] Mr Kelly said:

> *RQL had a procurement policy in place in July 2010 and it was expected that it would be adhered to in control body purchasing activities. RQL assured the Government that purchasing activity was being undertaken in accordance with their purchasing policy.*

203 Letter from Barry Dunphy to Carol Perrett, 13 March 2006.
204 Statement of Michael Kelly, 1 October 2013, page 7 para 21.
205 Racing Queensland Limited Control Body Approval Notice, 22 June 2010.
206 Queensland Government Gazette No. 85, 2 July 2010, page 1030.
207 Statement of Michael Kelly, 1 October 2013, page 9 para 26.
208 Statement of Michael Kelly, 27 September 2013, para 107.

6.10.3 Prior to the development of the Addendum to the policy,[209] the Office of Racing did not have any reason to think that the services of Contour Consulting Engineers Pty Ltd had been procured other than consistently with QRL's purchasing policies.[210]

6.10.4 Submissions for Mr Kelly and Ms Perrett contend that when significant public funds were to be expended by RQL from the RICDS, the Office of Racing became active in ensuring RQL's purchasing policies were guided by the procurement policies of the State government. Mr Kelly said:

> *In 2011 it was identified by the Office of Racing Regulation that the RQL purchasing policy did not contain enough detail related to the conduct of the IIP-related purchasing activity. The Office of Racing Regulation requested RQL to develop and implement specific IIP related purchasing processes that would be used to ensure the transparency of RQL processes and assist in the safeguarding of the public intra-related expenditure of the RICDS funding been provided by Government to RQL. The IIP policy was implemented by RQL in late 2011. ...As part of this process there were considerable communication between the Office of Racing Regulation and RQL.* [211]

6.10.5 Mr Kelly informed RQL that the policies applying to work undertaken using RICDS funds would be required to withstand scrutiny as there would be future audits. Mr Kelly said that the audits were planned to be conducted under section 46 of the Racing Act, but were not commenced as a result of this Commission.[212]

6.10.6 After Treasury had signed off on the IIP business cases and when developing the terms of the funding deeds to support the payments, the Office of Racing included clauses in the deeds which reflected the requirement for a tender process and an open approach to the market.

6.10.7 The Commission has concluded that in light of earlier assurances from QRL and RQL, upon which it was entitled to rely, and the later attempt to align RQL's policy with the State government purchasing policy, largely driven by the Office of Racing, that there was sufficient and appropriate oversight of this matter by the Office of Racing.

6.11 Response to equine influenza outbreak August 2007

6.11.1 As was acknowledged at the beginning of this Chapter, the Office of Racing carried out much of its regulatory role competently. Its response to the equine influenza outbreak in Queensland in partnership with QRL and QHRL earned widespread commendation. Some further detail is included here to provide a more complete picture of government oversight than might be gleaned otherwise.

6.11.2 In late August 2007, the Office of Racing had been monitoring the situation internationally, where races had been cancelled due to the spread of the equine influenza virus.[213] On 25 August, the Office of Racing was notified that two horses in New South Wales had tested positive to equine influenza. That morning Mr Kelly attended a conference between the thoroughbred and harness control bodies. Those attending resolved to cancel all race meetings previously scheduled for that weekend throughout Queensland.[214]

209 Discussed in Chapter 3.
210 The procurement policy and funding for the cushion track upgrade is discussed in Chapter 3.
211 Statement of Michael Kelly, 27 September 2013, para 108.
212 Statement of Michael Kelly, 27 September 2013, para 113.
213 Email from Michael Kelly to Leanne Linard, 21 August 2007.
214 Statement of Carol Perrett 30 October 2013, page 1 para 3.

6.11.3 The Office of Racing, together with the equine control bodies, worked closely with the Department of Primary Industries and Fisheries (DPIF), then the lead agency for animal disease outbreak. This cooperation resulted in what was recognised as the critical Standstill Notice of 26 August 2007, which prevented movement of horses across Queensland.[215]

6.11.4 Concurrently, Mr Kelly and Dr Bruce Young, the manager of veterinary services at the RSC, became responsible for liaising between the control bodies and various government agencies. That collaboration lead to the creation of the "exclusionary zone" plan, which successfully balanced disease management protocols with the physical and mental welfare of the animals.[216]

6.11.5 On 28 August, the RSC provided personnel to assist with fieldwork for the DPIF.

6.11.6 The agencies arranged for Situation Reports, which detected outbreaks and distributed information regularly to government and industry stakeholders. The number of infected premises increased from 16 in early September[217] to 2,062 by early December 2007[218] after which no new infected premises were identified. The Green Zone (an area covering most of southeast Queensland containing a horse population exceeding 98,000) was shortly after confirmed as free from infection.

6.11.7 As part of the response to the outbreak, the Office of Racing was involved in the creation of the $20 million equine influenza assistance package announced on 26 September 2007. Through it:

- small business interest subsidy schemes on existing and new loans for businesses facing financial hardship due to the crisis were arranged
- personal support and hardship packages to be administered by the Department of Communities which dealt with some 3,000 cases by 9 November 2007 were established
- a request was made to the Australian Bankers Association for short term relief for individuals facing difficulty in meeting repayments
- a program to assist with employment retention within the racing industry because of the equine influenza crisis was established.

6.11.8 The Office of Racing prepared a briefing note to the Treasurer in October 2007 seeking and obtaining approval for an ex gratia payment to the GRA to meet expenses incurred in providing extra product to replace thoroughbred and harness races.

6.11.9 The Office of Racing prepared a briefing note to the Treasurer in March 2008 seeking approval for expenditure to implement an equine influenza marketing initiative proposed by the thoroughbred and harness control bodies. The Treasurer granted $650,000 on 18 March 2008.

6.11.10 By 26 June 2008 Queensland was officially declared free of equine influenza. The active response of the Office of Racing, the control bodies and other agencies, was effective in controlling the crisis in circumstances where industry veterans and consulting scientific experts were uncertain about how the virus would behave in the Australian environment. The initiatives also assisted, in cooperation with the control bodies, in preserving the industry as a viable commercial enterprise.

215 Statement of Carol Perrett 30 October 2013, page 2 para 4.
216 Email from Michael Kelly to Craig Matheson, 27 August 2007.
217 DPI Situation Report 8 Equine Influenza Response, 1 September 2007.
218 DPI Situation Report 95 Equine Influenza Response, 5 December 2007.

6.12 Conclusions

Discussion

6.12.1 Ms Perrett was involved in preparing drafting instructions for the new Racing Act passed in 2002. She observed in her statement to the Commission that that Act was seen

> *...[a]s a way of raising the standard of the control body's governance, policies, processes and procedures.*[219]

6.12.2 She said it had been government policy that

> *...[t]he role of the Office of Racing was to provide assistance to the control bodies and educate them wherever possible. Accordingly, the role of the Office of Racing has been carried out in an educative and conciliatory manner rather than by taking disciplinary action.*[220]

6.12.3 Ms Perrett noted that the Office of Racing had built a good working relationship with the important officers of each control body. Those relationships ensured that control body officers were comfortable in providing information, which in turn lead to effective monitoring of emergent situations and enabled those senior to her to provide advice and assistance to the control bodies when required.

6.12.4 Ms Perrett emphasised that notwithstanding that good working relationship, Mr Kelly, the executive director, was firm about a control body's obligation to keep the Office of Racing informed about integrity or animal welfare issues.

6.12.5 Ms Perrett said that when the Office of Racing moved from one department to another as a result of machinery of government changes Mr Kelly would explain to the relevant senior officers that the Office of Racing carried out its regulatory function

> *...[i]n an educative and conciliatory manner rather than by threatening the control bodies with disciplinary action. This approach was never questioned by any of our superiors and I have always believed that it was endorsed by our superiors and ministers.*[221]

6.12.6 As discussed earlier, the section 39 audits were not, on the whole, well done by the control bodies. The Office of Racing did not require them to make a greater effort to perform their statutory duty. Similar comments apply to the section 41 annual reporting by the control bodies.

6.12.7 Perhaps because the Office of Racing was small in number and had day to day contact with control body personnel, it was less exacting than it might otherwise have been. In a less formal sense it had careful oversight of the control bodies.

6.12.8 In reviewing over five years of government oversight of the operations of the relevant entities to ascertain if that oversight was sufficient and appropriate, it is necessary to have full regard to the pitfalls of hindsight and the distorting effect of selecting a few examples for close analysis.

6.12.9 Where weakness has been revealed by the investigations of the Commission, to a large extent that weakness seems to be sourced in the ambiguous role of the Office of Racing as regulator of bodies whose nature and structure was chosen by government to keep them independent of government. This ambiguity was not understood at any level of government.

219 Statement of Carol Perrett, 30 October 2013, page 1 para 2.
220 Statement of Carol Perrett 30 October 2013, page 2 para 4.
221 Statement of Carol Perrett 30 October 2013, page 3 para 9.

6.12.10 There was no attempt by government to identify the roles and responsibilities of State and Commonwealth agencies for overseeing these new corporate control body entities with any clarity. Throughout the relevant period, ministers, senior executives and the day to day regulators in the Office of Racing thought that, apart from the express oversight functions in the Racing Act, ASIC was the proper regulator of a company incorporated under the Corporations Act, so far as its own governance was concerned.

6.12.11 The Commission has not concluded that a control body ought not be an independent company created under the Corporations Act. But the use of a corporate form should not be allowed to reduce in any significant way the accountability which should otherwise be expected if the activity in question were not being conducted by a company.[222]

6.12.12 Under a different chair, QRL and RQL may have operated effectively with support for, or at least acceptance, of most of the racing industry, of its decisions. The present model of a statutory body may be improved with an independent chair not coming from any racing industry sector to ensure not only independent decision-making, but the perception of it.[223] The successful example of the foundation chairman of the TAB[224] might be emulated.

6.12.13 What appears most unsuccessful about the RQL model was the removal of any industry participation. When the Class A members were removed, the racing industry had no entitlement to be heard on any issue of importance relating to commercial policy matters outside the annual meeting. Even before, under QRL, the industry did have a right to challenge any policy outside the Racing Act through the Class A members.

6.12.14 The purposes of the Racing Act were (and are) concerned with integrity and animal welfare matters and the checks and controls in the Act largely relate to those things. It was, therefore, essential that government appreciate that its role, so far as governance was concerned, was to have careful oversight of the appointed control bodies and enforce the ministerial conditions imposed.

6.12.15 Integrity and animal welfare issues and the sections 39, 41 and 46 oversight functions were sufficiently and appropriately carried out. The shortcomings arose in the monitoring of QRL's constitution and the process to accept the constitution of the amalgamated body.

6.12.16 The other contributor to these shortcomings was the almost insurmountable difficulties that arise if a regulator is also a developer of policy. This is more pronounced where:

- the object of the regulation is an independent external body that relies on the regulator to assist it in developing and promoting policies to government for substantial funding
- at the same time government relies on that same regulator to advise it, not just about how the regulation might be implemented, but also about policy development.

6.12.17 To speak of capture of the regulator by the regulated in the case of the Office of Racing and the control bodies may too harsh and simplistic.

6.12.18 It is clear that Mr Bentley was a forceful and energetic leader of the dominant control body who had a strong vision for racing. He rebuked those who criticised or were perceived to stand in the way of the outcomes he saw as best for the racing industry. He had access to government at a high level.

222 *Royal Commission into Commercial Activities of Government and Other Matters Report Part II* (Government Printer, Perth, 1992) referred to in *The Governance of Government Owned Corporations* (2005) 23 C&SLJ 181

223 Discussed in Chapter 10

224 Described in Appendix B "A brief history of racing in Queensland" at page 417.

6.12.19 The evidence before the Commission suggests that the Office of Racing came to accept Mr Bentley's vision for the Queensland racing industry, for the most part, uncritically. A notable exception was the Office of Racing's opposition and advice against dispensing with the independent recruitment consultant for choosing new directors to the control body in 2008.

6.12.20 Where complaints arose the Office of Racing also seems to have accepted Mr Bentley's strategy of blaming the complainant. This may have been due to a perception that his plans had ministerial endorsement or, simply, that Mr Bentley's proposals were accepted as *good for racing*.

Conclusion

6.12.21 The Commission has concluded that the oversight of the responsible minister, executive government and chief executive for the operations of the relevant entities was sufficient and appropriate, except in relation to:

- the proxy issue
- the director appointment process for QRL
- the process leading to the approval of the constitution of RQL
- aspects of the cushion track projects.[225]

6.12.22 The Commission makes no adverse findings against any person with respect to this Term of Reference.

6.13 Recommendations

Policy/compliance dichotomy

6.13.1 Racing industry functions of government that are policy functions and not directly compliance related[226] should be structurally separate from, and not undertaken by, officers responsible for compliance. Compliance officers in the racing portfolio should not administer or have an oversight role relating to the RICDS or a similar scheme.

6.13.2 The Productivity Commission's report into Australia's gambling industries suggests that:

> *An advantage of such a separation between regulating and policymaking is that regulators can closely interact with industry, but cannot directly change policies, thus reducing the potential for the regulator to be 'captured' by industry and/or other stakeholder groups.*[227]

6.13.3 It is respectfully recommended that the government should consider amalgamating the policy and compliance functions of the Office of Racing with another established and compatible government regulator, such as the Office of Liquor and Gaming Regulation. The implementation should avoid creating any separate racing industry business unit and ensure compliance functions and skills are transferrable across other industry compliance functions with the regulator.

6.13.4 The chief executive of the department administering the Racing Act should ensure that there is a comprehensive compliance policy in place to guide compliance officers within the racing portfolio. The compliance policy should be subject to regular review.

225 Discussed in Chapter 3.
226 Including strategic advice to the minister, preparing ministerial correspondence, Cabinet submissions and executive council minutes, administering funds for the industry and liaising with control body executive about racing industry matters,
227 Productivity Commission 2010, *Gambling*, report no. 50, Australian Government, Canberra, page 17.6.

6.13.5 Policy making which concerns the racing of animals should be in a unit administratively and physically separate from compliance activities. Such a unit might be the Office of Regulatory Policy (Liquor and Gaming Policy).

Consultation

6.13.6 The lack of formal and genuine consultation with industry stakeholders prior to significant change has been the origin of much unrest.

6.13.7 In 2001, there was a ministerial review of the governance structure of the thoroughbred racing industry in Queensland. The government undertook formal consultation with the racing industry by releasing a discussion paper and calling for written submissions.[228] Similarly, consultation with stakeholders and interested parties was an integral part of the National Competition Policy Review of the Racing and Betting Act during 1999 and 2000 and, earlier, prior to the introduction of the Racing and Betting Act.[229] The result was widespread industry acceptance of the proposals which eventuated.

6.13.8 When conducted correctly, public consultation provides an important source of evidence for government and assists in increasing accountability in decision-making. Effective consultation with a full range of stakeholders can identify deficiencies in how racing governance is structured (for example, if policymaking is positioned too close to the interests of any particular sector or interest group).[230] Consultation processes are also useful for encouraging public acceptance and facilitating effective implementation.[231]

6.13.9 It is respectfully recommended that, at an appropriate time, a broad-ranging consultation for and about the future needs of the racing industry in Queensland be undertaken by government. It would necessarily include wagering, on which racing relies for much of its recurring expenditure. The focus should acknowledge that racing animals in Queensland has a local, national and international dimension.

228 Department of Tourism, Racing and Fair Trading 2001, *Discussion Paper: Ministerial Review of the Governance Structure of the Thoroughbred Code in Queensland*, Queensland Government.
229 National Competition Policy Review, *Racing and Betting Act 1980* Report.
230 Productivity Commission 2010, *Gambling*, report no. 50, Australian Government, Canberra, page 17.12.
231 Productivity Commission 2010, *Gambling*, report no. 50, Australian Government, Canberra, page 17.12.

Chapter 7

Employment Contracts of Executives – Term of Reference 3(e)

"[T]he events surrounding the renegotiation of employment contracts of four RQL senior executives, Chief Executive Officer Malcolm Tuttle, Director of Integrity Operations Jamie Orchard, Director of Product Development Paul Brennan and Senior Corporate Counsel and Company Secretary Shara Reid (nee Murray) in 2011 and resulting payouts on their voluntary termination in March 2012 under those contracts, and whether the directors and senior executives acted consistently with their responsibilities, duties and legal obligations, with reference to the key findings of the Auditor-General in his Report to Parliament, Racing Queensland Limited: Audit by arrangement, tabled in July 2012 ..."

7.1 Background

7.1.1 On 26 March 2012 Mr Malcolm Tuttle, Mr Jamie Orchard, Mr Paul Brennan and Ms Shara Reid (together, the Executives) resigned with immediate effect. The cost to Racing Queensland Limited (RQL) was $1,858,421 (including tax and all statutory entitlements).[1] The cost in respect of each Executive was:

- $792,591 on account of Mr Tuttle
- $414,617 on account of Mr Orchard
- $435,160 on account of Mr Brennan
- $216,053 on account of Ms Reid.

7.1.2 This Term of Reference directs the Commission to consider the events surrounding the renegotiation of the Executives' employment contracts in 2011 and resulting payouts on their voluntary termination in March 2012. Whilst the justification for the renegotiation of those contracts was said to be the retention of the Executives, the result was that each Executive resigned at the earliest possible time and received the maximum possible payout. A summary of the possible payment scenarios is contained at Schedule A.

7.1.3 The Executives' resignations and their payouts attracted attention from the media and the incoming Liberal National Party (LNP) government which had won the State election on 24 March 2012. The new Deputy Premier took steps to stop the payments to the Executives on 28 March, but the payments had been processed by RQL's bank one hour earlier.

7.1.4 To examine these events fully and, in particular, the justifications put forward for the renegotiation of the Executives' contracts, it is necessary to consider the Executives' roles, involvement in the racing industry and the prevailing circumstances at RQL almost a year before their resignations.

7.1.5 This Term of Reference also asks whether the directors and Executives acted consistently with their responsibilities, duties and legal obligations, with reference to the key findings of the Auditor-General in his report to Parliament, *Racing Queensland Limited: Audit by arrangement*, tabled in Parliament on 10 July 2012 (QAO Report).

7.1.6 The Commission has no jurisdiction to *determine* whether the directors and Executives discharged their responsibilities, duties and legal obligations – only a court of competent jurisdiction can do so. This Chapter will consider whether, on the evidence examined by the Commission, further investigation should be undertaken by an appropriate body such as the Australian Securities and Investments Commission (ASIC) with the power to bring proceedings against the directors and Executives. The evidence before the Commission suggests that ASIC should consider these issues.

7.1.7 The legal representatives for Messrs Robert Bentley, Anthony Hanmer, William Ludwig, Wayne Milner, Jamie Orchard, Malcolm Tuttle, Paul Brennan and Ms Shara Reid (RBG Parties) argue that as a result of parliamentary privilege, it is not open to the Commission to call into question the QAO Report or its conclusions and that the Commission is constrained by the QAO report.[2]

1 Statement of Adam Carter, 2 August 2013, page 50 para 190(e). The total cost to RQL, includes leave entitlements and superannuation as well as the termination and severance payments.

2 Submission of Rodgers Barnes & Green (on behalf of Messrs Bentley, Hanmer, Ludwig, Milner, Orchard, Tuttle, Brennan, and Ms Reid), 30 October 2013, Part 5 pages 5-2 – 5-3.

7.1.8 Parliamentary privilege refers to the rights, powers and immunities of the Legislative Assembly, its committees, members and officers.[3] The best known aspect of parliamentary privilege, and that on which the RBG Parties rely, is freedom of speech. Section 8 of the *Parliament of Queensland Act 2001* (Qld) states "The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly." Impeach is said to mean "impede, hinder, prevent, or affect detrimentally or prejudicially, or to impair."[4]

7.1.9 The QAO Report was tabled in Parliament on 10 July 2012 and comes within the meaning of "proceedings" of the Assembly.

7.1.10 The Commission is neither impeaching nor questioning the QAO Report. This Term of Reference directs the Commissioner to make full and careful inquiry in an open and independent manner into the events surrounding the renegotiation of the Executives' contracts and resulting payouts. The Commission has conducted an independent investigation of these matters. It is not necessary for the Commission to question the QAO Report, only to have reference to it (as required by the Term of Reference).

7.1.11 Section 9(3) of the Parliament of Queensland Act states that parliamentary privilege will not apply to a document tabled in parliament:

> *(a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or an inquiry; and*
>
> *(b) if the document has been authorised by the Assembly or the committee to be published.*
>
> *Example—*
>
> *A document evidencing fraud in a department tabled at a portfolio committee inquiry can be used in a criminal prosecution for the fraud if the document was not created for the committee's inquiry and the committee has authorised the document to be published.*

7.1.12 The QAO Report was requested by Deputy Premier Seeney on 27 March 2012 pursuant to section 60 of the *Racing Act 2002* (Qld). It was not prepared for this Commission.

7.1.13 Section 67(3) of the *Auditor-General Act 2009* (Qld) provides that, for the purposes of its publication, a report given to the Speaker is taken to have been ordered to be published by the Legislative Assembly when it is given to the Speaker. The QAO Report was provided to the Speaker on or about 10 July 2012 and has subsequently been published on the webpages of the QAO and the Queensland Parliament.

7.1.14 The Commission is not constrained by parliamentary privilege in these circumstances.

7.1.15 As part of the investigation undertaken by the Queensland Audit Office (QAO) in April and May 2012, interviews not under oath were conducted with the directors of RQL and Ms Reid. Cooper Grace Ward (CGW) represented the interviewees in this investigation. Transcripts of those interviews have been produced to the Commission.

7.1.16 The audit by the QAO was followed by investigations by the Crime and Misconduct Commission (CMC) and by ASIC.[5] Mr Grace of CGW also acted in these investigations. The CMC investigation was closed on the announcement of this Commission on 1 July 2013. [6]

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3 Queensland Government 2000, The Queensland Parliamentary Procedures Handbook, viewed 14 November 2013, http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/parl-proc-handbook/priviledge-contempt/privileges.aspx, viewed 14/11/13.

4 *Erglis v Buckley* [2004] 2 Qd R 599.

5 Letter from Premier Newman to Andrew Greaves, 16 July 2012; Letter from Adam Carter to Director of Complaint Services CMC, 19 July 2012; Letter from Premier Newman to Chair of the CMC, Mr Ross Martin SC, 31 July 2012.

6 CMC, Report of Matter – Allegations.

7.1.17 As part of the ASIC investigations, in November and December 2012 interviews under oath were conducted with Mr Bentley and Ms Reid. The ASIC investigation is suspended pending the Commission's Report.

7.1.18 The directors and the Executives have been scrutinised about the issues raised by this Term of Reference in various forums since immediately after the Executives' resignations. They have had the benefit of legal representation at all times, have had detailed submissions made on their behalf and have had access to relevant documents throughout those other investigations[7] and this Commission. They were and are well aware of these issues and have had more than an adequate opportunity to present their case to the Commission, notwithstanding submissions to the contrary.[8]

The Executives: their roles and histories

7.1.19 In early 2011, RQL employed 172 individuals throughout Queensland, with 121 based in south east Queensland.[9] RQL's head office at Deagon housed the core management team in the areas of Integrity, Product Development, Legal, IT & Communications, Licensing & Training and Finance. Each area was headed by a manager with a support team.

7.1.20 Ms Reid described the RQL premises at Deagon as comprising two main buildings separated by a car park. The integrity department was in one building, the rest of the management team at Deagon was within the other. Ms Reid described it as a relatively small space housing a large number of employees working in close proximity, with the management team in offices, and the other staff at workstations.[10]

7.1.21 The Executives were part of the larger management team at RQL. However, in July 2011 they were designated as *key executives* of RQL, to the exclusion of RQL's other executives. Mr Tuttle said in his evidence at the Commission's public hearings that Mr Bentley designated the Executives as *key executives* without consulting them.[11]

7.1.22 RQL board minutes of a meeting on 8 July 2011 confirm the designation of the Executives as *key executives* of RQL.[12] The board considered the Executives so integral to the activities of RQL that the changes to their employment agreements, the subject of this Term of Reference, were deemed necessary for them, but not for other executives of RQL.

7.1.23 The Executives were long term employees of RQL (and its predecessors) and held senior executive positions. The primary justification for retaining the Executives was the work to be done on the Industry Infrastructure Plan (IIP) and the development of business cases for each project in that plan to obtain government funding.[13] With this in mind, the employment background of each Executive in the racing industry and the final role of each is briefly set out.

Mr Tuttle

7.1.24 Mr Tuttle commenced his career within the Queensland racing industry in February 1988 and held various roles with the Queensland Turf Club (QTC)[14] and Queensland Principal Club (QPC).[15] On 1 July 2006, Mr Tuttle commenced as chief operations manager of Queensland Racing Limited (QRL). He subsequently became chief executive officer (CEO) of RQL on 1 July 2010.

7 Particularly the QAO investigation, which commenced prior to the directors' resignations.
8 Submission of Rodgers Barnes & Green, 30 October 2013, Part 1 page 1-12 para 38.
9 Letter from Scott Sharry (Clayton Utz) to Executive Director (Commission), 12 July 2013, enclosing list of RQL employees.
10 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 25-27.
11 Transcript, Malcolm Tuttle, 27 September 2013, page 52 lines 25-46.
12 RQL, Board Meeting Minutes, 8 July 2011.
13 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-34 paras 146-147, page 5-23 para 98.
14 Statement of Malcolm Tuttle, 26 July 2013, page 1 para 1; QRL, Memorandum from Joanne McElligott to Adam Carter, 21 April 2004.
15 Statement of Malcolm Tuttle, 26 July 2013, page 1; para 3.

7.1.25 Mr Tuttle had the usual responsibilities and duties of a CEO in relation to the management of RQL as the amalgamated control body. Mr Bentley estimated that Mr Tuttle had ninety-eight employees reporting to him, with five being other managers.[16]

7.1.26 On the documents produced to the Commission Mr Tuttle had little to do with the preparation of the business cases for the IIP projects that were prepared and submitted in 2011 and 2012 for Treasury analysis for funding under the Racing Industry Capital Development Scheme (RICDS).

7.1.27 Mr Tuttle was responsible for monitoring the development of race information legislation.[17] Mr Tuttle's role in relation to the response of RQL and Queensland Race Product Co Limited (Product Co) to the introduction of such legislation interstate is addressed in Chapter 8 of this Report.

7.1.28 Mr Tuttle was a director of Rockhampton Racing Pty Ltd (Rockhampton Racing) (commencing on 30 June 2010) and Racing Queensland Venue Management Pty Ltd (Venue Management) (commencing on 31 March 2010), both subsidiaries of RQL, until his resignation from RQL.

7.1.29 Mr Tuttle resigned from his position at RQL on 26 March 2012.

7.1.30 He commenced as director of business development with Contour Consulting Engineers Pty Ltd (Contour) on 15 October 2012[18] having held other positions briefly prior to taking up that employment.

Mr Orchard

7.1.31 Mr Orchard was admitted as a solicitor of the Supreme Court of Queensland in 1987 and has worked in a series of legal and regulatory roles since then.[19] He commenced as director of integrity services of QRL in June 2008,[20] and was employed by RQL in this capacity from 1 July 2010.

7.1.32 On 1 July 2010, at the first board meeting of RQL as the newly amalgamated control body, Mr Orchard was appointed as a company compliance officer, as was Ms Reid.[21] The role of company compliance officer was not defined in any document produced to the Commission.

7.1.33 Mr Orchard said in his statement to the Commission that he was responsible for the regulatory aspects of the racing industry including overseeing the enforcement of the rules of racing, managing integrity staff (including stewards and veterinarians) and handling appeals in the Queensland Civil and Administrative Tribunal.[22] Mr Bentley estimated that Mr Orchard had 40 people working in his team.[23]

7.1.34 It also appears that Mr Orchard had responsibilities to ensure compliance with the Racing Act (including the development and implementation of an audit regime and reporting to government),[24] and to ensure that policies required by section 81 of the Racing Act were compliant.[25]

7.1.35 There was no evidence to indicate that Mr Orchard had involvement in the preparation of business cases for the IIP funding.

7.1.36 Mr Orchard resigned from his position at RQL on 26 March 2012.

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16 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 16-17.
17 RQL, *Performance Agreement and Appraisal: Malcolm Tuttle 2010/11*, 30 June 2011.
18 Statement of Brett Thomson, 5 August 2013, page 3 para 17.
19 Statement of Alfred Jamie Orchard, 26 July 2013, page 1 para 1.
20 Letter from Robert Bentley to Jamie Orchard, 26 March 2008; Letter from Malcolm Tuttle to Michael Kelly (Office of Racing), 23 April 2008; Letter from Mark Wilson (Northern Recruitment) to Malcolm Tuttle, 4 April 2008.
21 RQL, Board Meeting Minutes, 1 July 2010.
22 Statement of Alfred Jamie Orchard, 26 July 2013, page 2 para 8.
23 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 19.
24 RQL, *Performance Agreement and Appraisal: Jamie Orchard 2010/11,* 30 June 2011.
25 Statement of Alfred Jamie Orchard, 26 July 2013, page 2 paras 9-10.

Mr Brennan

7.1.37 Mr Brennan's role at RQL as director of product development was the culmination of a career in racing that began at the Sunshine Coast Turf Club as racing services manager and handicapper in November 1989.[26] Mr Brennan held roles at the QPC and QRL before he became director of product development at RQL in July 2010 when it was appointed the control body for the three codes of racing.

7.1.38 Mr Brennan's primary duties comprised the development of the Queensland racing calendar and management of the logistics of racing. Mr Bentley estimated that Mr Brennan had eight people directly reporting to him.[27]

7.1.39 In his statement to the Commission, Mr Brennan said he provided advice to the board about infrastructure projects and was involved in dealings with Contour on behalf of QRL and RQL.[28] Documents produced to the Commission suggest that Mr Brennan had very limited involvement in the preparation of the business cases submitted to government for funding for the IIP projects in the critical period from July 2011 to March 2012.

7.1.40 Mr Brennan was also a director of Rockhampton Racing, a subsidiary of RQL, from 30 June 2010 until his resignation on 26 March 2012.

7.1.41 Mr Brennan resigned from his position at RQL on 26 March 2012.

7.1.42 He commenced as the CEO of Contour on 28 March 2012.

Ms Reid

7.1.43 Ms Reid was admitted as a solicitor in 2005[29] and commenced as the legal officer for the Queensland Thoroughbred Racing Board (QTRB) in October 2005.[30] She held similar roles with QRL and then RQL. Ms Reid's final position was "Senior Corporate Counsel/Company Secretary" of RQL.

7.1.44 Ms Reid was the sole in-house legal counsel at RQL. Ms Reid said that she had three people, including herself, in her legal team at the Deagon office.[31]

7.1.45 On amalgamation, Ms Reid's responsibilities were as in-house counsel for all three codes of racing, monitoring race information legislation and recovery of monies from corporate bookmakers.[32] Ms Reid also had responsibilities to ensure that RQL complied with the *Corporations Act 2001* (Cth) and met reporting requirements to ASIC and the Australian Tax Office. She was required to advise the directors about regulatory and statutory requirements and to ensure compliance with RQL's constitution.[33]

7.1.46 Ms Reid also held the offices of:

- company secretary of QRL, having been appointed on 24 October 2005
- company secretary of RQL, having been appointed on 25 March 2010
- company secretary of Rockhampton Racing, having been appointed on 30 June 2010
- company secretary of Sunshine Coast Racing Pty Ltd, a subsidiary of RQL, having been appointed on 1 November 2006
- a director of Venue Management, having been appointed on 31 March 2010

26 Statement of Paul Brennan, 26 July 2013, page 1 para 1.
27 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 20.
28 Statement of Paul Brennan, 26 July 2013, pages 1-2 para 3, pages 5-6 para 10.
29 Statement of Shara Reid, 26 July 2013, page 1 para 1.
30 Statement of Shara Reid 26 July 2013, page 1 para 1.
31 Transcript, ASIC Interview, Shara Reid, 8 November 2012, page 25.
32 Statement of Shara Reid, 26 July 2013, page 8 para 33.
33 Noted in RQL, *Performance Agreement and Appraisal: Shara Reid 2010/11*, 30 June 2011. Similar responsibilities were imposed upon her by law by virtue of her position.

- company secretary of Venue Management, having been appointed on 31 March 2010.

7.1.47 Ms Reid resigned from her position at RQL on 26 March 2012 and ceased to hold the above offices on that day.

The directors: their roles and histories

7.1.48 The directors of RQL, at the time relevant to this Term of Reference, were:

- Mr Robert Bentley
- Mr Anthony Hanmer
- Mr William Ludwig
- Mr Robert Lette
- Mr Wayne Milner
- Mr Bradley Ryan.

7.1.49 For present purposes, it is relevant to note that:

- Mr Bentley was the chairman of RQL and its Remuneration and Nomination Committee (RNC). He had significant experience in similar roles having been the chairman of the QPC from 1992 until 1996, QTRB from 2002 until 2006 and QRL from 2006 until amalgamation in 2010.[34]
- Mr Ludwig was the only other member of the RNC at the material time.
- Mr Ryan was chair of QRL's Audit Risk & Finance Committee and continued in this role with RQL.[35]
- Messrs Hanmer, Lette, Milner and Ryan have stated that their involvement in the events relevant to this Term of Reference was limited to discussions at board level.

The Remuneration and Nomination Committee

7.1.50 The RNC was established at the first board meeting of RQL on 1 July 2010.[36] Its only members during the relevant times were Mr Bentley and Mr Ludwig.

7.1.51 On 1 July 2010, the board of RQL adopted a Charter for the RNC.[37] In accordance with the Charter, Mr Bentley and Mr Ludwig had additional responsibilities to those of other board members.

The RQL employment agreements: 1 July 2010

7.1.52 The employment agreements for all managers of RQL (including the Executives) commencing on 1 July 2010 (RQL Contracts) were substantially similar to the Executives' contracts with QRL (QRL Contracts).

7.1.53 In November 2008 (four months prior to the March 2009 State election), all senior managers of QRL were offered new contracts to "establish stability within the ranks of Senior Managers at QRL."[38] In a letter of 21 November 2008 to the Executives and other senior managers, Mr Bentley referred to the difficulties faced by senior racing administrators, and in particular that the racing

34 Statement of Robert Bentley, 26 July 2013, page 2 paras 4-6.
35 Statement of Bradley Ryan, 25 July 2013, page 1 para 8.
36 RQL, Board Meeting Minutes, 1 July 2010.
37 RQL, *Remuneration & Nomination Committee Charter*, 1 July 2010; The solicitors for the QACRIB have confirmed that the charter is the document that was adopted by the board, albeit marked draft. See: Letter from Scott Sharry (Clayton Utz) to Executive Director (Commission), 15 August 2013.
38 Letter from Robert Bentley to Paul Brennan; Shara Reid; Jamie Orchard; Adam Carter; Malcolm Tuttle; David Rowan; Peter Smith and Colin Truscott, 21 November 2008.

industry has a "history of, if you don't like the message, shoot the messenger."[39]

7.1.54 The issue of staff retention was discussed at a QRL board meeting on 3 October 2008. The minutes record that:

> *Given the sometimes volatile nature of the racing industry and the need for managers to have confidence to give full effect to Board decisions and strategy the Board agreed that a term of employment be offered to Senior Managers.*[40]

7.1.55 Deeds of Variation of the Executives' contracts with QTRB (QTRB Contracts) were executed in November 2008. Relevantly, the varied terms provided that:

- the term was until 30 June 2012, being the expiry of QRL's licence as control body for thoroughbred racing
- in the event of redundancy, the Executives would receive a payment for the remainder of the term of their contract; under the QTRB Contracts they stood to receive a payment of three months of their total remuneration value (TRV) for the first 2 years of employment, with additional payment of one week TRV for every year of employment completed with QTRB in excess of two years, to a maximum total redundancy payment of 52 weeks
- the notice period was increased from four weeks to six weeks.

7.1.56 The RQL Contracts provided for:

- a term of 1 July 2010 until 30 June 2013,[41] with any extension to be negotiated before 1 July 2012[42]
- remuneration to be calculated on a TRV basis, inclusive of all entitlements and superannuation[43]; remuneration arrangements were to be reviewed annually, but there was no guarantee the TRV would be increased[44]
- the notice period for resignation or termination (other than for misconduct) was six weeks[45]
- clause 15.3 provided:

  > *Should RQL cease to be the approved Control Body, RQL will provide you [the employee] the opportunity to take redundancy. The redundancy will be at least equivalent to the TRV you would have been entitled to receive had you remained employed for the period of the term of the contract.*[46]

- if an employee's employment was terminated for reasons other than redundancy or misconduct, RQL was obliged to give six weeks written notice and make a payment equivalent to the TRV that the employee would have been entitled to receive had they remained employed for the remainder of their contract.[47]

7.1.57 A *Resolution of Members* was executed by the directors of RQL on 1 July 2010.[48] That resolution provided that, to the extent the senior executive contracts provided for a termination payment that would be greater than 12 months TRV, those payments would be approved.[49]

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39 Letter from Robert Bentley to Paul Brennan; Shara Reid; Jamie Orchard; Adam Carter; Malcolm Tuttle; David Rowan; Peter Smith and Colin Truscott, 21 November 2008.
40 QRL, Board Meeting Minutes, 3 October 2008.
41 RQL, *Offer of Employment, Made by Racing Queensland Limited to Paul Brennan*, signed 1 July 2010, Clause 2.4.
42 RQL, *Offer of Employment, Made by Racing Queensland Limited to Paul Brennan*, signed 1 July 2010, Clause 2.5.
43 RQL, *Offer of Employment, Made by Racing Queensland Limited to Paul Brennan*, signed 1 July 2010, Clause 5.1.
44 RQL, *Offer of Employment, Made by Racing Queensland Limited to Paul Brennan*, signed 1 July 2010, Clause 5.7; RQL, Remuneration Policy and Procedures, 1 July 2010.
45 RQL, Offer of Employment Made by Racing Queensland Limited to Paul Brennan, signed 1 July 2010, Clause 15.1 and 15.2.
46 RQL, *Offer of Employment, Made by Racing Queensland Limited to Paul Brennan*, signed 1 July 2010, Clause 15.3.
47 RQL, *Offer of Employment, Made by Racing Queensland Limited to Paul Brennan*, signed 1 July 2010, Clause 15.4.
48 RQL, *Resolution of Members*, signed 1 July 2010.
49 RQL, *Resolution of Members*, signed 1 July 2010.

7.1.58 It was anticipated that upon amalgamation in July 2010 the remuneration of staff, particularly the Executives, would be reviewed.[50] However, no review took place until mid 2011. Minutes of the RNC meeting of 3 August 2011 noted that the overall increase in salaries for all employees was "within the 3% budget already approved" by the board.[51]

7.1.59 In contrast, in May 2010 the Godfrey Remuneration Group (Godfrey Group) was retained by QRL to provide recommendations as to reasonable remuneration levels for the directors of RQL. The Godfrey Group recommended that:

- the chair of RQL receive $135,000 (a 73 per cent increase for Mr Bentley)
- the deputy chair receive $90,000 (a 70 per cent increase for Mr Hanmer)
- other non-executive directors receive $60,000 (an increase of 39 per cent to 50 per cent depending on whether the director had previously been a director of the thoroughbred, harness or greyhound code).[52]

7.1.60 The government accepted these recommendations.[53]

7.1.61 The directors assert that the racing industry is unique and that benchmarking the remuneration of the Executives by an external consultant was not practical.[54] However, the Godfrey Group had no difficulty in obtaining and considering the current salaries of the board members of a number of other racing control bodies across Australia, including Racing NSW and Racing Victoria.

7.2 The original proposal

The industry climate and media coverage: 2010 - 2011

7.2.1 The renegotiation of the Executives' contracts appears to have started in or about April 2011. However, the circumstances that led to the Executives demanding new terms had been in existence for some time.

7.2.2 In their statements to the Commission, the Executives refer to numerous factors which prompted them to seek variations to their terms of employment, including:

a) *the "stressful environment"[55] and harassment from stakeholders[56]*

b) *criticism in the industry, "public pressure" and "disparaging media"* [57]

c) *the perception that the board of RQL was "aligned with the Labor Government"[58] and that in the event of a change of government, both the board and the Executives would be removed.[59]*

7.2.3 There is no doubt that RQL was subject to criticism from the racing industry and in the media. For example:

50 Transcript, Robert Lette, 15 October 2013, page 14 lines 34-40; Statement of Wayne Milner, 26 July 2013, page 12 para 34; Statement of Robert Bentley, 26 July 2013, page 16 para 45(a); Transcript, William Ludwig, 27 September 2013, page 32 lines 35-40, page 33 lines 24-27, page 34 lines 45-46, page 35 lines 17-21, page 38 lines 45-46, page 39 lines 13-16.
51 RNC, Meeting Minutes, 3 August 2011.
52 Statement of Michael Kelly, 1 October 2013, attachment MK12.
53 Statement of Michael Kelly, 1 October 2013, page 8 para 23.
54 Transcript, QAO Interview, Wayne Milner, 2 May 2012, page 8; Transcript, QAO Interview, Bradley Ryan, 2 May 2012, page 10; Transcript, QAO Interview, Anthony Hanmer, 2 May 2012, page 7.
55 Statement of Malcolm Tuttle, 26 July 2013, page 10 para 33.
56 Statement of Malcolm Tuttle, 26 July 2013, pages 9-10 para 32; Statement of Shara Reid, 26 July 2013, page 9 para 37; Statement of Paul Brennan, 26 July 2013, pages 8-9 paras 23-25; Statement of Alfred Jamie Orchard, 26 July 2013, page 4 paras 16-19.
57 Statement of Malcolm Tuttle, 26 July 2013, page 10 para 33.
58 Statement of Paul Brennan, 26 July 2013, page 9 para 24.
59 Statement of Malcolm Tuttle, 26 July 2013, page 11 para 34; Statement of Shara Reid, 26 July 2013, page 11 paras 51-53; Statement of Paul Brennan, 26 July 2013, page 9 para 25; Statement of Alfred Jamie Orchard, 26 July 2013, page 4 para 18; Statement of Robert Bentley, 26 July 2013, page 18 para 45(h)-(i); Statement of William Ludwig, 26 July 2013, page 8 para 24; Statement of Wayne Milner, 26 July 2013, page 13 para 35; Statement of Anthony Hanmer, 29 July 2013, page 8 para 20.

- in February 2010, an article in *The Courier-Mail* reported on a rally against the amalgamation of the three codes, the disposal of Albion Park and the abandonment of the Logan venue[60]
- discussions were conducted at board level in late November 2010 about the continued "biased" reporting of Bart Sinclair of *The Courier-Mail*[61]
- Ms Reid kept a "file" of the negative commentary from the press and industry. Directors such as Mr Hanmer were aware of the file, as he specifically suggested that it be provided to the QAO.[62] That file has been produced to the Commission, but does not contain material that is not already in other documents such as Mr Bentley's board papers.

7.2.4 It is uncontroversial that the racing industry is one where stakeholders hold divergent and passionate views and tend to express them, in some cases, with little restraint. It is to be expected that the Executives would be subjected to criticism. In fact, the Executives raised concerns about industry criticism at least as early as 2008[63] but remained in their positions until 2012.

7.2.5 At its heart, most of the media coverage and "harassment" seems to stem from the perception that an LNP government would bring about sweeping changes for the racing industry in Queensland. There is some justification for that perception. Mr Ray Stevens, the then Opposition spokesperson for racing, was a particularly vocal critic. He said in Parliament on 20 May 2010:

> *This is our guaranteed plan when we win the next election, when the people of Queensland vote this dreadfully arrogant government out of power. If this bill is passed, we commit to the overall racing industry that this legislation will be dismantled and control will be given back to each of the codes for a sustainable and secure racing industry into the future, run by industry participants for industry benefit rather than for the company profits of UNiTAB shareholders, of which Bob Bentley is of course a beneficiary.*[64]

7.2.6 All of the Executives refer to speculation about the outcome of the next State election which made performing their roles more difficult.[65] In his statement to the Commission, Mr Adam Carter confirmed that in early 2011 there was speculation that contributed to an atmosphere of anxiety throughout the management team at RQL.[66]

7.2.7 Mr Carter was aware in April 2011 that a discussion had taken place between Mr Tuttle and Mr Bentley about securing the employment of the senior executives of RQL.[67] Mr Carter also recalls having separate discussions with Mr Tuttle and Mr Brennan about this issue, giving certainty to staff, and the continued speculation regarding the outcome of the next state election.[68]

RNC meeting: 14 April 2011

7.2.8 On 14 April 2011, the RNC considered the extension of contracts for *key managers*.[69] Mr Bentley thought this meeting was the first official discussion regarding staff retention.[70]

60 Sinclair, B 2011, 'Anti-merger meeting could backlash', *The Courier-Mail*, 6 February.
61 RQL, Board Meeting Minutes, 18 November 2010.
62 Email from Anthony Hanmer to Robert Bentley, Wayne Milner, Bradley Ryan, William Ludwig cc: Adam Carter, 30 March 2012, 4.51pm.
63 See for example: Letter from Robert Bentley to Paul Brennan; Shara Reid; Jamie Orchard; Adam Carter; Malcolm Tuttle; David Rowan; Peter Smith and Colin Truscott, 21 November 2008.
64 Queensland, Legislative Assembly 2010, *Racing and Other Legislation Amendment Bill; Second Reading*, 20 May, page 1741.
65 Statement of Malcolm Tuttle, 26 July 2013, pages 9-10 paras 32-33; Statement of Shara Reid, 26 July 2013, page 9 paras 37-38; Statement of Paul Brennan, 26 July 2013, page 8 para 23; Statement of Alfred Jamie Orchard, 26 July 2013, page 6 paras 29-31.
66 Statement of Adam Carter, 2 August 2013, page 37 para 116.
67 Statement of Adam Carter, 2 August 2013, page 37 para 113.
68 Statement of Adam Carter, 2 August 2013, page 37 paras 114 – 115.
69 Statement of Adam Carter, 2 August 2013, page 39 para 123.
70 Transcript, Robert Bentley, ASIC Interview, 20 December 2012, pages 73-74.

7.2.9 Mr Bentley suggested that the existing contracts for the Executives, five other senior managers and one other employee should be extended until 30 June 2014.[71] The Committee agreed to recommend that to the board and also determined that five executive assistants were to be offered contracts with a term concluding on 30 June 2013.[72]

7.2.10 Although not reflected in the minutes, Mr Carter recalled discussion about the need to renegotiate the Product and Program Agreement before mid 2014 as a justification for the extension of the senior managers' contracts.[73] He also recalled that the political situation was discussed as the work of the senior executives should not be destabilised by speculation regarding the outcome of the election.[74]

The RQL board adopts the original proposal: 6 May 2011

7.2.11 On 6 May 2011, the RNC recommended that the board adopt its recommendations about the contracts of the named individuals.[75] The minutes of the board meeting of 6 May 2011 disclose that:

- Mr Bentley said that he and Mr Ludwig had considered the large amount of work required to be completed by the executive staff up until 2014 and the changing wagering landscape, in regard to negotiating a new agreement with TattsBet Limited (TattsBet)[76]
- the board resolved to adopt the recommendations.[77] Ms Reid was given the task of drafting the employment agreements for the executive assistants and the other employee[78]
- Mr Bentley "expressed the need to have the Board[']s actual position clarified post the 2012 election should there be a change in Government" in view of Mr Stevens' comments. The board resolved that Clayton Utz be retained to advise on the implications of a change of government for the board.[79]

7.3 The renegotiation of the RQL contracts

7.3.1 In or about May 2011, Mr Brennan and Mr Tuttle discussed pressure on the Executives and the constant criticism directed toward them from diverse areas of the industry.[80] Mr Tuttle recalled speaking to Mr Brennan after the May 2011 board meeting and that Mr Bentley joined the discussion.[81]

7.3.2 Mr Brennan told Mr Bentley that due to the pressures on the Executives he saw three alternatives:

a) *Leave now and try and find employment;*

b) *Stay and be pushed or sacked from a job with minimum entitlements; or*

c) *Stay until the election but renegotiate contracts that will compensate us for being unemployable in the industry after the election.*[82]

7.3.3 Mr Bentley spoke with Mr Tuttle and Ms Reid following the board meeting and informed them that the board had resolved to amend their contracts.[83] According to Mr Bentley, Mr Tuttle said that the board's resolution did not address "what they [the Executives] were trying to achieve". It did not give the Executives enough security to continue in their roles.[84]

71 RNC, Meeting Minutes, 14 April 2011.
72 RNC, Meeting Minutes, 14 April 2011.
73 Statement of Adam Carter, 2 August 2013, page 39 para 126.
74 Statement of Adam Carter, 2 August 2013, page 39 para 126.
75 RQL, RNC, Memorandum: Employment Agreements, 6 May 2011.
76 RQL, Board Meeting Minutes, 6 May 2011.
77 RQL, Board Meeting Minutes, 6 May 2011.
78 RQL, Board Meeting Minutes, 6 May 2011.
79 RQL, Board Meeting Minutes, 6 May 2011.
80 Statement of Paul Brennan, 26 July 2013, page 8 para 23.
81 Statement of Malcolm Tuttle, 26 July 2013, pages 9-10 para 32.
82 Statement of Paul Brennan, 26 July 2013, page 10 para 29.
83 Transcript, Robert Bentley, ASIC Interview, 20 December 2012, page 80.
84 Transcript, Robert Bentley, ASIC Interview, 20 December 2012, page 91.

7.3.4 In mid May 2011, Mr Tuttle drafted new termination clauses for the Executives. Documents produced to the Commission suggest that Mr Brennan and Mr Orchard had input into the drafting of those clauses but not Ms Reid.[85]

7.3.5 The termination clauses drafted by Mr Tuttle appear to have been based on the existing terms of the RQL contracts, but amended to:

- extend the contract term to 30 June 2014
- oblige RQL to "immediately" provide the Executives with the opportunity to take redundancy in the event that RQL should receive a show cause notice under the Racing Act or any other direction or notice that could cause it not to remain as the control body
- oblige RQL to "immediately" provide the Executives with the opportunity to take redundancy in the event that a director of RQL should receive a show cause notice under the Racing Act or any other direction or notice that could cause them not to remain a director of the control body
- in those circumstances, the redundancy payment "will be at least equivalent to the TRV you would have been entitled to receive had you remained employed for the period of the term of the contract."
- in the event of redundancy, the Executives were to be given six weeks' written notice of termination and:

> *RQL may accept a shorter period of notice than six weeks and may waive the notice period in its entirety. If the notice period is shortened or waived in its entirety by RQL, RQL will still be required to pay the notice period out in full.*

7.3.6 The above draft clauses were the start of the *Material Adverse Change* clauses which were eventually included in the new employment contracts. On 24 May 2011, Mr Tuttle emailed Mr Bentley the draft amended employment agreement asking for his comment "before we consider whether it should be legalled".[86]

Clayton Utz retained

7.3.7 On 25 May 2011, Ms Reid and Mr Bentley met with Mr Barry Dunphy at the offices of Clayton Utz. Mr Dunphy recalls that most of the discussion revolved around the Albion Park litigation, although a review of RQL's employment contracts was mentioned.[87]

7.3.8 On 26 May 2011, Ms Reid emailed Mr Dunphy and copied Mr Tuttle and Mr Bentley outlining the resolutions of the board on 6 May 2011. She attached Mr Tuttle's amended employment agreement and wrote:

> *It is the Board's intention that this Agreement be 'in favour' of the RQL employee.*[88]

7.3.9 Ms Reid said in her ASIC interview that Mr Bentley provided her with the wording for that email.[89] Mr Bentley maintains he did not use the phrase "in favour".[90] In his evidence at the public hearings of the Commission Mr Bentley stated that the phrase "in favour" speaks to the fact that the Executives were underpaid, that RQL did not want any kind of dispute, and that they wanted to reach an acceptable agreement for all parties.[91]

85 See for example: Email from Paul Brennan to Malcolm Tuttle, 20 May 2011, 8.44am; Email from Malcolm Tuttle to Paul Brennan, Jamie Orchard, 24 May 2011, 10.39am.
86 Email from Malcolm Tuttle to Robert Bentley cc: Kearra Christensen, 24 May 2011, 3.35pm.
87 Statement of Barry Dunphy, 5 September 2013, page 3 para 15.
88 Email from Shara Reid to Barry Dunphy, Brett Cook cc: Robert Bentley, Malcolm Tuttle, 26 May 2011, 12.03pm.
89 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 43, 115.
90 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 83.
91 Transcript, Robert Bentley, 24 September 2013, page 48 lines 19-22.

7.3.10 Ms Reid added in her email to Mr Dunphy "As noted above, Mr Bob Bentley has been authorised by the Board to approve these amended terms".[92] Presumably this paragraph was intended to refer to the resolution adopted by the board in its meeting on 6 May 2011 that "The Chairman to approve the terms relevant to the agreements and the extension of the agreements."[93] However, the terms of amended employment contract drafted by Mr Tuttle were quite different from the board's resolution to offer an extension of the contract term.[94] There is no evidence that the board was aware that different terms were being proposed.

7.3.11 Mr Bentley could not recall what instructions were given to Clayton Utz at this time, although he said he sent the Executives to Clayton Utz with his instructions, and recalls having a conversation with Mr Dunphy.[95] This put Ms Reid in particular in the awkward position of conveying Mr Bentley's instructions, purportedly on behalf of the board, on a matter concerning her own interests.

7.3.12 It is unclear why Clayton Utz was retained to review the amended employment agreements at this stage of the negotiations. What does seem clear is that Mr Bentley and the Executives were aware that the new clauses could potentially cause issues for the board. In particular:

- a file note prepared by Mr Dunphy of a teleconference with Ms Reid, after Mr Dunphy had outlined a number of issues relating to the reasonableness or otherwise of the trigger points and resulting payout, says "Don't want to go through the ASIC investigation".[96]
- Mr Bentley said that the material adverse change clause was difficult, and he wanted to get lawyers to review or draft the clauses.[97]

7.3.13 The lawyers for Messrs Bentley, Hanmer, Ludwig and Milner objected to the production to the Commission of the files maintained by Clayton Utz on the basis of legal professional privilege (LPP). LPP is

> *...a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.*[98]

7.3.14 The Commission rejected those claims. RQL waived LPP in relation to the Clayton Utz files. To the extent that those directors claimed joint LPP with RQL, the Commission considers that the Clayton Utz advice was given to the board collectively as the manifestation of RQL. In those circumstances, the privilege is that of RQL and not of the directors as individuals.

Clayton Utz draft advice: 2 June 2011

7.3.15 Clayton Utz sent an advice marked as "draft" addressed to Ms Reid as "Senior Corporate Counsel/Company Secretary" of RQL.[99] It was described as advice to RQL relating to the proposal to "offer varied employment arrangements to certain executive and administrative personnel" (First CU Advice).[100]

92 Email from Shara Reid to Barry Dunphy, Brett Cook cc: Robert Bentley, Malcolm Tuttle, 26 May 2011, 12.03pm.
93 RQL, Board Meeting Minutes, 6 May 2011.
94 This issue was picked up by Clayton Utz, see: Memorandum from Peter McDonald to File, Clayton Utz, 1 June 2011.
95 Transcript, Robert Bentley, 24 September 2013, page 31 lines 30-41.
96 File Note, Clayton Utz, 2 June 2011, 11.45am.
97 Transcript, Robert Bentley, 24 September 2013, page 30 lines 40-45; page 31 lines 6-11.
98 *The Daniels Corporation International Pty Ltd v Australia Competition and Consumer Commission* (2002) 213 CLR 543 at [9].
99 Email from Barry Dunphy to Shara Reid cc: Peter McDonald, Hedy Cray, 2 June 2011, 5.29pm.
100 Letter from Barry Dunphy to Shara Reid, 2 June 2011.

7.3.16 In his statement to the Commission, Mr Dunphy explained that he "thought it was best" that the advice be issued in draft to ensure "from the perspective of RQL" that Clayton Utz had addressed all issues.[101] There is no evidence that Clayton Utz's advice was inaccurate or anything other than relevant to the board's position.

7.3.17 The advice noted that the board had resolved that executive and managerial staff needed to be retained and provided with security of tenure to ensure the continuity of RQL's business and projects.[102] The advice stated that RQL was justified in seeking to ensure that its remuneration policy gained the best advantage for the company and solidified its business continuity in a critical period. However, the advice stressed that the board must pursue this in a "sustainable manner" which would not negatively affect RQL.

7.3.18 The terms of the amended employment agreement drafted by Mr Tuttle were outlined. Clayton Utz took the view that the proposed amendments were problematic, and even more so when considered with the proposed extension to the contract term. The First CU Advice commented that

> *...the proposed variations are not the optimal means for the Board to achieve its objectives. Indeed they appear to us to pose some legal risks for both the Board, the company and its other officers.*[103]

7.3.19 Clayton Utz addressed five concerns about the *Tuttle* clauses that raised issues for the directors in terms of the duty of good faith and proper purpose:[104]

- the extension of the contract term to mid 2014 enlarged the TRV to be paid on redundancy
- the lack of any board resolution to confirm any changes to the redundancy clauses
- the wording in the clause "to immediately provide staff with the opportunity to take redundancy" in the event of one of the identified triggers was inconsistent with the concept of redundancy
- the primary objective of the board to retain its employees did not seem consistent with "immediately" providing them an opportunity to take redundancy (particularly at a time when RQL may need all staff, as in the event of a show cause notice under the Racing Act)
- the quantum of redundancy measures in consideration of the extended contract term until mid 2014 seemed overly generous when considering commercial practice.[105]

7.3.20 The board was advised to ensure that a compelling paper trail was maintained of its deliberations and decisions.[106] Clayton Utz recommended that the "entire package" be outlined in a board paper to be put to the board members before making a decision.[107]

7.3.21 A discussion of the board's obligations under the Corporations Act and the possibility of an ASIC investigation was included. Clayton Utz suggested that a way to address any future investigation was to maintain a robust record of board resolutions and the decision process.[108]

7.3.22 The advice concluded with a table which suggested parameters for a retention and termination payment framework for staff, including a termination without cause payment of between six to nine months (with six months recommended), redundancy in accordance with the *Fair Work Act 2009* (Cth), a retention bonus paid in instalments and short term incentive payments, with a defined amount to be paid for each key performance measure achieved.

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101 Statement of Barry Dunphy, 5 September 2013, page 4 para 22.
102 Letter from Barry Dunphy to Shara Reid, 2 June 2011, page 1.
103 Letter from Barry Dunphy to Shara Reid, 2 June 2011, page 2.
104 *Corporations Act 2001*, sections 181 and 184.
105 Letter from Barry Dunphy to Shara Reid, 2 June 2011, page 3.
106 Letter from Barry Dunphy to Shara Reid, 2 June 2011, page 4.
107 Letter from Barry Dunphy to Shara Reid, 2 June 2011, page 4.
108 Letter from Barry Dunphy to Shara Reid, 2 June 2011, pages 3-4.

Was the First CU Advice provided to the board?

7.3.23 Ms Reid sent the advice to Mr Tuttle, saying Clayton Utz would issue the final advice once "we are happy".[109] Ms Reid said in her ASIC interview that the reference to "we" meant the board of RQL,[110] although this seems tenuous on a plain reading of the email and its recipient.

7.3.24 In her ASIC interview, Ms Reid said that any discussions she had with Mr Tuttle about the First CU Advice were in relation to the amended clauses he drafted and not about its contents generally.[111] She said that Mr Bentley told her to send the advice to Mr Tuttle, but agreed that Mr Bentley would not have been authorised to waive privilege in the advice for it to be provided to Mr Tuttle.[112] She did not consider there was a conflict arising from her providing the advice for the board to Mr Tuttle.[113]

7.3.25 On 6 June 2011, Mr Tuttle and Ms Reid exchanged emails about arranging a meeting with Mr Bentley to review the First CU Advice.[114] In her ASIC interview Ms Reid could not recall whether that meeting ever took place.[115] She said that on receiving the advice, she did not read it, but would have printed it and given it to Mr Bentley immediately. She characterised her role as to "funnel" the advice to Mr Bentley with no other involvement.[116]

7.3.26 Mr Tuttle sent the First CU Advice to Mr Brennan and Mr Orchard on 8 June 2011. In the email Mr Tuttle said "several issues have been raised" and that he was to meet Mr Bentley the next day.[117] Mr Tuttle recalls discussing parts of the advice with Mr Bentley and Ms Reid. Consequently, Mr Tuttle thought that it was more likely Mr Bentley received the advice.[118]

7.3.27 Mr Bentley has given a number of conflicting accounts about the First CU Advice, who received it, and when.[119] It is likely that Mr Bentley did receive the First CU Advice, particularly as it has been submitted by his lawyers that he gave it to the board.[120]

7.3.28 There is no documentary evidence that other directors of RQL received the First CU Advice. A board meeting was held on 7 June 2011, but there is no mention in the minutes that the First CU Advice was distributed during the course of this meeting, or even mentioned. Mr Bentley could offer no explanation for the First CU Advice not going to the board.[121]

7.3.29 None of the other directors mentioned receiving the First CU Advice in any of their statements to the Commission. Mr Lette said that he could not recall ever receiving an advice from Clayton Utz dated 2 June 2011.[122] Mr Hanmer stated that he recalled receiving one advice from Clayton Utz, and two advices from Norton Rose.[123] Mr Hanmer also commented that the board did not generally receive draft advices, or advices that were not otherwise included in the board papers.[124]

7.3.30 The evidence before the Commission suggests that the First CU Advice was received by the Executives and Mr Bentley, but not the other directors of RQL, although clearly enough, Clayton Utz was retained to advise the board.

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109 Email from Shara Reid to Malcolm Tuttle, 3 June 2011, 2.38pm.
110 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 137-138.
111 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 141-142.
112 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 136, 143.
113 Transcript, ASIC Interview, Shara Reid, 8 November 2012, page 143.
114 Email from Malcolm Tuttle to Shara Reid, 6 June 2011, 9.41am; Email from Shara Reid to Malcolm Tuttle, 6 June 2011, 9.42am.
115 Transcript, ASIC Interview, Shara Reid, 8 November 2012, page 140.
116 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 128-129, 138-139, 142.
117 Email from Malcolm Tuttle to Jamie Orchard, Paul Brennan, 8 June 2011, 12.12pm.
118 Statement of Malcolm Tuttle, 23 October 2013, page 12 para 31.
119 See for example: Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 28, 95, 108; Transcript, Robert Bentley, 24 September 2013, page 37 line 1; Statement of Robert Bentley, 21 October 2013, pages 7-8 para 20.
120 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5, page 5-10 para 52.
121 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 106-107.
122 Transcript, Robert Lette, 15 October 2013, page 24 lines 10-19.
123 Transcript, Anthony Hanmer, 26 September 2013, page 111 lines 35-36.
124 Transcript, Anthony Hanmer, 26 September 2013, page 112 lines 2-3; 13-14; page 110 lines 40-44; page 112 lines 21-25.

14 June meeting

7.3.31 On 14 June 2011, Mr Tuttle and Ms Reid met with Mr Dunphy. [125] This meeting is significant because it was the first time a trigger to allow the Executives to take redundancy on a change of government was mentioned.

7.3.32 The meeting is also significant as Mr Tuttle and Ms Reid purported to give instructions on behalf of RQL, despite it being a matter that directly affected their personal interests. Mr Bentley's evidence seemed to be that they were negotiating their employment agreements with Clayton Utz.[126] He thought it best that the Executives be involved in the process to ensure it was not drawn out or onerous.[127]

7.3.33 Mr Dunphy said Mr Tuttle "set the scene for what he understood the Board wanted to achieve". He emphasised that "protection for the medium term" for the board was a key factor. There was also discussion about a trigger for the Executives to take redundancy in the event that the LNP won the next State election.[128]

7.3.34 A particularly stark statement appears in the Clayton Utz file note for this meeting: "Brd [the board] wants a poison pill if there is a change of Gov."[129] A *poison pill* is generally understood to be a defensive strategy used by a company to discourage a hostile takeover. Common strategies relate to the provision of benefits to officers or employees such as retirement benefits and long term contracts.[130]

7.3.35 Ms Reid attributed this phrase to Mr Bentley,[131] but Mr Bentley denied he ever used the phrase *poison pill*, or that it was a phrase of the board.[132] In submissions made on behalf of Mr Tuttle he "emphatically denies" ever using the phrase.[133]

7.3.36 The phrase *poison pill* appears in Mr Dunphy's notes of the statements made to him by Mr Tuttle at the start of the meeting.[134] Mr Dunphy does not specifically recall whether Mr Tuttle used the phrase, but says that his diary note suggests that he did. Mr Dunphy acknowledges that he himself may have used the phrase to summarise the proposition being put to him.[135]

7.3.37 Mr Dunphy says that

> *...my impression of the effect of the relevant statement made to me by Mr Tuttle was that the Board of Racing Queensland Limited wanted to see a situation where the four Executives could, in the event of a change of Government, unilaterally decide to terminate the life of their employment contracts. The "poison pill" was in this sense a reference to a "suicide pill" of the type that in spy fiction is used by a spy when they find themselves in an impossible situation.*[136]

7.3.38 Mr Dunphy recalled that it was resolved at the meeting that there would be three different approaches to contract amendments for different classes of employees: the critical people needed until 2014, other senior staff, and executive assistants.[137]

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125 File Note, Clayton Utz, 14 June 2011.
126 Transcript, Robert Bentley, 24 September 2013, page 97 lines 11-46.
127 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 113.
128 Statement of Barry Dunphy, 5 September 2013, page 5 para 26.
129 File Note, Clayton Utz, 14 June 2011.
130 *Re Saker (as liquidators of Great Souther Managers Australia Ltd) (receivers and managers appointed) (in liquidation))* [2010] FCA 1080; *Chameleon Mining NL v International Litigation Partners Pte Ltd and Ors* (2010) 79 ACSR 462; Guilday, M 2006, 'ASIC scrutiny of "poison pills" and other entrenchment devices', *Company and Securities Law, Australian Corporate Newsletter,* Issue 11, 28 June.
131 Transcript, ASIC Interview, Shara Reid, 8 November 2012, page 147.
132 Transcript, Robert Bentley, 24 September 2013, page 94 lines 18-38, page 97 lines 3-9; Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 112.
133 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-11 para 57.
134 Statement of Barry Dunphy, 13 November 2013, page 1 para 6.
135 Statement of Barry Dunphy, 13 November 2013, page 2 para 7.
136 Statement of Barry Dunphy, 13 November 2013, page 2 para 8.
137 Statement of Barry Dunphy, 5 September 2013, page 5 para 26.

7.3.39 Ms Reid said that Mr Bentley attended this meeting to outline the board's intentions and then left her and Mr Tuttle to talk about their workload and key projects.[138] This seems unlikely. Mr Bentley is not recorded as attending in Mr Dunphy's contemporaneous note of the meeting and Mr Bentley does not recall this meeting.[139]

Clayton Utz advice on restructuring issues: July 2011

7.3.40 On 1 July 2011, Clayton Utz provided RQL with the advice which had been sought at the 6 May 2011 board meeting in the form of a draft paper titled *Racing Queensland Limited: Discussion about Potential Restructuring Issues, July 2011* (Restructuring Paper). The Restructuring Paper advised on the power to remove the current directors of RQL as the control body should there be a change of government at the next State election.[140]

7.3.41 Although not tied directly to the issue of the Executives' contracts, the paper related to their fear that they would be removed from their positions by a new government who would replace the board in an almost instantaneous fashion. In seeking this advice, the board seems not to have comprehended the steps an "adverse" government would have to take for RQL to cease to be the control body, or the near-impossibility of removing the directors of an independent company incorporated under the Corporations Act.

7.3.42 Relevantly, Clayton Utz concluded that:

- under the Racing Act the only express mechanism available to the State to alter the existence or structure of RQL was to cancel the approval of RQL as a control body
- the State had no legislative power to interfere directly with the assets of RQL or the tenure of its directors
- whilst the State could theoretically enact legislation to alter the structure of RQL, if the State wished to disband RQL, the simplest method would be for it legislatively to cancel the approval of RQL as a control body
- although the State could, potentially, legislate to remove the current directors of RQL, this would be an extraordinary step, particularly in the absence of any proven misbehaviour; it would also be in breach of the fundamental legislative principles contained in the *Legislative Standards Act 1992* (Qld) and be likely to attract political controversy
- given the plenary power of the State to enact legislation, Clayton Utz did not consider that there was much that RQL could do to protect itself from a State government intent on restructuring.[141]

7.3.43 In the light of that advice, the board should have concluded that an incoming LNP government would likely take steps under the Racing Act to cancel RQL's approval as the control body. This, realistically, would not occur immediately or even closely following the next election. The prospect of the board or the Executives being immediately removed should, objectively, have been seen as remote.

Meeting with Clayton Utz: 4 July 2011

7.3.44 Mr Dunphy met with Mr Bentley, Mr Tuttle and Ms Reid on the afternoon of 4 July 2011[142] to discuss the Executives' next proposal.

138 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 145-146.
139 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 109.
140 Clayton Utz, *Racing Queensland Limited: Discussion about Potential Restructuring Issues*, 1 July 2011, page 2.
141 Clayton Utz, *Racing Queensland Limited: Discussion about Potential Restructuring Issues*, 1 July 2011, pages 4-5.
142 Statement of Barry Dunphy, 5 September 2013, page 6 para 30.

7.3.45 Earlier that day *The Courier-Mail* had published an article by Mr Mark Oberhardt which suggested that Mr Bentley and Mr Tuttle would be replaced in the event of a change of government.[143] According to Mr Dunphy, this escalated the Executives' concerns about the security of their positions at RQL.[144]

7.3.46 At the meeting, a new proposal about the employment agreements was made. Mr Dunphy summarised the principal terms as:

- an uplift of 50 per cent in salary until 31 January 2012 (Mr Dunphy noted that the final figure of the salary increase was not settled at that time)
- the Executives' contracts would be terminated on 31 January 2012 and there would be a redundancy payment made to each Executive representing the balance of their contract (either mid 2013 or longer; the contract term had not yet been agreed)
- from 1 February 2012 until 1 July 2012 the Executives would enter into temporary employment contracts; the salary of the temporary contract was not yet agreed, however, if there was no change of State government, it was anticipated that permanent employment contracts would then be offered to the Executives and the redundancy payment would be repayable.[145]

7.3.47 Mr Dunphy commented that the

> *...concept that was put to me was that the State election would not be called early, and that the four executive staff would effectively be paid out by RQL before the election was held.*[146]

7.3.48 At the conclusion of the meeting, Mr Dunphy was informed that the next RQL board meeting was in two days on 7 July 2011 when the final proposal would be considered. The final advice was, therefore, required urgently from Clayton Utz.[147]

7.3.49 On 5 July 2011 Mr Dunphy emailed his colleague Mr Robbie Walker of Clayton Utz summarising the meeting the previous afternoon. He commented that a key issue was that the proposed course

> *...raises not only the employment law issues but company law matters. The four staff clearly, as officers, now have a clear conflict of interest and almost seem to be extracting an unfair profit from the company. The Chairman is to some extent supportive of that move.*[148]

7.3.50 Whilst only an internal email, it conveys Mr Dunphy's impression of the proposal and its motivations.

Letter from the Executives: 5 July 2011

7.3.51 After the meeting on 4 July 2011, Mr Bentley asked the Executives to put their concerns in writing.[149] Mr Tuttle drafted a letter which was signed by all the Executives. [150]

7.3.52 This letter refers to the "significant media speculation" regarding the racing industry and its regulation in the wake of the State election, the Mark Oberhardt article of the previous day and other sources of speculation obtained from racing websites which regularly commented on the future of RQL and its officers. In view of that speculation

> *...it is apparent that at the very least there will be significant change to the Board of Directors and senior executive staff at Racing Queensland Limited if there is a change of Government.*[151]

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143 Oberhardt, M 2011, 'Racing Whispers', *The Courier-Mail*, 4 July; Statement of Barry Dunphy, 5 September 2013, page 5 para 28.
144 Statement of Barry Dunphy, 5 September 2013, page 5 para 29.
145 Statement of Barry Dunphy, 5 September 2013, page 6 para 30.
146 Statement of Barry Dunphy, 5 September 2013, page 6 para 31.
147 Statement of Barry Dunphy, 5 September 2013, page 6 para 31.
148 Email from Hayley Schofield on behalf of Barry Dunphy to Robbie Walker cc: Shae McCartney, 5 July 2011.
149 Transcript, Robert Bentley, 24 September 2013, page 54 lines 21-29; Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 232; Transcript, Malcolm Tuttle, 30 September 2013, page 98 lines 3-10.
150 Letter from Paul Brennan, Shara Reid, Jamie Orchard, Malcolm Tuttle to Robert Bentley, 5 July 2011.
151 Letter from Paul Brennan, Shara Reid, Jamie Orchard, Malcolm Tuttle to Robert Bentley, 5 July 2011.

7.3.53 Ms Reid received the Restructuring Paper from Clayton Utz on 1 July 2011.[152] In the light of the advice contained in it, it should have been apparent to Ms Reid that the prospect of the Executives being removed immediately, if there was a change of government, was remote.

7.3.54 The Executives' 5 July letter requested urgent consideration of the retention of "key people in the organisation", and the installation of a

> *...framework that provides us [the executives] with the necessary security both leading up to* ***and subsequent*** *to the upcoming State election.* (emphasis added)

7.3.55 The letter implied that, if the board did not respond positively, the Executives would leave. It is not immediately clear that this was, in fact, the case. The Commission has found no evidence that the Executives were actively seeking other employment. It was not in their financial interests to resign immediately as they held high paying roles and would have received no severance payment. Nonetheless, by the time of this Inquiry each Executive was adamant that he or she would very likely have left.[153] The letter was emailed to Mr Dunphy by Ms Reid on 5 July 2011 at Mr Bentley's request.[154]

7.3.56 On the same day, entirely coincidentally (according to the directors), Ms Reid emailed Mr Dunphy (marked high importance) asking that Clayton Utz review RQL's directors and officers insurance policy (D&O Policy).[155] Mr Dunphy recalled that Ms Reid asked him to do the review urgently by 7 July 2011 and advise whether the coverage was appropriate for RQL's directors and officers.[156]

7.3.57 Mr Dunphy forwarded Ms Reid's email to Mr Mark Waller, a partner at Clayton Utz, with the following comment:

> *I will ring you shortly to give you a briefing but I will send you an email that I sent to Robbie Walker earlier today which sets out some of the background. I will also send you a copy of an earlier advice that we sent to Racing Queensland about the potential risk for the Directors under the Corporations Act if they inappropriately escalated the entitlements of existing senior staff.* [157]

7.3.58 Mr Dunphy considered it relevant to refer to the Executives' contracts as part of the D&O Policy review, and in particular to his comments that they "...seem to be extracting an unfair profit from the company. The Chairman is to some extent supportive of that move".[158]

7.3.59 On 6 July 2011, Ms Reid sent Mr Dunphy a draft board paper with some input from Mr Bentley, Mr Tuttle and Ms Reid.[159] In his ASIC interview, Mr Bentley said either Ms Reid or Mr Tuttle would have prepared the board paper[160] and that it represented Mr Tuttle's wish list.[161] Ms Reid denied any involvement in the preparation or content of the board paper.[162]

7.3.60 The draft was prepared on the basis that Mr Bentley would recommend to the board that the Executives receive:

- a three per cent CPI increase to each Executive's TRV in accordance with the board's agreed position within the 2011/12 budget

152 Statement of Barry Dunphy, 13 November 2013, page 3 para 12.
153 Transcript, Malcolm Tuttle, 30 September 2013, page 47 lines 23-27, page 48 lines 19-29, page 49 lines 1 -17, page 50 lines 1-17, page 50 lines 40-44, page 51 lines 6-19, page 97 line 18 – page 98; Statement of Alfred Jamie Orchard, 19 October 2013, pages 4-5 para 13(k)-(n); Statement of Shara Reid, 26 July 2013, page 9 para 38; Statement of Paul Brennan, 11 October 2013, page 17.
154 Email from Shara Reid to Barry Dunphy, 5 July 2011, 1.23pm.
155 Email from Shara Reid to Barry Dunphy, 5 July 2011, 1.26pm.
156 Statement of Barry Dunphy, 5 September 2013, page 10 para 59.
157 Email from Hayley Schofield on behalf of Barry Dunphy to Mark Waller, 5 July 2011, 1.38pm.
158 Email from Hayley Schofield on behalf of Barry Dunphy to Robbie Walker cc: Shae McCartney, 5 July 2011, 9.25am.
159 Email from Shara Reid to Barry Dunphy, 6 July 2011, 2.40pm.
160 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 137-140.
161 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 179.
162 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 83, 155.

- payment of all outstanding leave entitlements as at 31 January 2012 (including Long Service Leave)
- "payment of 50% of the executive's annual TRV, payable on a monthly basis with the full amount to be paid prior to January 31, 2012."
- "The existing contracts for the four executives to be extended by seven (7) months to January 31, 2014 with the full value of the employment agreement paid out as a redundancy on January 31, 2012".

7.3.61 Mr Bentley said this draft was not presented to the board at its 8 July 2011 meeting;[163] but it does evidence the continuing development of the Executives' requirements. Mr Bentley could not recall why the board was not given the paper, but inferred that since the proposal put to Clayton Utz on 4 July 2011 was not proceeding that may have been the reason.[164]

7.3.62 On 7 July 2011, Mr Bentley informed Mr Walker at Clayton Utz that the Clayton Utz advice was no longer to be considered by the board at its 8 July 2011 meeting; the Executives were now getting their own legal advice to be paid for by RQL, and Clayton Utz would not be required to do further work on the employment issue until that advice was given to them for comment.[165]

7.3.63 The minutes of the RQL board meeting of 8 July 2011 record that Mr Bentley updated the board on further media surrounding "proposed changes to RQL board and management structures."[166] The minutes record "[a]s Chairman, I have engaged the services of Norton Rose Lawyers to act on behalf of RQL in respect of providing advice to" the Executives. Norton Rose was approached on 7 July 2011 prior to the board meeting.

7.3.64 During this board meeting, Ms Reid updated the board about Clayton Utz's progress with the D&O policies, and their recommended amendments, which would be circulated to the board.

Norton Rose retained

7.3.65 Mid-morning on 7 July 2011, Mr Orchard contacted Mr Murray Procter of Norton Rose. Norton Rose had previously completed work for RQL on a discrimination claim by a trainer/jockey. Mr Orchard arranged a meeting at the Norton Rose offices for 3.00pm that afternoon.[167]

7.3.66 Prior to the meeting Ms Reid emailed a document titled *Briefing to Murray Procter*. In her ASIC interview, Ms Reid confirmed that she prepared this briefing paper by cutting and pasting parts of Mr Bentley's draft board paper prepared originally for the 8 July 2011 meeting.[168] Ms Reid provided Mr Procter with the Executives' RQL Contracts and the letter the Executives had jointly signed to Mr Bentley on 5 July 2011.[169]

7.3.67 That afternoon all the Executives (Mr Brennan via telephone)[170] met with Norton Rose. A file note of that meeting:

- made reference to the perceived alignment of RQL and its board to the incumbent Labor party, and as a consequence of the election the "LNP indicated Board & senior exec will go", and "they will make them fight for their entitlements."
- stated that the Executives were "looking for: financial benefits up front + on termination... BUT provided board is not exposed to ASIC investigation."
- concluded with the notation "RQL as client at this stage".[171]

163 Statement of Robert Bentley, 11 September 2013, page 12 para 67.
164 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 152-154.
165 Email from Robbie Walker to Barry Dunphy cc: Peter McDonald, 7 July 2013, 11.36am.
166 RQL, Board Meeting Minutes, 8 July 2011.
167 Statement of Murray Procter, 9 September 2013, page 2 paras 10-13.
168 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 163-165.
169 Email from Shara Reid to Murray Procter, 7 July 2011, 12.33pm.
170 Statement of Paul Brennan, 26 July 2013, page 10 para 31.
171 File Note, Norton Rose, 7 July 2011, 3.00pm.

7.3.68 Ms Reid explained that the phrase "they will make them fight for their entitlements" meant that a new board of RQL, upon its appointment, would make it difficult for the Executives to receive their normal entitlements. Ms Reid stated that Mr Tuttle agitated the need for a trigger relating to a change of State government during this meeting.[172]

7.3.69 Mr Procter said in his statement to the Commission that, at the commencement of the meeting, the Executives suggested that Norton Rose would be acting on their behalf, but as the meeting progressed he suggested it would be more appropriate for Norton Rose to advise RQL regarding retention strategies for the Executives.[173] He said:

> *By the end of the meeting, it was clearly agreed that I would be advising RQL and its board of directors on possible retention strategies for the Executives. I was not instructed by RQL to advise the Executives and I was not engaged by the Executives.*[174]

7.3.70 This proposal was made by Mr Procter as RQL had been previously, and still was, a client of Norton Rose, and he did not want the firm to act against RQL. Mr Procter said the Executives agreed and this agreement was reflected in his diary note.[175]

7.3.71 In their statements to the Commission, the Executives and Mr Bentley strongly maintained their belief that Norton Rose was acting on behalf of the Executives.[176] The contemporaneous documents contain numerous indicators to the contrary. For example:

- Norton Rose's engagement letters identified the client as RQL and the scope of work as "Advice on a strategy for the remuneration of Racing Queensland Limited's executives, as required by you". Clause 2.4 said "... our advice does not extend to, and may not be relied upon by third parties, including your directors and employees in their private capacity."[177]
- Norton Rose's advices were addressed to RQL and referred to providing advice to RQL
- Norton Rose was instructed by Ms Reid on 19 July 2011 to prepare a Redundancy Policy for RQL[178]
- Ms Reid instructed Norton Rose to prepare board resolutions for RQL[179]
- Norton Rose's invoices were addressed to RQL and paid by it. When Ms Reid requested that Norton Rose's final invoice be sent to the Executives Norton Rose replied that it was "not appropriate for us to bill you and the other executives" as "[w]e have at all times been acting on behalf of the Board of Racing Queensland Limited in relation to this matter, with its instructions conveyed by you [Ms Reid]."[180]
- Norton Rose corresponded with Ms Reid in her capacity as corporate counsel/company secretary
- the file note of Ms Gamble, a solicitor who worked with Mr Procter, of the original meeting with the Executives on 7 July 2011 concluded with "RQL as client at this stage."[181]
- the whole tenor of Norton Rose's advices was directed to the board of RQL; if Norton Rose had misunderstood the instructions, they were never corrected by Ms Reid or anyone else at RQL.

172 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 167-168, 177.
173 Statement of Murray Procter, 9 September 2013, pages 2-3 paras 16-23.
174 Statement of Murrary Procter, 9 September 2013, pages 3 para 23.
175 Statement of Murray Procter, 9 September 2013, pages 2-3 paras 16-23.
176 Statement of Malcolm Tuttle, 23 October 2013, page 11 para 28; Transcript, Malcolm Tuttle, 30 September 2013, page 58 line 46 – page 59 line 38; Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 167-168; Transcript, Robert Bentley, 24 September 2013, page 56 lines 7–36, page 57 lines 4–7, page 59 lines 21-30; Statement of Alfred Jamie Orchard, 19 October 2013, page 7 para 13(w); Transcript, ASIC Interview, Shara Reid, 8 November 2012, page 172.
177 Letter from Murray Procter to Shara Reid, 12 July 2011.
178 Email from Shara Reid to Murray Procter, 19 July 2011, 10.38am.
179 Email from Shara Reid to Murray Procter cc: Kristin Gamble, 3 August 2011, 11.28am.
180 Email from Kristin Gamble to Shara Reid, 27 March 2012, 5.00pm.
181 File Note, Norton Rose, 7 July 2011.

7.3.72 Although she acknowledged that the engagement letter and retainer referred to RQL as the client, Ms Reid stated in her ASIC interview that she thought that Norton Rose was retained for the Executives and RQL were just paying for this advice.[182] Nonetheless, as will become clear from the advices delivered by Norton Rose, Ms Reid knew or ought to have known that the firm was advising the board.

7.3.73 The Executives objected to the production to the Commission of the files maintained by Norton Rose on the basis of LPP. In view of the overwhelming documentary evidence that Norton Rose were advising RQL, the Commission rejected those claims. Beyond this, any privilege that may have existed was lost by the provision of documents to the Commission by the Executives and by other parties.[183]

7.3.74 Further online speculation and commentary on the fate of the Executives and the board of RQL continued on certain horse racing websites and forums during July. Ms Reid kept Mr Procter updated with this commentary by emailing extracts and articles to him.[184]

15 July Draft Advice

7.3.75 On 15 July Mr Procter emailed a draft advice to Ms Reid (Draft NR Advice). This was the first of a number of draft advices produced by those solicitors before Norton Rose's final advice was issued to RQL on 20 July 2011.

7.3.76 In the covering email attaching the advice, Mr Procter stated "We provide our advice at this stage in draft as requested to gauge your views on the approach of the Board."[185] The advice was addressed to "The Chairman Racing Queensland Limited c/o Ms Shara Murray Senior Corporate Counsel Racing Queensland Limited". It began:

> *We have been instructed to advise the Board of Directors of Racing Queensland Limited (Board) in relation to a retention strategy for the following executives of [RQL].*[186]

The Executives were named.

7.3.77 The Draft NR Advice continued:

> *The Board has instructed us to advise on options available to it to address the ongoing need to retain and reward high performing executives in an environment of uncertainty, taking into account the legal obligations imposed on the Board in determining the appropriate level of remuneration and benefits.*[187]

7.3.78 The Draft NR Advice:

> *(1) considered the general obligations imposed on the Board under the Corporations Act 2001 (Cth) (Act);*
>
> *(2) considered the specific requirements, if any, to avoid breaching the Act in relation to any benefits to be provided; and*
>
> *(3) provided an overview of the types of benefits that we consider would be appropriate in the circumstances that the Board may wish to consider.*

7.3.79 In the numerous drafts of this advice which followed and the final advice which eventually went to the board these opening instructions did not change.

182 Transcript, ASIC Interview, Shara Reid, 8 November 2012, pages 162-163.
183 *Australian Securities and Investments Commission v Lindberg & Anor* (2009) 25 VR 398 at [43] to [51].
184 See for example: Email from Shara Reid to Murray Procter, 15 July 2011, 9.23am.
185 Email from Murray Procter to Shara Reid, 15 July 2011, 5.26pm.
186 Letter from Murray Procter to Robert Bentley c/o Shara Reid, 15 July 2011.
187 Letter from Murray Procter to Robert Bentley c/o Shara Reid, 15 July 2011.

7.3.80 The following is the summary of the benefits proposed:

> *2.3 Our suggestion of appropriate benefits that are not disproportionate and that would be in the interests of RQL is as follows:*
>
> *1) an increase to the total remuneration value (TRV) of each Executive of between 10% and 20%;*
>
> *2) the inclusion of a new 5 year term commencing from, say August 2011;*
>
> *3) a notice period for termination of the Executive Employment Agreement by either party without cause, which should be an amount…of no more than 12 months;*
>
> *4) the implementation of a RQL-wide redundancy policy with payments based on length of service in a particular position;*
>
> *5) the inclusion of two incentive bonuses as follows:*
>
> *(a) a performance bonus linked to the achievement of certain outcomes, with payment of the bonus deferred (say, until half-way through the term and then at the end of the term) and conditional on the Executive remaining employed with RQL at that time, unless the Executive's employment is terminated by RQL earlier, in which case the bonus becomes immediately payable; and*
>
> *(b) a retention bonus of, say, 12 months of the Executive's TRV, payable on completion of the term by the Executive unless the term is renewed for a further period, or if the Executive's employment is terminated by RQL during the final year without cause;*
>
> *6) the inclusion of a material adverse change clause with a trigger that includes RQL ceasing to be a control body for the purpose of the Racing Act 2002 (Qld), a change to either the make up of the RQL Board, reporting lines for the Executive or an organisational restructure, or a reasonable expectation by the Executive of any of these triggers occurring, entitling [the] Executive to payment of:*
>
> *(a) a fixed amount equivalent to 12 months of each Executive's TRV as a material adverse change severance payment;*
>
> *(b) any accrued incentives (including any deferred incentives); and*
>
> *(c) all other legal entitlements (such as accrued leave); and*
>
> *7) the inclusion of a clause limiting the payments of benefits (as defined in the Act) paid in connection with the termination to the Executive's average annual base salary (as defined in the Act).*
>
> *2.4 In summary, the general effect of these benefits is that in circumstances of a termination or cessation other than for misconduct, an Executive would become entitled to a payment of up to (depending on the Board's decision about the amount), 12 months TRV.*[188]

Who received the Draft NR Advice

7.3.81 Ms Reid received the Draft NR Advice via email at 5.26pm on 15 July 2011. Later that evening at 6.53pm, she sent it to Mr Tuttle.

7.3.82 On the morning of 17 July 2011, Mr Tuttle emailed Ms Reid, Mr Orchard and Mr Brennan with his initial impressions of the Draft NR Advice, along with a copy of the advice as an attachment.

188 Letter from Murray Procter to Robert Bentley c/o Shara Reid, 15 July 2011, page 2.

7.3.83 In this email, Mr Tuttle noted that he thought the 10 to 20 per cent TRV increase "seems light", and disparaged the five year term and the performance and retention bonus payable in connection with this five year term. Mr Tuttle asked Ms Reid to arrange a meeting of the Executives.[189] Ms Reid organised the meeting for the following morning. She said in her ASIC interview that although she set up the meeting, she did not attend.[190]

7.3.84 It is unclear if Mr Bentley received the Draft NR Advice. There is no documentary evidence that he did and Mr Bentley has provided several conflicting versions.[191]

7.3.85 Mr Tuttle said in his oral evidence to the Commission that Ms Reid would have been in charge of the distribution of the advices.[192] Mr Tuttle was unsure whether Mr Bentley ever received the Draft NR Advice or if he discussed its contents with him.[193] He also commented that as he believed that Norton Rose was advising the Executives, providing the Draft NR Advice to the board was not something he thought about.[194]

7.3.86 There is insufficient evidence to reach any conclusion as to whether Mr Bentley received the Draft NR Advice. It is highly unlikely that any of the other directors did.[195]

18 July meeting

7.3.87 Mr Tuttle and Ms Reid met with Ms Kristin Gamble and Mr Procter on 18 July 2011 to discuss the Draft NR Advice. Prior to that meeting, Mr Tuttle prepared a draft email to Ms Reid (which does not appear to have been sent) setting out "Key outcomes from today will be":

1. *30% trv increase from July 1, 2011*
2. *Contract until June 30, 2013*
3. *Renegotiate before December 31, 2012*
4. *In the event of a change of Government, LNP policy (back to 3 codes) triggers material change and redundancy payment in favour of employee for balance of term and entitlements*
5. *Other material changes to include change of board member, change of board.*[196]

7.3.88 This document was provided to Mr Procter and Ms Gamble during the meeting.[197] A diary note of the meeting made by Ms Gamble stated:

- *met with Chairman this morning*
- *Trigger→ election result- available to resign on the next morning, i.e. Sunday*
- *transition period- would like to avoid this if possible*
- *No performance bonus*
- *No extended term*
- *No deferred payments*
- *trim current advice to deliver their outcomes.*[198]

189 Email from Malcolm Tuttle to Shara Reid, Jamie Orchard, Paul Brennan, 17 July 2011, 7.18am.
190 Transcript, ASIC Interview, Shara Reid, 15 November 2012, pages 24-25.
191 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 166-167, pages 237-240; Transcript, Robert Bentley, 24 September 2013, page 54 line 42 – page 55 line 1, page 64 lines 20-28, page 65 lines 8-9, page 65 lines 25-46, page 66 lines 1-27, page 79 lines 43-45, page 80 lines 6-17.
192 Transcript, Malcolm Tuttle, 30 September 2013, page 77 lines 38-42, page 78 lines 30-47.
193 Transcript, Malcolm Tuttle, 30 September 2013, pages 81-82, page 86 line 44 – page 87 line 19.
194 Transcript, Malcolm Tuttle, 30 September 2013, page 78 lines 5-15.
195 Transcript, William Ludwig, 27 September 2013, page 47 lines 5-11; Transcript, Anthony Hanmer, 26 September 2013, page 111 lines 35-36, page 110 lines 35-44, page 112 lines 19-25; Transcript, Robert Lette, 15 October 2013, page 26 lines 22-31.
196 Email from Malcolm Tuttle to Shara Reid, 18 July 2011.
197 Statement of Murray Procter, 9 September 2013, page 5 para 50.
198 File Note, Norton Rose, 18 July 2011.

7.3.89 Mr Procter in his statement to the Commission recalled receiving instructions in those terms.[199] Mr Tuttle could not remember if he or Ms Reid gave the instructions during this meeting.[200] Mr Tuttle stated in evidence to the Commission that he suggested the salary increase of 30 per cent for the Executives.[201]

7.3.90 Mr Tuttle said he had met with Mr Bentley that morning. He could not recall if all of the Executives were there, although he recalled that the Executives had discussed their preferred outcomes with Mr Bentley prior to the Norton Rose meeting.[202] The diary note at 7.3.88 above was explained by Mr Procter as follows: Mr Tuttle and Ms Reid said they had met with Mr Bentley that morning and put to him the proposal in Mr Tuttle's draft email to Ms Reid. Mr Tuttle agreed that he likely gave the new proposal to Mr Bentley.[203]

19 July 2011 draft advices

7.3.91 Following this meeting, Ms Reid was in frequent correspondence with Norton Rose to facilitate the provision of the final advice. The diary notes record some pressure on Norton Rose to send the advice. On 19 July, Norton Rose provided Ms Reid with various amended drafts of its advice.[204] All were addressed to "The Chairman Racing Queensland Limited c/o Ms Shara Murray Senior Corporate Counsel". Ms Reid gave Norton Rose the instructions to amend those advices.[205]

7.3.92 A tabular summary of those amendments is contained at Schedule B of this Chapter but in substance they were significantly favourable to the Executives' position and removed cautions to the board of RQL:

- the TRV increase for the Executives was changed from a 10 to 20 per cent rise to 30 per cent
- the recommendation relating to the notice period was deleted
- the discussion relating to the Cap formula found in the Corporations Act was removed
- reasons for the implementation of a redundancy policy were added saying that it was to "increase the defensibility of a severance payment made to the Executive on termination of employment"
- any mention of incentive bonuses was deleted
- in the material adverse change clause recommendation, the phrase "change of State government" was included as a trigger event
- the phrase "reasonable expectation by the Executive of any of these triggers occurring" was deleted from the clause
- any reference to a 12 month cap on the termination payment was deleted, as was reference to the payment of accrued incentives
- limiting the payment of benefits in connection with termination to an Executive's base salary was deleted
- in the Draft NR Advice, on termination or cessation of employment other than for misconduct, an Executive was entitled to a payment of up to twelve months TRV; this paragraph was altered so that an Executive would receive a payment equivalent to the amount they would have received to the end of the term, in addition to a redundancy payment; this was said to provide the Executives with the protection they were seeking and give effect to RQL's wish to retain their services.

199 Statement of Murray Procter, 9 September 2013, page 5 paras 51-53.
200 Transcript, Malcolm Tuttle, 30 September 2013, page 88 lines 24-26.
201 Transcript, Malcolm Tuttle, 30 September 2013, page 100 lines 14-16.
202 Transcript, Malcolm Tuttle, 30 September 2013, page 85 line 32 – page 86 line 6.
203 Transcript, Malcolm Tuttle, 30 September 2013, page 86 lines 11-41.
204 Email Murray Procter to Shara Reid, 19 July 2011, 3.41pm; Email Murray Procter to Shara Reid, 19 July 2011, 8.01pm.
205 File Note, Norton Rose, 19 July 2011, 6.02pm; File Note, Norton Rose, 20 July 2011, 8.30am.

7.3.93 The amendments were consistent with the instructions given by Mr Tuttle and Ms Reid at the meeting on 18 July 2011. Ms Reid said in her ASIC interview that the changes to the Norton Rose advice were on instructions from Mr Tuttle.[206]

7.3.94 When questioned by the Commission, Mr Tuttle said that the Executives had emphasised to Norton Rose that they wanted the board of RQL to be protected.[207] He did not explain why he and Ms Reid instructed Norton Rose to make the significant amendments to the advice which deleted particular concerns which RQL, as a company, should consider.

20 July 2011 board paper and meeting

7.3.95 On instructions from Ms Reid,[208] Norton Rose delivered the final version of its advice on the morning of 20 July 2011 (Final July Advice).

7.3.96 The Final July Advice was presented later that day to the board at its meeting for consideration as part of a board paper titled *Senior Executive Staff*. The paper recommended:

> a) *A 30% increase to each executive's TRV effective from 1 July 2011;*
>
> b) *The inclusion of a material adverse change clause with a trigger that includes a change in State Government, RQL ceasing to be a control body for the purpose of the Racing Act 2002 (Qld), a change to either the make-up of the RQL Board, reporting lines for the Executive or an organisational restructure, entitling Executive to:*
>
> (i) *a payment equivalent to the amount of each Executive's TRV that they would have received had the Executive remained employed by RQL to the completion of the term, plus an amount of severance pay equivalent to the RQL-wide redundancy pay payment, as a material adverse change severance payment; and*
>
> (ii) *all other legal entitlements (such as accrued leave).*
>
> c) *Retention of the current 3 year contract term with an obligation on RQL to renegotiate before 31 December 2012.*[209]

7.3.97 The 5 July 2011 letter from the Executives, an estimated cost summary of severance/redundancy for the Executives and the Final July Advice were attached to the board paper. The paper also set out a detailed list of each of the initiatives and projects the Executives were contributing to or working on for RQL.

7.3.98 In addition to the recommendations for the Executives, the board was recommended to resolve:

- to rescind the board resolution of 6 May 2011 which identified nine executives for extended contract terms, and five executive assistants and another employee for new agreements
- that the agreements of the other executives referred to in the 6 May 2011 resolution were to be "styled and formatted" in accordance with any recommendations from Clayton Utz
- that Clayton Utz review the Final July Advice and "on the basis that there are no material concerns, the Board to authorise the Chairman to effect all agreements in accordance with the above resolutions".

7.3.99 There is some lack of clarity about who had prepared the board paper. In his oral evidence to the Commission Mr Tuttle said that he was most likely involved in some way in its preparation.[210] He agreed that the board paper recommended what he and the other Executives wanted.[211]

206 Transcript, ASIC Interview, Shara Reid, 15 November 2012, page 42.
207 Transcript, Malcolm Tuttle, 30 September 2013, page 79 lines 3-43.
208 File Note, Norton Rose, 20 July 2011, 8.30am.
209 RQL, Board Paper, *Senior Executive Staff*, 20 July 2011.
210 Transcript, Malcolm Tuttle, 30 September 2013, page 99 lines 40-47.
211 Transcript, Malcolm Tuttle, 30 September 2013, page 100 lines 18-25.

7.3.100 The board paper was signed by Mr Bentley and he wrote part of it.[212] Mr Bentley agreed that the recommendations were "a high price" and "generous" but that he was nonetheless prepared to put them to the board.[213]

7.3.101 The board (all directors were in attendance) noted the advice from Norton Rose and "unanimously supported the intent of the advice received." The first draft of the minutes record that the board "considered it appropriate and prudent for Clayton Utz to review the Norton Rose advice" but "prudent" was subsequently deleted. The board asked Ms Reid to obtain salary ranges of comparable positions to the Executives in Racing NSW and Racing Victoria.[214]

7.3.102 Ms Reid said in her QAO interview that she was asked to leave the meeting while these matters were discussed,[215] and that she was unable to gain salary comparisons due to confidentiality.[216] In her ASIC interview, Ms Reid said she refused to obtain salary ranges for comparable positions as she believed it presented a conflict.[217] Mr Bentley agreed that Ms Reid declined to obtain these salary comparisons due to her conflict.[218] It is a matter for comment that Ms Reid considered herself conflicted when she was merely collecting data and, arguably, not in a position of conflict, but did not recognise her significant conflict in providing instructions on behalf of the board to Clayton Utz or in *suppressing* aspects of Norton Rose's advice from the board.

7.3.103 Mr Bentley said that he made the inquiries about salary by telephone with his contacts in other States. He did not keep a record of what these salary ranges were as he "does not keep notes", but agreed in his examination before the Commission that he should have made some written record of the outcome of these inquiries.[219]

Preparation of resignation packs

7.3.104 On 28 July 2011, Ms Reid instructed Norton Rose to draft resignation letters and any associated documents the Executives would need to resign "in circumstances of a termination or cessation due to a material adverse change". She added, "That is, if I could please have packs 'ready to go' should the need arise!"[220]

7.3.105 A revised instruction sheet relating to this further work was sent by Norton Rose to RQL, signed by Mr Bentley and returned to Norton Rose on 29 July 2011. Consistently, RQL was again identified as Norton Rose's client.

7.3.106 Mr Tuttle was aware that Ms Reid had requested Norton Rose to prepare the resignation letters. He thought it unusual that she had done so.[221] He rejected her assertion that he had asked her to get the resignation letters prepared.[222]

7.3.107 A tabular summary of the development of the Executives' requirements is contained at Schedule C of this chapter, but the insertion of the *Change of State government* trigger to the Norton Rose advice and the preparation of the resignation packs make it clear that the Executives did not intend to remain at RQL in the long term and not after the next State election (in the likely event that the LNP won) as had been the board's and the Executives' express original intention.

212 Transcript, Robert Bentley, 24 September 2013, page 71 lines 15-42.
213 Transcript, Robert Bentley, 24 September 2013, pages 73-74; page 76 lines 25-31.
214 RQL, Board Meeting Minutes, 20 July 2011.
215 Transcript, QAO Interview, Shara Reid, 30 April 2012, page 4.
216 Transcript, QAO Interview, Shara Reid, 30 April 2012, page 4.
217 Transcript, ASIC Interview, Shara Reid, 8 November 2012, page 99.
218 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 182-185.
219 Transcript, Robert Bentley, 24 September 2013, page 85 lines 12-16.
220 Email from Shara Reid to Murray Procter, 28 July 2011, 11.50am.
221 Transcript, Malcolm Tuttle, 30 September 2013, page 103 lines 16-24.
222 Transcript, Malcolm Tuttle, 30 September 2013, page 107 lines 30-36; Transcript, ASIC Interview, Shara Reid, 15 November 2012, page 50.

Clayton Utz final advice: 1 August 2011

7.3.108 On 1 August 2011, Mr Dunphy emailed Mr Bentley (copied to Ms Reid) that most of the suggestions in the Final July Advice would "not be unreasonable to adopt" but that there were three areas where variation was needed. Two were what Mr Dunphy described as drafting points. The third concerned the "very large windfall" which would come to the Executives should there be an early election which "would be hard to justify".[223]

7.3.109 Mr Dunphy summarised succinctly concerns about the proposed new terms for the agreements, which were to be developed more fully in the advice proper. Even if Mr Bentley did not read the detail in the advice, this email message conveyed the important points clearly:

> *There is a potential complication if an early State election were to be called, say, in the next two months. In that circumstance…the four executives may then be entitled to twenty months pay-out (at the 30% increased level) which would be equivalent to 26 months salary at their current remuneration. All of that would occur in circumstances where their retention would have only been for a short period of, say, three months. We think that that outcome would be in the nature of a windfall and would be hard to justify and we have therefore suggested that the termination payment … should have some form of cap to mitigate that risk. This is a matter for the Board to consider balancing all of the commercial considerations but if one is having regard to the uplifted salary level (which includes the 30% increase) then a cap of 12 -14 months might be considered by the Board.*[224]

7.3.110 Mr Dunphy subsequently emailed Clayton Utz's advice to Mr Bentley and copied Ms Reid (Final CU Advice). In the Final CU Advice, Clayton Utz reminded Mr Bentley, to whom the advice was addressed, of the earlier discussions and advice about the board's legal obligations (particularly pursuant to sections 181 and 182 of the Corporations Act) in relation to the remuneration of the Executives. The executive summary dealt with the key matters:

> *(a) The proposed 30% increase in salary does not appear to be unreasonable in all of the circumstances.*
>
> *(b) However, the Board needs to carefully assess whether the flow on effect of the 30% increase into the TRV for each of the four senior executives for the purposes of their relevant termination payments (under clause 15.3 of their respective employment contracts) is, in all of the circumstances, reasonable and in the best interests of Racing Queensland. We suggest that there be a form of cap (in terms of the total number of months of TRV equivalent) on the amount that can be paid under the terms of the revised clause 15.3. The value of the capped amount is for the Board to determine but we would suggest that a range of between 12 and 14 months might be considered. Our reason for raising this point is that the timing of the next State general election is really quite flexible and uncertain. In our opinion the next State general election could be as early as September 2011 or as late as June 2012. Our concern is that if the election is held very early, e.g. October 2011 and this then led to an activation of one of the clause 15.3 triggers, that the four executives would then become entitled to a termination payment of 20 months (at the increased 30% level) which, in terms of their current salary would be the equivalent of a 26 month payment. As that trigger would occur in circumstances where the employees were only effectively retained for 3 months from the date of incentive, it is our opinion that such a windfall outcome may be difficult for the Board to justify;*

223 Email from Jennifer McComber on behalf of Barry Dunphy to Robert Bentley cc: Shara Reid, 1 August 2011, 11.39am.
224 Email from Jennifer McComber on behalf of Barry Dunphy to Robert Bentley cc: Shara Reid, 1 August 2011, 11.39am.

(c) *The variation in the current termination payment triggers as set out in clause 15.3 of the respective employment contracts of the four senior executives appears to be reasonable. However, we recommend that all of the additional triggers ought to have a significant impact in the role or duties of each of the four senior executives. We would not recommend that one of the triggering events that activate payment be a mere change in State government alone, as that event of itself may or may not have implications for the employment of the four senior executives; and*

(d) *The change in the contract renegotiation date in the employment contracts of the four senior executives appears to be reasonable.*[225]

7.3.111 Clayton Utz noted that

> *...there has been a most unfortunate escalation in the public discussion about the future of Racing Queensland Limited ... [which] has now also gone so far as to suggest that two of the senior executives ... will be replaced if there is a change of Government.*[226]

7.3.112 The advice noted the risk of the Executives resigning, but observed

> *...[t]he only countervailing factor seems to be that under their respective employment contracts, the four senior executives are required on resignation to give either six or seven weeks notice...and their entitlements in the event of a voluntary resignation are minimal.*[227]

7.3.113 The advice addressed the concept of redundancy and its application:

> *As we have already advised, we have serious reservations whether an employee triggered termination under clause 15.3 of the current employment contracts would give rise to a genuine redundancy situation...It is incomprehensible that the current duties undertaken by the four senior executives will in any future management structure of Racing Queensland all cease to exist or, in that sense, become redundant in terms of the ongoing operation and management of Racing Queensland.*[228]

7.3.114 Clayton Utz advised that the payment of a 30 per cent salary retention increase was conceptually reasonable. However, the board needed to be satisfied, when the total payments were considered, that what was proposed was in the best interests of RQL, particularly if there was an early State election.

Norton Rose advice: 3 August 2011

7.3.115 On 3 August 2011 Mr Procter emailed Ms Reid a further advice addressed to Mr Bentley as chairman of RQL, commenting on Clayton Utz's advice of 1 August (Final NR Advice).[229] The summary was to the following effect:

> *2.1 In our view, in the event of an early election the potential increase to the termination payment under the proposed material adverse change clause is defensible for the followings reasons:*
>
> *(1) there is a commercial need for RQL to retain the Executives in context of the current industry environment; and*
>
> *(2) for this reason, it is in the interests of RQL to reach an agreement satisfactory to the Executives in order to retain their employment.*

225 Letter from Barry Dunphy to Robert Bentley,1 August 2011, pages 1-2.
226 Letter from Barry Dunphy to Robert Bentley, 1 August 2011, page 2.
227 Letter from Barry Dunphy to Robert Bentley, 1 August 2011, page 3.
228 Letter from Barry Dunphy to Robert Bentley, 1 August 2011, page 6.
229 Email from Laura Wawryk on behalf of Murray Procter to Shara Reid, 3 August 2011, 10.53am.

2.2 If the Executives agree to the inclusion of a cap on the termination payment under the material adverse change clause, then this will satisfy RQL's commercial need to retain the Executives.

2.3 However, in the event that the Executives do not agree to the proposed cap, we consider that it remains in the best interests of RQL to reach an agreement without the inclusion of the cap in order to retain the Executives.

2.4 In order to adequately address the current concerns of the Executives, we also consider that it is necessary to include, effectively, a change in State Government as a trigger in the proposed material adverse change clause.[230]

7.3.116 Ms Reid emailed Mr Procter shortly after receipt of the Final NR Advice that Mr Bentley was happy with it adding "it has been decided: ... completion of the term (30 June 2013) or 14 months ..." as a cap. Ms Reid asked Mr Procter to draft the appropriate resolution reflecting the agreed proposal for consideration and approval by the board.[231]

7.3.117 Mr Bentley denied saying he was "happy with the advice" and could not recall if he instructed Ms Reid to ask Norton Rose to draft the board resolution.[232] Ms Reid conceded in her ASIC interview that Norton Rose was unarguably retained by RQL (rather than the Executives) to draft the board resolution.[233]

7.3.118 At a meeting of the RNC held the same day, 3 August 2011, there is no record in the minutes of any discussion of this ongoing employment issue, let alone that the advice was received or what would be proposed to the board. The minutes do record discussion about performance reviews and that the budget for salary increases was three per cent.[234]

Draft amended employment agreements

7.3.119 In the late afternoon on 3 August 2011, Norton Rose emailed Ms Reid the amended employment agreements for the Executives, draft resignation letters, draft separation deeds and a draft resolution for the board's approval.

7.3.120 Numerous amendments were subsequently made to those documents.

7.3.121 The material adverse change clause was amended so that a change of State government (and nothing more) amounted to a Material Adverse Change. Ms Reid instructed Norton Rose that she had

> *...received instructions from the Board to change the Material Adverse Change definition to delete the reference to it being a stated policy of a parliamentary party who has control of the Qld Legislative Assembly [to materially alter the structure of RQL or remove one or more of the directors of RQL].*[235]

7.3.122 Norton Rose expressed concern that the amendments made the clause too broad, but Ms Reid "said that her instructions were to get it changed, therefore please change it".[236]

7.3.123 The notice period was amended from one month to one week. Ms Reid told Norton Rose that the Executives' preference was for the obligation to provide notice to be removed.[237] Norton Rose was concerned about removing the notice period altogether and emphasised that the

230 Letter of advice from Murray Procter to Robert Bentley c/o Shara Reid, 3 August 2011, pages 1-2.
231 Email from Shara Reid to Murray Procter cc: Kristin Gamble, 3 August 2011, 11.28am.
232 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 202-203.
233 Transcript, ASIC Interview, Shara Reid, 15 November 2012, page 64.
234 RNC, Meeting Minutes, 3 August 2011.
235 File Note, Norton Rose, 4 August 2011, 11.47am.
236 File Note, Norton Rose, 4 August 2011, 11.47am.
237 File Note, Norton Rose, 3 August 2011, 4.40pm.

board would be in a difficult position should the Executives resign without notice. [238] Ms Reid's response was to suggest a one week notice period. This was accepted by Norton Rose and included in the amended employment agreements.

7.3.124 Following the reduced notice period amendment, a provision was inserted for the notice period to be waived. Ms Reid instructed Norton Rose to prepare documents for Mr Bentley to sign to give effect to such a waiver.[239]

7.3.125 Ms Reid said in her ASIC interview that she had been instructed to ask Norton Rose to include a provision to waive the notice period and that dispensing with the notice period was originally Mr Tuttle's suggestion, although the idea may have originated from Mr Bentley.[240] Mr Tuttle denies suggesting the waiver.[241]

7.3.126 Norton Rose expressed concern about the waiver, particularly where a one week notice period "was a bit skimpy as it was."[242] Nonetheless, on Ms Reid's instructions, Norton Rose prepared updated employment agreements and waiver letters. The employment agreements were amended in clause 15.2 to allow the chairman to waive the requirement for the Executives to provide one week written notice of termination.

7.3.127 All of these amendments were favourable to the Executives. Instructions to make the amendments were provided by Ms Reid. In numerous instances she insisted that they were the board's, or Mr Bentley's, instructions.[243] There is no evidence that the board was aware of the changes and it is highly unlikely that the board, other than Mr Bentley, was involved at all.

7.3.128 Finally, Ms Reid amended the board resolution drafted by Norton Rose so that the employment contracts were not provided to the board. Ms Reid instructed that:

> *[t]he Chairman has advised that highlighting the key changes to the agreements is sufficient, there is no need to provide complete agreements to the Board.*[244]

7.3.129 The draft board resolution prepared by Ms Reid purports to summarise the changes to the Executives' contracts, but failed to include that the notice period was reduced to one week and could be waived by the chairman.

7.3.130 Ms Reid told the ASIC interviewers that Mr Bentley had provided her with the wording of the resolution.[245] She could not explain the omissions. Mr Bentley said, despite the contents of the email (at 7.3.128), that the directors would have received the complete employment agreements sometime. He too cannot explain why the waiver addition was not included.[246]

7.3.131 As will become clear, the board was not aware of these changes and did not become aware of them until the Executives had resigned.

5 August 2011 board meeting

7.3.132 On 3 August 2011 Mr Bentley and Mr Dunphy discussed how the board intended to proceed with the amended contracts for the Executives.[247] In submissions for Mr Bentley, it is said that

238 File Note, Norton Rose, 3 August 2011, 4.45pm.
239 File Note, Norton Rose, 4 August 2011, 8.46am.
240 Transcript, ASIC Interview, Shara Reid, 15 November 2012, pages 68-72.
241 Transcript, Malcolm Tuttle, 30 September 2013, pages 111-113.
242 File Note, Norton Rose, 4 August 2011, 9.31am.
243 See for example: File Note, Norton Rose, 4 August 2011, 11.47am; File Note, Norton Rose, 4 August 2011, 8.46am; Email from Shara Reid to Kristin Gamble, 4 August 2011, 2.57pm.
244 Email from Shara Reid to Kristin Gamble, 4 August 2011, 2.57pm.
245 Transcript, ASIC Interview, Shara Reid, 15 November 2012, page 79.
246 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 210.
247 Email from Barry Dunphy to Hedy Cray, Robbie Walker cc: Peter McDonald, 3 August 2011, 5.45pm; Transcript, Robert Bentley, 24 September 2013, page 89 lines 20-42.

Mr Bentley spoke to Mr Dunphy and told him they were thinking of adopting the Norton Rose trigger clause and that Mr Dunphy did not say not to do so.[248]

7.3.133 In his statement to the Commission, Mr Dunphy recalled that Mr Bentley told him the board may want an amalgamation of the trigger clause suggestions from the two advices. Mr Dunphy recalled he told Mr Bentley

> *...that was fine, that he had both legal advices and we [Clayton Utz] understood that they [RQL] would make the call that was in the best interests of the company.*[249]

7.3.134 Plainly Mr Dunphy did not approve Mr Bentley's proposed course; he made it clear that it was a matter for the board of RQL to decide what was in the best interests of RQL.

7.3.135 Mr Ludwig's evidence in the QAO interview shed some further light on the deliberations of the board on this matter:

> *Well we got advice from Clayton Utz, but the advice didn't give us what we wanted so we got a second advice from, what's their names, Nortons, and they, yeah they, they, they absolutely gave us the, the redundancy that we wanted. You know, they addressed it whereas Clayton Utz didn't.*
>
> *... if you want to have a look at the broad [board], we got two opinions and in the end we went with the Norton opinion because it did what we wanted it to do. It took care of the security of tenure for those people and if there was a, you know, I mean I'm always an optimist, I always thought Labor was gonna win...*[250]

7.3.136 A board paper entitled *Employment Agreements/Redundancy Policy* was prepared for the RQL meeting on 5 August 2011. It attached three advices; the July NR Advice, the Final CU Advice and the Final NR Advice.

7.3.137 Like the board paper of 20 July 2011, Mr Bentley said that although his name was on it and he signed it, he did not draft it.[251] It appears that Ms Reid and Mr Tuttle were involved in its preparation.[252]

7.3.138 The recommendations in the paper were adopted by the board. It resolved that:

- the resolution of 6 May 2011 be rescinded
- the variations to the Executives' contracts be approved. In doing so, the board confirmed they had received and read the three legal advices, and that the only variations to the employment agreements were outlined in the 5 August 2011 board paper
- a Redundancy Policy was introduced for all employees of RQL.

7.3.139 Mr Bentley said that the discussion at the board meeting centred on the need to retain the Executives.[253] Mr Bentley maintained in oral evidence to the Commission that it was a commercial decision to include the material adverse change clause as RQL needed the Executives.[254]

7.3.140 The other directors also gave evidence about the basis for approving the amendments to Executives' contracts. Relevantly:

- Mr Hanmer said the amendments were in the best interests of RQL as they:

  > *ensured that the key senior executives would remain for the very critical period of the ensuing months to allow the infrastructure plan to be completed by Mr Tuttle and*

248 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-35 para 153.
249 Statement of Barry Dunphy, 9 August 2013, page 9 para 52.
250 Transcript, QAO Interview, William Ludwig, 1 May 2012, page 8.
251 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 204.
252 Email from Shara Reid to Malcolm Tuttle, 4 August 2011, 2.16pm.
253 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 211.
254 Transcript, Robert Bentley, 24 September 2013, page 93 lines 23-30.

Mr Brennan, to ensure continuity in the actions being taken by Ms Reid in relation to race field information and bookmakers issues, and ensured that we could portray stability in the all-important integrity structure headed by Mr Orchard.[255]

He understood that Clayton Utz had advised that an election could be as early as three weeks away, but in his own estimation, he believed the election would be at the end of June, in nine months.[256] Mr Hanmer said that the board was expecting a change of government and thought the staff would leave in that circumstance.[257]

- Mr Lette said he took the advices from Norton Rose and Clayton Utz into consideration when making his decision at the board meeting.[258]

  He thought that the cap on the termination payment was twelve months rather than fourteen months as in the resolution and employment agreements. He said he insisted at the meeting that the cap be twelve months, but acknowledged this was not reflected in the board minutes which he could have sought to have amended.[259]

  He said that RQL needed to retain the Executives (particularly Mr Tuttle and Mr Brennan), as their knowledge was irreplaceable in the short term.[260]

  Mr Lette recalled discussion at the meeting about longer contract terms and a retention bonus, but this was not supported by the RNC because the Executives would not support changes of that kind.[261] He said in his oral evidence that he balanced the cost of paying an agency to find new executives and the actual payout figure should they resign. He saw the amendments as defensible as RQL needed to keep the knowledge and expertise of the Executives within the company.[262]
- Mr Milner considered that the valuable work already done by the Executives, and still to be completed, as well as the difficult environment of media abuse justified their greatly improved terms even if it meant giving them a "golden handshake."[263]
- Mr Ryan accepted the recommendations made to the board by Mr Bentley and Mr Ludwig. In his experience as a committee member of the Brisbane Turf Club board he regarded the Executives as underpaid. He regarded the trigger of change of government as appropriate.[264]

7.3.141 The board approved the proposed amendments and the Executives' amended contracts were executed that day.

D&O Insurance Policies

7.3.142 On the same day, 5 August 2011, the D&O policies for RQL and the new Deeds of Indemnity for the directors were signed. When pressed about the timing of this in his examination at the Commission's public hearings Mr Bentley said:

Well, it was a fairly substantial decision that we'd made, and we wanted to make sure that – I mean going forward, that if there was any trouble or it was going to be queried, that we would be covered.[265]

255 Statement of Anthony Hanmer, 18 October 2013, page 10 para 17.
256 Transcript, Anthony Hanmer, 26 September 2013, page 114.
257 Transcript, Anthony Hanmer, 26 September 2013, page 115 lines 35-38, page 114 line 47, page 116 line 16.
258 Transcript, Robert Lette, 15 October 2013, page 16 lines 20-27.
259 Transcript, Robert Lette, 15 October 2013, page 12 lines 40-43, page 15 lines 22-24, page 18 lines 17-22, page 18 line 17 – page 19 line 11.
260 Transcript, Robert Lette, 15 October 2013, page 19 lines 32-36.
261 Transcript, Robert Lette, 15 October 2013, page 29 lines 1-6.
262 Transcript, Robert Lette, 15 October 2013, page 28 lines 9-18.
263 Statement of Wayne Milner, 26 July 2013, pages 13-14 para 36.
264 Statement of Bradley Ryan, 25 July 2013, page 8 paras 52-56.
265 Transcript, Robert Bentley, 19 September 2013, page 16 lines 15-20.

7.3.143 In submissions it is said that Mr Bentley

> *...accepted that the new employment contracts were likely to be contentious, and said that is why RQL wanted to make sure that they did it right because he suspected there would be an investigation if there was a change of government.*[266]

7.3.144 By these admissions Mr Bentley and the board were mindful that the Executives' amended contracts presented some risk to them in discharging their duties as directors.

7.4 The resignations and payouts

The lead up to the election

7.4.1 Public and media scrutiny of RQL and its senior staff continued to the end of 2011 and into 2012. For example, Mr Orchard prepared an Integrity Report for a board meeting on 4 November 2011 that discussed the integrity issues arising from offensive comments in social media. Anonymous forum posts, commentary from the parliamentary opposition, dedicated horse-racing blogs, inaccuracies in newspaper articles and possible action to restrict or mitigate some of this behaviour was discussed in his report.[267]

7.4.2 On 25 January 2012, Premier Bligh announced that the next State election would be held on 24 March 2012.

7.4.3 It is evident that the issue of the election keenly engaged the interest of the Executives. They were anxious to know the earliest possible time that they could resign.[268] As early as 30 January 2012, Ms Reid contacted Norton Rose and asked

> *...whether the phrase "change in the State Government" could be interpreted to mean a change that occurs once the election has been declared (ie, if the election is held on Saturday night - could the executives resign on Sunday).*[269]

7.4.4 Ms Reid instructed Norton Rose to amend the resignation and waiver letters previously prepared so the Executives' notice of resignation would be effective on the swearing in of a new government. [270] Very shortly after the date of the election was announced, the Executives were ensuring they had everything ready to facilitate their resignations.

7.4.5 There was a flurry of communications between Ms Reid and Norton Rose the day prior to the election. Ms Reid wanted clarification of when the Executives' resignation letters could be signed, in particular, whether it could be before the swearing in of a new government and when Mr Bentley could sign the waiver letters.[271]

7.4.6 Ms Reid's own view was that a *Change of State government* would occur on the Saturday. However, Norton Rose's advice was that resigning before the swearing in of the new government "would be in the grey area about whether it was a valid exercise of their rights".[272]

7.4.7 Mr Brennan and Mr Tuttle were also in contact with Norton Rose the day prior to the election. Their focus was clearly on resigning at the earliest possible time.

266 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5, page 5-38 para 160.
267 RQL, Board Paper 2.5, Integrity Services, 4 November 2011; RQL, Board Meeting Minutes, 4 November 2011.
268 See for example: Transcript, ASIC Interview, Shara Reid, 15 November 2012, pages 81-82.
269 File Note, Norton Rose, 30 January 2012, 10.40am.
270 File Note, Norton Rose, 20 February 2012, 9.02am.
271 File Note, Norton Rose, 23 March 2012, 11.41am; File Note, Norton Rose, 23 March 2012, 11.49am.
272 File Note, Norton Rose, 23 March 2012, 11.49am.

7.4.8 Mr Brennan wanted to confirm whether their resignations would be effective on the swearing in of the new government and "would the risk pass when the new government were actually sworn in". The possibility of Mr Bentley signing a "conditional waiver" was also brought up as "Bob [Mr Bentley] was wondering if he could sign it conditional on the resignation taking effect".[273]

7.4.9 In a separate conversation later that afternoon, Mr Tuttle asked if they could tender their resignation on Monday and confirm that position with another letter once the swearing in of a new government occurred.[274]

The resignations and the waivers: 26 March 2012

7.4.10 Mr Bentley said in his ASIC interview that he asked Mr Tuttle his intentions on Friday, 23 March 2012. Mr Bentley did not want any "lingering" and required a decision on Monday morning.[275] Mr Tuttle said that the Executives would discuss their decision over the weekend and would inform Mr Bentley of it on Monday.[276] Mr Bentley also spoke with the other Executives that day and directors over the weekend about the impending resignations.[277]

7.4.11 The LNP won the election on 24 March 2012. A three-person executive was sworn in at 1.00pm the following Monday, 26 March 2012 – Mr Campbell Newman as Premier, Mr Jeff Seeney as Deputy Premier (and Minister for Racing) and Mr Tim Nicholls.[278]

7.4.12 The Executives each signed a resignation letter that day. The precise timing of their resignations is unclear, but it occurred before a 9.00am meeting on 26 March 2012 which they all attended.

7.4.13 At 7.23am on 26 March 2012, Ms Reid contacted Norton Rose to ask if the new government was to be sworn in that day as Mr Bentley was flying out of Brisbane at 10.00am and wanted the letters signed before he left.[279] Ms Reid was informed by Norton Rose later that morning that it appeared that the new government would be sworn in at 3.00pm.[280]

7.4.14 Mr Carter recalled in his statement to the Commission that he was called into the board room by Ms Reid around 9.00am. The Executives, Mr Bentley and Mr Hanmer were present. Mr Carter learned for the first time that the Executives were resigning and finishing at RQL by the end of the day. He was told that he needed to calculate and make their termination payments by then.[281]

7.4.15 Ms Reid said she gave her resignation letter with the waiver to Mr Bentley to sign, but told him she was happy to work another few weeks. Ms Reid also commented that when Mr Carter was brought into the meeting the issue of workloads and business continuity was discussed.[282]

7.4.16 Ms Reid said Mr Bentley discussed the resignations with Mr Hanmer before signing the waiver letters.[283] Mr Bentley signed letters accepting the Executives' resignations and waived their required notice period.

7.4.17 It is not immediately clear that the Executives resigned in accordance with Norton Rose's advice. Whilst Ms Reid described the 9am meeting as "an off the record chat"[284] at the very least the Executives repudiated their contracts when they expressed their intention to resign. They were very anxious to resign and leave RQL that day with their payments safely made.

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273 File Note, Norton Rose, 23 March 2012, 12.10pm.
274 File Note, Norton Rose, 23 March 2012, 2.55pm.
275 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 221-222.
276 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 208.
277 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 221-222.
278 Extraordinary Queensland Government Gazette, 26 March 2012; Jabour B 2012, 'Premier Campbell Newman sworn in', *Brisbane Times*, 26 March.
279 File Note, Norton Rose, 26 March 2012, 7.23am.
280 File Note, Norton Rose, 26 March 2012, 10.19am.
281 Statement of Adam Carter, 2 August 2013, pages 45-46 paras 164-176.
282 Transcript, ASIC Interview, Shara Reid, 15 November 2012, pages 72-75.
283 Transcript, ASIC Interview, Shara Reid, 15 November 2012, page 72-74.
284 File Note, Norton Rose, 26 March 2012, 10.19am.

7.4.18 On 26 March 2012, Mr Bentley sent a letter to Mr Kelly of the Office of Racing attaching a Transition Plan.[285] The Transition Plan was based on Clayton Utz's Restructuring Paper and was clearly prepared in advance of the election. The Transition Plan indicates that Mr Bentley understood that there would not be an abrupt closing down of RQL.

Board discussion and the audit by BDO

7.4.19 Mr Carter recalled that Mr Bentley told him that the payments had to be made. His contemporaneous note records that Mr Bentley said "Don't stop the payments".[286]

7.4.20 Mr Carter regarded the payments as "highly irregular" and wanted legal and tax advice about the entitlements.[287] He sought advice from Norton Rose as to whether the termination payments were appropriate as well as how the payments should be treated for tax purposes. Norton Rose advised it could not comment on the appropriateness of the payments as it presented a conflict for them[288] and that RQL should seek independent legal advice about whether to make the payments.[289]

7.4.21 Mr Carter recalled that Mr Ryan, the chairman of the Audit Committee, reviewed the termination payment calculations on the morning on 27 March 2012.[290] The directors subsequently exchanged emails in relation to the quantum of the proposed payments.[291] RQL's auditors, BDO Kendalls (BDO) were engaged at Mr Lette's suggestion.[292]

7.4.22 BDO agreed, apart from a few minor discrepancies, with RQL's calculation methodologies regarding tax withheld on the termination payments.

7.4.23 A board meeting was held at midday on 28 March 2012. Mr Bentley tabled a letter from BDO that confirmed the payments were in accordance with the Executives' agreements and "in order from an audit prospective [sic]". The board then instructed Mr Carter to make the payment to each of the Executives.

7.4.24 Mr Carter prepared a memorandum for Mr Bentley's approval. He outlined the amounts to be paid to each Executive in a spreadsheet. The total cost to RQL was $1,858,421. Mr Bentley signed the memorandum that day and in doing so confirmed his acceptance of the contents and authorised the payment to each Executive.

7.4.25 The payments were made at approximately 2.30pm on 28 March 2012[293] and processed by RQL's bank at 4.31pm.[294]

7.4.26 At approximately 5:33pm, Mr Carter received an email from Mr Kelly of the Office of Racing attaching correspondence from Mr Seeney[295] in which Mr Seeney:

- provided a direction pursuant to section 45 of the Racing Act to review RQL's employment policies, relevantly, to require government approval to make redundancy payments to any staff
- asked that RQL not take any steps contrary to that direction

285 Letter from Robert Bentley to Michael Kelly, 26 March 2012.
286 Statement of Adam Carter, 2 August 2013, Attachments.
287 Statement of Adam Carter, 2 August 2013, page 46 para 173.
288 File Note, Norton Rose, 26 March 2013, 3.25pm.
289 Statement of Adam Carter, 2 August 2013, page 47 paras 179-180.
290 Statement of Adam Carter, 2 August 2013, page 47 para 183.
291 Email from Bradley Ryan to Robert Bentley, Anthony Hanmer, Wayne Milner, Robert Lette, William Ludwig cc: Adam Carter, 27 March 2012, 10.29am; Email from Robert Lette to Bradley Ryan cc: Robert Bentley, Anthony Hanmer, Wayne Milner, Robert Lette, William Ludwig, Adam Carter, 27 March 2012, 12.24pm; Email Adam Carter to Robert Lette, Bradley Ryan, Robert Bentley, Anthony Hanmer, Wayne Milner, Robert Lette, William Ludwig cc: Robert Bentley, 27 March 2012, 5.51pm; Email from Robert Lette to Adam Carter, Bradley Ryan, Robert Bentley, Anthony Hanmer, Wayne Milner, Robert Lette, William Ludwig cc: Robert Bentley, 27 March 2012, 5.11pm.
292 Email from Robert Lette to Bradley Ryan cc: Robert Bentley, Anthony Hanmer, Wayne Milner, Robert Lette, William Ludwig, Adam Carter, 27 March 2012, 12.24pm.
293 Statement of Sharon Drew, 19 August 2013, page 10 para 52.
294 Statement of Adam Carter, 2 August 2013, page 50 para 190(f).
295 Statement of of Adam Carter, 2 August 2013, page 50 para 192.

- invited RQL to apply for additional conditions on its control body approval under the Racing Act requiring government approval to make payments in excess of $20,000, or enter into any contracts in excess of $20,000.[296]

7.4.27 It was too late to prevent the payments to the Executives which had by then been transferred into their respective banking accounts.

7.4.28 By resigning on 26 March 2012, the Executives' received the highest possible payments achievable under their amended contracts. A schedule comparing other payment scenarios is at Schedule A.

7.5 QAO audit

7.5.1 On 27 March 2012 Mr Seeney wrote to the Auditor-General requesting the QAO urgently undertake an audit of RQL in relation to the Executives' resignations pursuant to section 60(1) of the Racing Act.[297]

7.5.2 Mr Seeney also wrote to RQL and its directors informing them of a forthcoming audit.[298] Mr Bentley confirmed with the directors at a board meeting on 28 March 2012 that they had all received this notification.[299]

7.5.3 The QAO audit commenced in early April. Documents and information were obtained from the offices of RQL and Norton Rose.

7.5.4 As part of the audit the directors of RQL and Ms Reid were interviewed by QAO officers. These interviews were held from late April to early May 2012, and were not given on oath. Transcripts of those examinations were produced to the Commission.

7.5.5 CGW, on behalf of the interviewees, provided written submissions to QAO on 3 May 2012.[300] On 5 June 2012 all interviewees were offered the opportunity to view the draft report at the QAO office at a pre-arranged time. They could comment on the report within seven days.[301] CGW provided detailed submissions on 15 June 2012 on behalf of the interviewees. [302]

7.5.6 On 10 July 2012, the final report of the Auditor-General, *Racing Queensland Limited: Audit by arrangement*, was tabled in the Parliament.

7.5.7 In view of the findings in the QAO Report, Premier Newman referred the matter to ASIC for investigation. The ASIC investigation has been suspended pending the Commission's Report.

The QAO findings

7.5.8 The QAO divided its key findings under two main headings - "Retention Strategy"[303] and "Roles, responsibilities and duties of board members and officers."[304] It is not necessary to restate those findings here.

7.5.9 The Commission has considered the issues in this Term of Reference independently of both the QAO and ASIC investigations. The Commission has had the considerable benefit of the work

296 Statement of Sharon Drew, 19 August 2013, pages 10-11 para 54; Letter from Jeffrey Seeney to Robert Bentley, 28 March 2012.
297 Letter from Jeffrey Seeney to Andrew Greaves, 27 March 2013.
298 Letter from Jeffrey Seeney to Robert Bentley, 27 March 2013.
299 RQL, Board Meeting Minutes, 28 March 2013.
300 Letter from David Grace (Cooper Grace Ward) to Michael Hyman (QAO), 3 May 2012.
301 See for example: Email from Elizabeth Duncan on behalf of Michael Hyman to David Grace cc: Michael Hyman, Denis Byram, Allison Pontaks, Elizabeth Duncan, 5 June 2012, 11.35am.
302 Letter from David Grace to Andrew Greaves (Auditor-General), 15 June 2012.
303 Queensland Audit Office 2012, *Racing Queensland Limited: audit by arrangement – report to parliament 1*: 2012-13, Queensland Government, Brisbane, page 8; page 13.
304 Queensland Audit Office 2012, *Racing Queensland Limited: audit by arrangement – report to parliament 1*: 2012-13, Queensland Government, Brisbane, pages 8-9.

undertaken by the QAO and ASIC in their investigations. It has had the further advantage of access to a great deal more documentary evidence and to sworn statements from all relevant witnesses. It has found the evidence of Ms Reid to the ASIC investigators, given under oath, to be of particular assistance since Ms Reid was not available to give oral evidence at the public hearings because of her health.

7.5.10 The Commission's findings and recommendations are set out below.

7.6 Responsibilities, duties and legal obligations of the directors

7.6.1 The directors of RQL were subject to responsibilities, duties and legal obligations arising from various sources. For present purposes the relevant sources are:

- statutory duties under the Corporations Act and *Public Sector Ethics Act 1994* (Qld)
- common law and equity
- the constitution of RQL
- policies of RQL found in the Charter of the RNC and the Code of Conduct.

Corporations Act

7.6.2 The directors of a company have duties and legal obligations defined in the the Corporations Act. The relevant provisions for consideration here are:

- section 180 – the duty to exercise care and diligence
- section 181 – the duty to act in good faith in the best interests of the company and for a proper purpose
- section 182 – the duty not to use an officer's position improperly to gain an unfair advantage or cause detriment to the company
- section 184 – which creates an offence if an officer recklessly or dishonestly fails to exercise their powers and discharge their duties in good faith or for a proper purpose.

7.6.3 The provisions placing restrictions on termination payments contained in Part 2D.2 of the Corporations Act are also relevant. Those provisions prohibit, in summary, retirement benefits for directors and certain executives that exceed their average annual base salary unless those benefits are approved by members or are otherwise exempt under the Corporations Act. The intention of these sections is to prohibit potential abuse by those who control a company and in particular the provision of *golden handshakes*.[305]

7.6.4 Section 200B of the Corporations Act provides that an entity must not give a benefit in connection with a person's retirement from a position of employment if the person holds a *managerial or executive office* in the company or a related body corporate. *Entity* is defined to include a company and its directors.[306]

7.6.5 The Executives will potentially be persons caught by these provisions as section 200D provides that *a person* who is, amongst other things, a *managerial or executive officer* must not receive a *benefit* that contravenes section 200B.

7.6.6 It is sufficient to note that these provisions may apply to the Executives, the directors of RQL and RQL itself. There is, however, some controversy about their application (discussed below).

305 *Fox v GIO Australia Ltd* (2002) 56 NSWLR 512 at [54].
306 *Corporations Act 2001* (Cth), sections 200B(1A) and 11(a).

Common law and equity

7.6.7 In addition to their statutory duties, directors have duties and legal obligations at common law and in equity. The statutory duties do not displace a director's common law duties and it is possible for a director's act or omission to give rise to a breach of statutory, common law and equitable duties.[307] The standards imposed by the statutory duty of care and diligence are generally the same as the standards imposed upon directors under the common law.[308]

Constitution

7.6.8 The constitution of a company operates as a statutory contract between the company, its directors, secretary and its members.[309] While the extent of an officer's duties to the company is determined by the Corporations Act and the common law, the constitution of the company may alter the scope of those duties by setting out the officer's responsibilities in given circumstances.

7.6.9 Relevantly, the constitution of RQL provided that:

- by clause 16.1 - the management of RQL was the responsibility of the board and the board may exercise all powers of RQL which were not, by the Corporations Act or the constitution, required to be exercised by RQL in a general meeting
- by clause 17.9 - the board may delegate any of its powers and/or functions to one or more committees consisting of such of the directors as the board thought fit
- by clause 17.10 - each committee was required to keep proper minutes of its meetings and the rules relating to proceedings of the board applied to proceedings of a committee
- by clause 17.12 - committees could make recommendations only to the board; no decision of a committee was binding on RQL unless ratified by the board.

7.6.10 The constitution of RQL did not alter the general duties of its directors. The provisions relating to committees are relevant to this Term of Reference as the RNC played an important role in making recommendations to the board of RQL about amendments to the Executives' contracts.

RNC Charter

7.6.11 The RNC was a delegate of the board with advisory powers only.[310] The primary objective of the RNC was to assist the board to fulfil its corporate governance and overseeing responsibilities in relation to, amongst other things, senior executive remuneration framework, recruitment and succession planning.[311]

7.6.12 The RNC Charter sets out the objectives, duties and responsibilities of the RNC and contemplated that the RNC would have an important role in the renegotiation of the Executives' contracts. The responsibilities of the RNC included:

> *3.1 The recruitment, remuneration, retention, successive [sic] planning, termination and training policies and procedures for executives ...*
>
> *3.2 The Company's overall remuneration strategy including executive remuneration, business and cultural alignment and external competitiveness...*
>
> *3.3 CEO and senior executive remuneration including:*
>
> - *obtaining expert external advice in establishing CEO and senior executive remuneration frameworks and levels;*

307 See for example: *Corporations Act 2001* (Cth), section 185.
308 *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [7187]–[7192].
309 *Corporations Act 2001* (Cth), section 140.
310 RQL, *Racing Queensland Limited constitution,* 14 July 2010, Clause 17.9.
311 RQL, *Remuneration & Nomination Committee Charter,* 1 July 2010, Clause 1.

- *annually assessing the market to ensure that the CEO and senior executives are being rewarded commensurate with their responsibilities appropriate to the company's circumstances;*
- *annually reviewing remuneration levels of the CEO and senior executives recommending the outcome of any salary framework reviews for the CEO and senior executives to the Board; and*
- *recommending the outcomes of the CEO's annual performance review to the Board.*[312]

7.6.13 Clause 3.2 provided for the annual review by the RNC of the company's remuneration strategy. It was anticipated that on amalgamation of the three codes a review of the remuneration of staff would be undertaken by the new board and the RNC.[313] However, no such review took place until mid 2011.

7.6.14 The RNC met twice a year, scheduled for July and September, when remuneration reviews were conducted, and otherwise on an ad hoc basis.[314] In addition to Mr Bentley and Mr Ludwig, Mr Tuttle and Mr Carter also attended committee meetings.[315]

7.6.15 The Charter of the QRL Human Resources and Remuneration Committee (HRRC) was reviewed by HR Business Solutions (HRBS) in 2009.[316] Relevantly, HRBS considered that:

- QRL's approach to remuneration was "largely unstructured, based on 'company practices' and the discretion of the managers and Chief Operations Manager"
- succession planning and talent management practices were "largely informal and undocumented, based on the discretion of the managers", which was a "significant risk to the organisation as there [we]re a number of critical roles with QRL that currently [did] not have an identified successor, and high potential employees [were] not being actively trained and developed within the organisation".[317]

7.6.16 Whilst the RNC Charter contained more detail than the HRRC version, the above issues were never remedied and RQL's practices remained similarly deficient.

Code of Conduct of RQL

7.6.17 RQL resolved to adopt the Code of Conduct tabled at its first meeting on 1 July 2010 and expressly resolved that it applied to all RQL officials including board members in the performance of their duties.

7.6.18 In the Code of Conduct, RQL official was defined:

> *...includes Board members of the Racing Queensland Board and all other persons employed or remunerated by Racing Queensland, whether full-time, part-time, permanent, fixed-term, contract or casual and includes members of any Racing Queensland sub-committee.* [318]

7.6.19 As explained in Chapter 5, the Public Sector Ethics Act did not apply to RQL. However, RQL's Code of Conduct adopted its provisions by providing that all officials of RQL were public officials within the meaning of the Public Sector Ethics Act and were required to comply with its provisions, including the ethical principles.[319] Those ethical principles are:

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312 RQL, *Remuneration and Nomination Committee Charter*, 1 July 2010, Clauses 3.1, 3.2 and 3.3.
313 Transcript, Robert Lette, 15 October 2013, page 14 lines 34-40; Statement of Wayne Milner, 26 July 2013, page 12 para 34; Statement of Robert Bentley, 26 July 2013, page 16 para 45(a); Transcript, William Ludwig, 27 September 2013, page 32 lines 35-40, page 33 lines 24-27, page 34 lines 45-46, page 35 lines 17-21, page 38 lines 45-46, page 39 lines 13-16.
314 Statement of Adam Carter, 2 August 2013, page 38 para 120.
315 Statement of Adam Carter, 2 August 2013, page 39 paras 121-122.
316 See paragraphs 4.3.195 to 4.3.224 of Chapter 4 of this Report.
317 HR Business Solutions, *HR Audit Report for Queensland Racing*, February 2009
318 RQL, *Code of Conduct*, 1 July 2010, Part 2: Definitions.
319 RQL, *Code of Conduct*, 1 July 2010 [Part 4]; *Public Sector Ethics Act 1994*, section 4(2).

- integrity and impartiality
- promoting the public good
- commitment to the system of government
- accountability and transparency.[320]

7.6.20 The Code of Conduct required all RQL officials to:

- act in accordance with relevant statutes, policies and employment contracts and to carry out their official duties lawfully [321]
- act with the highest standards of professionalism, honesty, diligence and integrity[322]
- exercise powers fairly and equitably[323]
- strive to obtain value for money and to ensure that resources are safeguarded and not wasted, abused or used improperly or extravagantly.[324]

7.6.21 Clause 3.2 applied to the board. It largely restated statutory and common law obligations of the directors by confirming that:

- the board was responsible for determining the strategic direction of RQL and ensuring compliance with statutory obligations
- a board member must act independently and has an obligation to be impartial
- a board member must take all reasonable steps to be satisfied as to the soundness of all decisions to be taken by the board
- a board member must ensure that the member is fully informed of the activities and affairs of RQL and racing generally, including statutory obligations.

7.6.22 Clause 3.2.1 describes the role of the chairman:

> *the Chair ... plays an important leadership role in ensuring Racing Queensland works effectively. Those responsibilities include ensuring:*
>
> - *The Board reviews the method by which the senior management team undertakes day to day management of Racing Queensland;*
> - *All relevant issues are included on the agenda for the Board's meetings and that Board members receive timely and relevant information on agenda items;*
> - *Members of the Board comply with their statutory obligations and with the provisions of the Code.*[325]

7.6.23 There are legal authorities which suggest that the chair owes duties additional to those of any other director.[326] Clause 3.2.1 seems to acknowledge that Mr Bentley, as chairman, had additional responsibilities toward other directors as well as responsibilities beyond those of other directors.

7.6.24 Mr Bentley's responsibilities (arising by way of statute, delegation or through RQL's course of dealings) will also be relevant to the assessment of whether he discharged his statutory duties.[327]

320 *Public Sector Ethics Act 1994*, section 4(2); RQL, *Code of Conduct*, 1 July 2010 [Part 4].
321 RQL, *Code of Conduct*, 1 July 2010, Clause 4.1.
322 RQL, *Code of Conduct*, 1 July 2010, Clauses 4.3 and 4.4.
323 RQL, *Code of Conduct*, 1 July 2010, Clause 4.2.
324 RQL, *Code of Conduct*, 1 July 2010, Clause 4.5.
325 RQL, *Code of Conduct*, 1 July 2010, Clause 3.2.1.
326 See for example *AWA Ltd v Daniels (trading as Deloitte Haskins & Sells)* (1992) 7 ACSR 759.
327 *Shafron v Australian Securities and Investments Commission(ASIC)* (2012) 286 ALR 612; *Australian Securities and Investments Commission (ASIC) v Rich* [2003] NSWSC 85.

7.7 Responsibilities, duties and legal obligations of the executives

7.7.1 As senior executives of RQL, the Executives were subject to responsibilities, duties and legal obligations arising from various sources. For present purposes the relevant sources were:

- statute, imposing duties similar to those of the directors, depending on their role
- common law and equity
- RQL's constitution
- policies of RQL including its Code of Conduct
- contractual obligations pursuant to their individual employment contracts and arising from the nature of their roles.

Corporations Act

7.7.2 The legal representatives for Ms Reid submitted to the Commission that she was not acting as an *officer*[328] of RQL "when seeking a re-negotiation of the terms of her employment".[329] That submission fails to consider the various capacities in which Ms Reid purported to act in the relevant events. Authorities confirm that it is not possible to divide the duties and responsibilities performed as company secretary and general counsel so as to avoid liability under the Corporations Act.[330] Ms Reid was the company secretary for RQL during the relevant period.[331] She was therefore an officer for the purposes of the Corporations Act.[332] The different capacities in which Ms Reid acted will be considered below.

7.7.3 The legal representatives for the Executives made the submission that the Executives too were not officers of RQL.[333] That submission does not withstand scrutiny. The definition of *officer*[334] includes persons who manage the company or its property who:

- make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the company
- have the capacity to affect significantly the company's financial standing
- in accordance with whose instructions or wishes the directors of the company are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the company).

7.7.4 The Executives were said to be key executives who played a vital role in relation to significant projects affecting the business of RQL. To be considered an officer of a company participation by an executive in decision making is sufficient even if others ultimately make the decisions.[335] The question of participation in decision-making is one of fact and degree.[336]

7.7.5 On the basis of the evidence before the Commission, Mr Tuttle, Mr Brennan, Mr Orchard and Ms Reid would be considered officers for the purposes of the Corporations Act, and-to the extent relevant to this Term of Reference- subject to the same statutory duties as the directors.

328 As defined in *Corporations Act 2001*, section 9.
329 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-6 para 31.
330 See for example *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 286 ALR 612.
331 *ASIC 2013, Organisational search on Racing Queensland Limited*, 14 June 2013.
332 *Corporations Act 2001*, section 9(a).
333 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5, page 5-6 para 31.
334 *Corporations Act 2001*, section 9(b).
335 *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 286 ALR 612; *Morley v Australian Securities and Investments Commission (ASIC)* [2010] NSWCA 331.
336 See, for example: *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 286 ALR 612.

Common law and equity

7.7.6 Senior executives owe common law duties to their employer. The scope of a specific executive's duties will depend upon that person's particular circumstances, having regard to factors such as position, responsibilities and contractual obligations.

7.7.7 The relevant terms of the Executives' employment contracts are set out below. In general, it is sufficient to say that the Executives' common law duties included:

- to act in good faith and in the interests of RQL
- to ensure that RQL's resources were not wasted, abused or used improperly or extravagantly
- to act with honesty and integrity
- to carry out duties impartially and regardless of personal preference
- to avoid situations where a reasonable person could conclude that their private interests interfered, or were likely to interfere, with a proper performance of their duties
- to resolve any conflict between personal interests and duties to RQL in favour of RQL.

7.7.8 To some extent, discussed below, there is modification of some of these obligations when negotiating employment agreements.

Code of Conduct of RQL

7.7.9 Similarly to the directors, the Executives were obliged to comply with the Code of Conduct as officers or employees of RQL. They also had express obligations in their contracts requiring such compliance.[337]

7.7.10 In addition to the general principles outlined at paragraphs 7.6.19 and 7.6.20, clause 4.3.1 of the Code of Conduct provided that RQL officials were obliged to avoid conflicts of interest and, where one arose, resolve the conflict in favour of RQL.

7.7.11 Clause 3.3 also provided clarification of the role of CEO (Mr Tuttle) and director of integrity operations (Mr Orchard). Relevantly:

- they were obliged to ensure all RQL officials within their organisational area complied with the Code
- they had a duty under the *Crime and Misconduct Act 2002* (Qld) to report to the CMC any allegation of *official misconduct*
- they were required to comply with all statutory obligations imposed on them in their capacities as executive managers.

7.7.12 The obligations imposed on the Executives by the Code of Conduct will be relevant in assessing not just their compliance with the Code, but also the discharge of their statutory and common law duties.

Employment contracts

7.7.13 All of the Executives' employment contracts imposed obligations to:

- act in good faith and consistently with their appointment as a senior executive of RQL[338]
- comply with all policies, procedures, operational manuals of RQL[339] and any legislation relating to their duties[340]

337 See for example: RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 10.4.
338 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 9.1.
339 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 8.1(f).
340 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 8.1(k).

- perform their duties to the best of their ability and consistently with their position[341]
- not do anything to the detriment of RQL's interests or reputation[342]
- not disclose confidential information[343] to any person[344].

7.7.14 The terms of each of the Executives' contracts are largely identical, but subtle variations arise from the nature of their role and responsibilities. The responsibilities of each of the Executives are set out under the heading "The Executives: their roles and histories" above.

7.7.15 Ms Reid was engaged as "Senior Corporate Counsel/Company Secretary". Her position and responsibilities will be relevant to the scope of her statutory and common law duties.

7.7.16 Ms Reid's position as senior corporate counsel and a solicitor admitted to practice in Queensland gives rise to additional professional duties. Those duties can be found in:

- the common law and equity relating to solicitors generally
- statute, most relevantly the *Legal Profession Act 2007* (Qld)
- professional rules, comprising the *Legal Profession (Solicitors) Rule 2007* (Solicitors Rules) during the relevant period and subsequently the *Australian Solicitors Conduct Rules 2012* (ASCR).[345]

7.7.17 That a solicitor may be employed in an in-house legal role does not diminish that solicitor's professional responsibilities.[346] Employed solicitors face numerous challenges in discharging their ethical duties, particularly the loss of independence and professional detachment, and pressures to act in an unethical manner to advance the organisation's perceived interests.

7.7.18 Clause 2.7 of Ms Reid's contract required her to give legal advice to RQL. RQL acknowledged that in doing so she was independent of RQL and "must give that advice whether it be favourable to RQL or otherwise".[347] In simple terms, clause 2.7 confirmed that Ms Reid was expected to remain independent and advise RQL appropriately without fear of consequences.

7.7.19 A solicitor's paramount duty is to the court and to the administration of justice.[348] That duty prevails over all other duties. Relevantly, the Solicitors Rules provided that a solicitor's other ethical duties are to:

- act honestly and fairly, and with competence and diligence, in the service of a client; not disclose any information which is confidential to a client and acquired by the solicitor during the client's retainer; ensure that, in any dealings with a client, no interest of the solicitor or an associate of the solicitor conflicts with the client's interest; decline instructions to act or continue to act for a person in any matter when the solicitor is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the solicitor's own interest; not engage in conduct, whether in the course of practice or otherwise, which is dishonest or likely to be prejudicial to the administration of justice
- for an in-house solicitor, not, despite any contrary direction from the solicitor's employer, act as a solicitor in the performance of any legal service in breach of any of the provisions of the Legal Profession Act or Solicitors Rules.

341 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 8.1(a).
342 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 8.1(j).
343 Defined in: RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 22.2.
344 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 11.1.
345 The ASCR came into force on 1 June 2012 and accordingly the Solicitors Rules were in force during the relevant period.
346 G E Dal Pont, *Lawyers' Professional Responsibility*, 5th ed, Lawbook Co, Sydney, p 427; Rule 5, Legal Profession (Solicitors) Rule 2007.
347 RQL, *Offer of Employment, Made by Racing Queensland Limited to Shara Reid*, signed 5 August 2011, Clause 2.7.
348 *Giannarelli & Shulkes v Wraith* (1988) 165 CLR 543: Confirmed in Rule 3, ASCR.

7.7.20 To the extent that Ms Reid was acting as solicitor to RQL, her duties relevantly required her to act independently, avoid conflicts and exercise reasonable skill, care and diligence in representing and advising RQL.

7.7.21 Ms Reid also had duties arising from her position as company secretary of RQL. A company secretary will owe obligations of confidentiality and good faith to the company and will be responsible for exercising that position with the degree of care, skill and diligence that a reasonable person occupying that position would use. The company secretary is generally considered to be the company's chief administrative officer[349] or a senior executive officer.[350]

7.7.22 There are a number of common law and statutory responsibilities imposed on company secretaries. Relevantly, they include:

- to be familiar with the provisions of the Corporations Act and the company's constitution
- to ensure that the company complies with its statutory duties
- to ensure that the company's documentation, registers and records are properly maintained
- to prepare for directors' meetings, ensuring that the appropriate notice is given, an agenda is distributed and minutes are kept[351]
- commentators also suggest that the company secretary is the person responsible for giving practical effect to the board's decisions.[352]

7.7.23 Whether any additional duties would be imposed at law will depend upon the role actually performed by Ms Reid, rather than merely the title of company secretary.

7.8 Did the directors act consistently with their responsibilities, duties and legal obligations?

Mr Bentley

7.8.1 From the narrative of the events surrounding the amendments to the Executives' employment contracts, plainly Mr Bentley was significantly involved. He:

- made the recommendations to the board of RQL, reflected in his board papers of 20 July and 5 August 2011, for amendments to the Executives' employment terms which may not have been in the best interests of RQL
- failed to disclose to the board, or any member of the board, the existence or contents of the First CU Advice and the Draft NR Advice (if he saw it), which:
  - related to the best interests of RQL concerning amendments to the employment terms
  - may have caused the board of RQL to question whether the amendments sought by the Executives, and the amendments ultimately made, were in the best interests of RQL
- at the RQL board meeting on 5 August 2011, voted in favour of the resolutions approving the amendments to the Executives' employment contracts in accordance with his recommendations
- on 26 March 2012, upon accepting the resignations of the Executives, waived the notice requirements of the amended employment terms
- on 28 March 2012, at the RQL board meeting on that day, voted in favour of the resolution instructing Mr Carter to make payments to the Executives in accordance with the amended employment terms

349 *Club Flotilla (Pacific Palms) Ltd v Isherwood* (1987) 12 ACLR 387.
350 *Minlabs Pty Ltd v Assaycorp Pty Ltd* [2001] WASC 88 at [55].
351 As secretary of RQL, Shara Reid also had an obligation to cause minutes to be made of all meetings of RQL, the board and committees of the board under: RQL, *Racing Queensland Limited constitution*, 14 July 2010, Clause 21.2.
352 LexisNexis, *Australian Corporation Practice*, [13.030].

- subsequently on 28 March 2012, in response to a memorandum from Mr Carter, authorised the making of those payments.

Board papers

7.8.2 There is inconsistent evidence as to the origin of the board papers. However, in his examination at the Commission's public hearings, Mr Bentley acknowledged that he was responsible for his board papers.[353] In authorising the board papers and making recommendations Mr Bentley was subject to various duties as a director of RQL.

7.8.3 Mr Bentley's positions as the chairman of RQL and chairman of the RNC suggest that he may be subject to a higher standard than other directors. At the least Mr Bentley had the additional responsibilities set out in the Code of Conduct and the Charter of the RNC.

7.8.4 Mr Bentley and other members of the board assert that the amendments to the Executives' contracts were in the interests of RQL because it was necessary to ensure that the Executives would stay on to complete their projects, particularly to assist in securing IIP funding, when there was a real risk that some or all would depart sooner rather than later. However, it was not in the interests of RQL to do so at any cost or on any terms. As such, some stringent analysis of the costs and benefits was required of the board.

7.8.5 In his examination at the Commission's public hearings Mr Bentley said that acting in the best interests of RQL meant acting in the best interests of stakeholders and the racing industry.[354]

7.8.6 A director may breach his duty of good faith if, objectively, what the director did was improper, even if the director subjectively believed that he was acting in the best interests of the company. Other cases have held that a breach involves consciousness that what is being done is not in the best interests of the company and deliberate conduct in disregard of that knowledge. Legal issues appear unresolved in regard to these matters.[355]

7.8.7 Mr Bentley's board paper dated 5 August 2011 relied significantly on the Executives' roles to justify the proposed changes. It set out a long list of activities to be undertaken by the Executives over the following six months. While it included duties particular to each, the main justification was to retain them to work on the IIP.

7.8.8 In his examination before the Commission, Mr Bentley said that RQL needed the Executives to remain to finish work on the IIP.[356] Submissions made on his behalf refer to the work that was required to be carried out on the businesses cases and IIP.[357] It was submitted that the critical period, during which RQL needed to retain the Executives, was while the IIP was implemented and the business cases developed.[358]

7.8.9 The documents produced to the Commission do not suggest that all of the Executives were integral to the IIP; rather they suggest to the contrary and that this was well known at 5 August 2011. The minutes of the inaugural meeting of the Industry Infrastructure Plan Control Group (IIPCG) on 21 July 2011 attended by the Executives (except Mr Orchard), Mr Carter and Mr Snowdon supports this conclusion. They record that:

> *The purpose of the meeting was to develop an agenda for the group in terms of overarching management of delivery of the Industry Infrastructure Plan (Plan).*

353 Transcript, Robert Bentley, 24 September 2013, page 71 lines 15-42.
354 Transcript, Robert Bentley, 24 September 2013, page 25 lines 15-21.
355 *ACN 101 074 015 Pty Ltd v Oaks Hotels & Resorts Ltd* [2012] VSC 502 at [16].
356 Transcript, Robert Bentley, 24 September 2013, page 20 lines 9-25.
357 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-34 para 146-147, page 5-23 para 98.
358 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-10 paras 49-50.

1. *Shara Murray undertook to prepare a draft charter for the group to be circulated for comment.*
2. *Mark Snowden [sic] undertook to prepare a schedule for the delivery of the Plan, including timelines and cash flows.*
3. *Mark Snowden [sic] undertook to provide a list of the questions that ought to be put to Government for the sake of clarity in relation to the management of the relationship between Racing Queensland Limited, the Office of Racing and other relevant areas of Government, including Treasury.*
4. *Paul Brennan undertook to identify the preferred business models for each of the race clubs that are either recipients of or involved with benefits that flow from the Plan.*
5. *Adam Carter undertook to map out the required approval by RQL and Government.*

7.8.10 It was Mr Snowdon who reported progress to the board on the IIP projects and business cases.[359] Furthermore, in the minutes of the board meeting of 2 September 2011, under the heading "Industry Infrastructure Report", the following appears:

> *The Board considered a report regarding additional staffing requirements to deliver the Industry Infrastructure Plan. The matter was considered by the Remuneration and Nomination Committee on August 31, 2011 and this Committee recommended the appointment of four additional staff specifically dedicated to the delivery of the Plan.*[360]

7.8.11 Mr Snowdon commenced as a consultant in February 2010, and was employed by RQL as project director of the IIP in July 2011. As the board minutes reveal, additional staff were required to assist Mr Snowdon to complete work on the implementation of the IIP.

7.8.12 Further:

- The vast majority of the work on the business cases was undertaken by Mr Snowdon and not the Executives; the business cases are discussed in Chapter 9.
- Mr Tuttle and Mr Brennan were involved but to a lesser extent than Mr Snowdon: the documentary evidence, particularly the minutes and papers of the IIPCG and the emails exchanged with government officials over the development of the business cases suggest that Mr Snowdon and Mr Carter were the key figures in bringing the IIP to fruition.
- Ms Reid says that she reviewed the Industry Infrastructure Funding Agreements "in conjunction" with Mr Snowdon, but that she did not suggest any changes[361]; on the documents produced to the Commission Ms Reid's involvement in such a review appears to have been cursory at best.
- Mr Orchard does not appear to have been involved in any way whatsoever.

7.8.13 It is suggested that the renegotiation with TattsBet and dealings with corporate bookmakers justified retaining the Executives.[362] The documents produced to the Commission do not suggest that all of the Executives were integral to this activity either. In particular:

- the circumstances surrounding the issues with TattsBet are set out in Chapter 8; while Mr Tuttle had some involvement, all parties were adamant that dealing with TattsBet was a Product Co issue
- Ms Reid acknowledged in her statement to the Commission that she had nothing to do with providing advice regarding renegotiations with TattsBet[363]

359 See for example: RQL, Board Meeting Minutes, 2 September 2011.
360 See for example: RQL, Board Meeting Minutes, 2 September 2011.
361 Statement of Shara Reid, 26 July 2013, pages 12-13 paras 62-63.
362 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-41 paras 171-172.
363 Statement of Shara Reid, 26 July 2013, page 12 para 61.

- Ms Reid said in her statement to the Commission that the task of recovering Queensland race information fees from various bookmakers was initially undertaken by Mr Peter Smith, but it became her responsibility[364]; that task was undertaken with significant assistance from the Office of Racing; Ms Perrett said that the Office of Racing initiated 29 prosecutions,[365] and CGW also assisted RQL generally with the recovery of fees
- of this activity, Mr Smith says in his statement to the Commission:

  > *Most of the work would end up requiring us to deal with very minor players, whereas most of the money that would come from race information fees would come from the big, wagering operators such as corporate bookmakers.*[366]

- in circumstances where the task was allocated to Mr Smith, whose experience is in licensing and training, it is difficult to see why Ms Reid's ongoing employment was essential for RQL; the task of dealing with corporate bookmakers was ongoing, but RQL did not replace Ms Reid after her resignation
- Mr Brennan and Mr Orchard had no role in relation to race information fees.

7.8.14 In assessing whether an officer has discharged his or her duties, legal authorities suggest that the question is not whether they made mistakes or held different opinions from those of the court but whether they failed to meet the standard of care and diligence, having regard to the circumstances, at the relevant time.[367] Accordingly, both the recommendations contained in Mr Bentley's board paper and the steps that he took to reach those recommendations are relevant.

7.8.15 The first recommendation made in the board paper dated 5 August 2011 was that the Executives receive a 30 per cent increase to their TRV effective from 1 July 2011.

7.8.16 The QAO found that there was no documented evidence available to substantiate that Mr Bentley or the board undertook any benchmarking of the amended employment conditions with external consultants, despite this issue being raised in advice to the board and it being an obligation of the RNC.[368] The Commission, similarly, has found no documentary evidence to confirm that benchmarking took place. No external consultant was engaged by RQL to assess the Executives' remuneration in 2011. Of itself, this is inconsistent with Mr Bentley's obligations under the Charter of the RNC and his obligation to act with transparency pursuant to the Code of Conduct.

7.8.17 Mr Bentley said that he contacted the CEO of the Australian Racing Board and his recollection was that even with the 30 per cent increase the Executives were paid less than their interstate counterparts. He maintained that confidentiality issues would likely mean that any official inquiries would be met with no response.[369]

7.8.18 Other directors also contended that the racing industry was unique and thus not able to be benchmarked.[370] Yet, there were no difficulties in benchmarking the directors' remuneration prior to amalgamation by an outside consultant.

7.8.19 In or about April 2013, RQL engaged Mercer Consulting (Australia) Pty Ltd (Mercer) to provide remuneration advice for the position of CEO of RQL.[371] In her second statement to the Commission, Ms Raphaele Nicaud of Mercer sets out the steps taken by Mercer to assess the appropriate remuneration for the CEO. She stated that had Mercer been engaged to benchmark

364 Statement of Shara Reid, 26 July 2013, page 12 para 60.
365 Statement of Carol Perrett, 30 October 2013, page 6 para 12.
366 Statement of Peter Smith, 16 August 2013, page 8 para 28.
367 *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229.
368 Queensland Audit Office 2012, *Racing Queensland Limited: audit by arrangement – report to parliament* 1: 2012-13, Queensland Government, Brisbane, page 9.
369 Statement of Robert Bentley, 26 July 2013, pages 17-18 para 45(g).
370 Transcript, QAO Interview, Wayne Milner, 2 May 2012, page 8; Transcript, QAO Interview, Bradley Ryan, 2 May 2012, page 10; Transcript, QAO Interview, Anthony Hanmer, 2 May 2012, page 7.
371 Statement of Raphaele Nicaud, 8 August 2013, page 3 para 24.

the remuneration for the Executives in mid-2011 Mercer would have undertaken similar steps.[372] It is sufficient to say that Mercer anticipated no difficulty in obtaining comparable salaries to undertake this task.

7.8.20 It was said by the directors and submitted for the RBG Parties that the Executives were underpaid. There is no evidence to suggest the increase in their TRV was not justified[373] but there is no evidence, either, apart from some vague assertions by some directors drawn from their board experience, that it was appropriate. This submission fails to take into account Mr Bentley's duties to exercise care and diligence and to act in a manner that was transparent and in the best interests of RQL, which included undertaking a proper process.

7.8.21 The submission for the RBG Parties also presumes that an end result can justify a defective process. Whilst it is unnecessary to decide here, there are cases to suggest that in some circumstances, a breach of a director's duty of care and diligence can occur notwithstanding that the company suffered no damage.[374]

7.8.22 Mr Bentley's board paper of 5 August 2011 recommended that the Executives receive a 30 per cent uplift to their TRV and:

> *A payment of a sum equivalent to the TRV the Executive would have been entitled to receive had they remained employed until the end of the term of their contract, however not exceeding a sum equivalent to 14 months of their TRV.*[375]

7.8.23 In addition, Mr Bentley recommended that the Executives receive "A severance payment calculated in accordance with the relevant scale contained in any redundancy policy of RQL" and any accrued but unpaid entitlements. Mr Bentley also recommended "retention of the current 3 year term with an obligation on RQL to renegotiate before 31 December 2012".

7.8.24 In the Final CU Advice, Clayton Utz cautioned the board to consider the flow on effects of the increase in the TRV and suggested a cap of 12 to 14 months.[376] The QAO found that:

- *In the absence of the new clauses and based on previous levels of remuneration, if the executives had resigned of their own volition they would have been entitled to $0.308 million. Had RQL dismissed them without cause, however, they would have been entitled to $1.276 million.*
- *The increase in Total Remuneration Value (TRV) of 30 per cent also meant that the termination payments were paid at a higher rate than would have been the case under their previous contracts. This increase cost RQL $0.429 million.* [377]

7.8.25 When taken with the increase in TRV, the payout of the extended term and additional severance payment represented a significant potential payment to the Executives. It also represented a significant financial liability for RQL. The circumstances in which RQL was exposed to that liability were then extended by the second recommendation made by Mr Bentley to the board for the inclusion of the new material adverse change clause.

7.8.26 The QAO found that the material adverse change clause allowed the Executives to exit at the earliest opportunity with significantly increased financial benefits they would not otherwise have received. It should be uncontroversial that the Executives received benefits far exceeding what they would have received had they chosen to resign without the benefit of the renegotiated contracts. The question is whether those additional costs were in the best interests of RQL.

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372 Statement of Raphaele Nicaud, 22 August 2013, page 1 paras 4-5.
373 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-42 para 178.
374 See for example *Vrisakis v Australian Securities Commission* (1993) 11 ACSR 162 at 212.
375 RQL, *Board Paper: Senior Executives*, 5 August 2011.
376 Letter from Barry Dunphy to Robert Bentley, 1 August 2011.
377 Queensland Audit Officer 2012, *Racing Queensland Limited: Audit by arrangement - report to parliament* 1:2012-13, Queensland Government, Brisbane, page 8.

7.8.27 The potential cost to RQL at the time Mr Bentley made his recommendations to the board was in fact far higher. As warned in the Final CU Advice, it was possible that the State election could have been called as early as September 2011.[378] In his examination before the Commission, Mr Bentley acknowledged this but said that the board thought that it would be far later[379] and that they had to make a commercial decision then.[380]

7.8.28 The QAO found that using the result of the State election as a material adverse event, without also tying it to some other unfavourable condition, was inconsistent both with the commercial intent of similar clauses used in takeovers of private companies, and with reality. In contrast, Mr Hanmer and Mr Lette asserted that similar clauses were commonplace in commercial practice.[381]

7.8.29 Clayton Utz's advice was that the mere change of State government alone should not be a trigger.[382] On the other hand, Norton Rose advised that the clause was "defensible" because "there is a commercial need for RQL to retain the Executives in the context of the current industry environment".[383]

7.8.30 The board could choose to rely upon the legal advice from Norton Rose and to prefer it to the advice from Clayton Utz. But the directors also had an obligation to make an independent assessment of the advice, having regard to matters such as the complexity of the structure and operations of RQL.[384] In particular, they should have considered the risk (which eventuated) that all the Executives would seek to maximise their payments and leave immediately; and, if that occurred, the extent to which management, in conjunction with the RNC, had developed succession plans.

7.8.31 Mr Bentley requested the advice contained in the Restructuring Paper,[385] from which it was clear that a new State government could not act immediately to remove the board or the Executives. Even if they had been dismissed without cause by a new administration, the QAO calculated that the Executives would have been entitled to payments totalling $1.276 million. These possibilities do not seem to have been considered by Mr Bentley or the board.

7.8.32 The QAO found that the board minutes did not demonstrate that the alternative strategies identified by RQL's legal advisers were considered by the board. There were numerous alternative strategies suggested by both Clayton Utz and Norton Rose. In particular:

- The First CU Advice suggested the possibility of retention bonuses or short term incentive payments. This advice was never provided to the board, but even so, these were common business strategies.
- The Draft NR Advice suggested a retention bonus, performance bonus and an extended notice period of up to 12 months. Ms Reid and Mr Tuttle instructed Norton Rose to remove those options.
- The Final CU Advice referred to the possibility of retention payments

  > *...as we have previously advised, making these retention payments after certain timelines or milestones have been met by the employees would give rise in an overall sense to a lower risk profile from the Board's perspective.*[386]

  However, in the absence of the First CU Advice those comments would have been difficult to understand and the directors did not ask Mr Bentley to provide them with the other earlier advice.

378 Letter from Barry Dunphy to Robert Bentley, 1 August 2011.
379 Transcript, Robert Bentley, 24 September 2013, page 10 lines 40-44.
380 Transcript, Robert Bentley, 24 September 2013, pages 11 – 12.
381 Transcript, Robert Lette, 15 October 2013, page 20 lines 36-47; Transcript, QAO Interview, Anthony Hanmer, 2 May 2012, page 8.
382 Letter from Barry Dunphy to Robert Bentley, 1 August 2011.
383 Letter from Murray Procter to Robert Bentley c/o Shara Reid, 3 August 2011.
384 See for example: *Corporations Act 2001*, section 189.
385 Clayton Utz, *Racing Queensland Limited: Discussion about Potential Restructuring Issues*, 1 July 2011.
386 Letter from Barry Dunphy to Robert Bentley, 1 August 2011, page 4.

7.8.33 Mr Bentley said he discussed retention bonuses with Mr Tuttle but

> *...he just said that Clayton Utz's idea of what should happen, right, is not acceptable to the four of them.*[387]

7.8.34 Those possibilities were never presented to the board. Mr Bentley's board papers omitted other material considerations too, as discussed in further detail below.

7.8.35 The QAO found that the material adverse change clause was inconsistent in principle with the stated board objective of the long term retention of key management personnel, and with the stated concerns of the Executives about their security of tenure after the election.

7.8.36 Clearly, the original intention had been to retain the Executives until at least 2014 because of the "changing wagering landscape and the approach to the end of the exclusivity of the TattsBet license".[388] In submissions it is acknowledged that the focus of Mr Bentley's board paper of 20 July 2011 was to retain the Executives for at least the following six months.[389]

7.8.37 It is not immediately clear how it could be said that it was in the interests of RQL to offer the amended terms to the Executives to retain them only until the next election (which was required to be held by June 2012).

7.8.38 It is submitted that "it was the solicitors' idea to introduce a material adverse change clause into the advice."[390] But the trigger events suggested by Norton Rose were rejected by Ms Reid and Mr Tuttle in favour of a change of government as suggested by Mr Tuttle in his draft email dated 18 July 2011. Further, Mr Dunphy's statement confirms that the change of government trigger was first suggested by Mr Tuttle in the meeting with Clayton Utz on 14 June 2011.[391]

7.8.39 The addition of that trigger was unnecessary as the Restructuring Paper made it clear that the prospect of there being an immediate material change was remote. It is submitted that the Executives were

> *...fearful that an incoming board would exact revenge and dismiss them in circumstances where they were not entitled to a payout of their contracts, or where they would be forced to litigate to recover such payment.*[392]

7.8.40 However, the addition of the material adverse change clause in fact provided a mechanism for the Executives to resign at the earliest possible time and receive benefits that they would not otherwise have been able to achieve.

7.8.41 The Executives' RQL Contracts already had adequate protections to provide them with security in the event of a change of government. In the event that RQL ceased to be the control body, or they were dismissed by RQL for grounds other than misconduct, they would receive a payment equivalent to what they would have been entitled to receive had they remained employed for the period of their contract. If the Executives expected to be dismissed for misconduct that could never justify the addition of the material adverse change clause.

7.8.42 It is conceded in submissions for the RBG Parties that "as the matter progressed the employees [Executives] shifted their focus from remaining indefinitely at RQL to remaining only until the next election".[393] However, there is no evidence that the Executives informed the board of this change of intention and it seems clear that at least some of the directors were shocked at the walk out.[394]

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387 Transcript, ASIC Interview, Robert Bentley, 20 December 2012, page 102.
388 RQL, Board Meeting Minutes, 6 May 2011.
389 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-31 para 137.
390 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-24 para 103.
391 Statement of Barry Dunphy, 5 September 2013, page 5 para 26.
392 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-22 para 96.
393 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-26 para 117.
394 Transcript, Robert Lette, 15 October 2013, page 23 line 12; Transcript, QAO Interview, Robert Lette, 1 May 2012, page 11; Transcript, QAO Interview, Anthony Hanmer, 2 May 2012, pages 15-16; Transcript, QAO Interview, Bradley Ryan, 2 May 2012, page 7.

7.8.43 It is abundantly clear that the Executives never intended to remain at RQL in the event of a change of government once they had secured the change of government trigger. Ms Reid's instructions to Norton Rose to prepare resignation *packs* are particularly telling. After all, resigning immediately after the election allowed them to maximise their payouts (see Schedule A).

7.8.44 The QAO found that Norton Rose's advice formed the basis for the contracts and that the instructions from RQL were that the amendments were to be *in favour* of the Executives.

7.8.45 When pressed as to why the board would want to know the contents of this advice if it was for the Executives, Mr Bentley stated that as RQL paid for the advice and they did not want to lose the Executives, it was in the board's interests to view the advice.[395] However, that overlooks the numerous clear indications that Norton Rose were advising the board and not the Executives.

7.8.46 Plainly, the renegotiation of the Executives' contracts was not conducted at arms length as it ordinarily would and should be. In his examination at the Commission's public hearings, Mr Bentley stated that the board's intention was to act in the best interests of all parties.[396] Mr Bentley clarified that the board did not want the agreements to be in favour of the Executives, but they were to be fair to all parties.[397]

7.8.47 Commentators suggest that a company owes no general duty to its employees other than to comply with all laws governing the employment relationship.[398] The interests of the Executives and RQL were not aligned in the negotiations, and Mr Bentley appears to have failed to appreciate this (if his true intention was to be fair to all parties).

7.8.48 Mr Bentley's board paper of 5 August 2011 failed to draw the directors' attention to the shortened notice period and the potential for it to be waived. Mr Lette swore that he was unaware of either provision[399] and was under the impression that the Executives were to work out a six week notice period;[400] he thought the possibility of a waiver of the notice period was too generous.[401]

7.8.49 The board paper also failed to provide directors with the proposed contracts. Mr Hanmer said in his examination before the Commission that he had not seen the contracts before.[402] The directors would have been better informed of the terms of the contracts if they had received them.

7.8.50 Mr Bentley's board paper had the effect of recommending the shortened notice period and the potential for it to be waived by failing to mention those additions. In the context of what is meant by *reasonable notice* to be implied to an employment contract, it is not uncommon for senior executives to be allowed a period of several months. Whilst there is no principle of reciprocity for notice periods[403] it is not unreasonable to expect that the Executives be required to serve a notice period to allow an orderly transition.

7.8.51 Mr Bentley has been quoted as saying that there was a succession plan in place at RQL in the event that the Executives resigned. [404] The Commission has seen no evidence of planning of that kind. The central premise of Mr Bentley's board papers was that the Executives were critical to the operations of RQL. There is a fundamental inconsistency in asserting this, whilst enabling the Executives to leave RQL abruptly (as they were likely to do) without ensuring an adequate succession plan was in place. Mr Bentley and the directors did not probe sufficiently, if at all, into this matter of importance to RQL's interests.

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395 Transcript, Robert Bentley, 24 September 2013, page 82 lines 34-41, page 83 lines 1-6, page 83 lines 17-26.
396 Transcript, Robert Bentley, 24 September 2013, page 48 lines 28-44.
397 Transcript, Robert Bentley, 24 September 2013, page 49 lines 23-41.
398 LexisNexis, *Australian Corporation Practice*, [13.216].
399 Transcript, Robert Lette, 15 October 2013, page 19 lines 42-46.
400 Transcript, Robert Lette, 15 October 2013, page 19 lines 42-46, page 23 lines 29-37.
401 Transcript, Robert Lette, 15 October 2013, page 12 lines 41-43, page 15 lines 22-24, page 18 line 17 – page 19 line 11.
402 Transcript, Anthony Hanmer, 26 September 2013, page 110 lines 1-2.
403 *Macauslane v Fisher & Paykel Finance Pty Ltd* [2003] 1 Qd R 503.
404 *The Courier-Mail* 2011, 'LNP Examines pay as racing team quits', 27 March 2012.

Advices

7.8.52 The Commission has found no evidence to suggest that the First CU Advice and the Draft NR Advice were provided to the board. The full extent of those advices was important and material to the directors in considering the proposed amendments and the duties upon them in doing so.

7.8.53 It seems likely that Mr Bentley received the First CU Advice but failed to pass it on to other board members. The evidence does not permit the conclusion that he saw the Draft NR Advice.

7.8.54 It is submitted for Mr Bentley that other board members were aware that Clayton Utz was retained, could have asked for the advice and that "it is plain from the minutes of 8 July that the board had notice that it had been taking advice from Clayton Utz".[405]

7.8.55 There is no reference to the First CU Advice in those minutes. Further, it appears that reliance is placed by Mr Bentley's solicitors on the draft board paper prepared for this meeting,[406] but that paper was never presented to the board.

7.8.56 There are authorities to suggest that an officer of a company fails to act with due care if he or she does not bring material information to the notice of the board.[407] Mr Bentley was aware of the limitations of the legal advice placed before the board, particularly in view of the reference to the First CU Advice in the Final CU Advice.

7.8.57 The RBG Parties also submit that the First CU Advice was of marginal relevance as it concerned a proposal that was abandoned.[408] That overlooks that the Final CU Advice referred to the First CU Advice for a relevant discussion about the duties of the directors of RQL. The First CU Advice was clearly material and should have been brought to the board's attention.

7.8.58 In the First CU Advice, Clayton Utz also advised the board on strategies to address any future ASIC investigation arising out of the renegotiated employment contracts, including maintaining a compelling paper trail regarding its deliberations[409] and a robust record of board resolutions and the decision process that drove those resolutions.[410] A compelling paper trail was not kept. Mr Lette gave evidence of exculpatory discussions not recorded in the minutes.[411] The QAO Report comments adversely on this failure to keep adequate minutes.

RQL board meeting on 5 August 2011

7.8.59 A director may act in breach of his duties by causing a company to enter into a transaction which exposes it to significant risks without the prospect of corresponding benefits.[412] At the board meeting on 5 August, Mr Bentley not only voted in favour of the resolutions approving the amended contracts, but was the proponent of those changes.

7.8.60 As chairman of the RNC, Mr Bentley had duties to the board as its delegate to consider issues such as the Executives' contracts. In putting forward his board papers, Mr Bentley assumed an obligation to brief the board correctly and as fully as was commensurate with the subject matter. The potential issues with that briefing are set out above. There are also authorities to suggest that as chairman of RQL Mr Bentley had the primary responsibility for selecting documents to be brought to the board.[413]

405 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-19 para 87.
406 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-18 paras 85-86.
407 *ASIC v Macdonald* (No 11) (2009) 256 ALR 199; *Biodiesel Producers Ltd (ACN 099 165 876) v Stewart* [2007] FCA 722.
408 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 pages 5-10–5-11 para 52.
409 Letter from Barry Dunphy to Shara Reid, 2 June 2011, page 4.
410 Letter from Barry Dunphy to Shara Reid, 2 June 2011, pages 3-4.
411 Transcript, Robert Lette, 15 October 2013, page 14 lines 16-17, page 28 lines 37-38, page 29 lines 3-6.
412 See for example: *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* [2008] NSWSC 1224 at [28].
413 *AWA Ltd v Daniels (trading as Deloitte Haskins & Sells)* (1992) 7 ACSR 759.

7.8.61 The QAO found that the board minutes did not adequately reflect the level of discussions and deliberations said to have been undertaken, and in particular much of the information was verbal rather than written. As chairman, Mr Bentley was required to sign the minutes of the meeting on 5 August to confirm that they were accurate and accepted by the board.[414]

7.8.62 Minutes do not have to be a transcript of every word spoken at a meeting,[415] of course, but numerous cases demonstrate the importance for boards to ensure that full and accurate minutes are kept.[416] Minutes appropriately signed are prima facie evidence of what took place at a board meeting unless the contrary is proved.[417]

7.8.63 Mr Lette, in particular, gave evidence of discussions not recorded in the minutes.[418] On one view there are, therefore, no contemporaneous documents that confirm the discussions or considerations taken into account by the board. If those discussions occurred, then it was a breach of the obligation to maintain proper minutes.

7.8.64 The position of the other board members at this meeting will be discussed below.

Waiver of notice requirements

7.8.65 No sensible or proper reason for waiving the already reduced notice period was advanced in evidence or submissions.

7.8.66 In his examination before the Commission, Mr Bentley said that after discussions with the Executives he concluded that it was in the interests of RQL to waive the notice period as the Executives' "files" were up to date and the Executives' skills were no longer needed.[419] However, Mr Bentley was aware that:

- the business cases for many of the projects within the IIP were incomplete; and the negotiations with TattsBet some time off; yet these two matters were the principal justifications for the renegotiation of the Executives' contracts
- in the First CU Advice, Clayton Utz noted that it was doubtful that offering the Executives the opportunity to take redundancy immediately was in the interests of RQL as they would expect that RQL would need all staff to respond to any formal disciplinary processes under the Racing Act.[420] As it turned out, the new government initiated the QAO audit, gave RQL the direction under section 45 of the Racing Act and issued an invitation for RQL to apply for additional conditions on its approval as a control body. RQL was left to deal with those matters without the Executives.

7.8.67 Waiving the already short notice periods cannot, by any measure, be said to have been in the interests of RQL. The evidence before the Commission suggests that Mr Bentley acted recklessly in doing so or was indifferent to the real interests of RQL.

RQL board meeting on 28 March 2012 and authorisation of payments

7.8.68 At the board meeting on 28 March 2012, Mr Bentley sought confirmation that all board members had received Mr Seeney's letter dated 27 March. That letter relevantly said:

> *I take this opportunity to notify you that I propose, in the very near future, to request the Auditor-General to audit Racing Queensland Limited, pursuant to section 60 of the Racing*

414 *Corporations Act 2001*, section 251A(2).
415 *August Investments Pty Ltd v Poseidon Ltd* (1971) 2 SASR 60.
416 *Claremount Petroleum NL v Cummings* (1992) 110 ALR 239; *Australian Securities and Investments Commission (ASIC) v Macdonald* (No 11) (2009) 256 ALR 199.
417 *Corporations Act 2001*, section 251A(6).
418 Transcript, Robert Lette, 15 October 2013, page 28 lines 37-38, page 29 lines 3-6, page 14 lines 16-17.
419 Transcript, Robert Bentley, 24 September 2013, page 26 lines 13-18, page 24 line 35 – page 25 line 5.
420 Letter from Barry Dunphy to Robert Bentley, 2 June 2011.

Act 2002. I will also ask the chief executive responsible for the Racing Act to prepare for me a program pursuant to section 46 of the Racing Act which focuses on the suitability of Racing Queensland Limited as a control body to manage codes of racing in Queensland.

...

I also take this opportunity to remind you, as Chair of the Racing Queensland Limited board of directors, of the fiduciary duties the directors owe Racing Queensland Limited as a company under the Corporations Act. I am also forwarding a copy of this letter to the other directors of Racing Queensland Limited.

...

Should any issues, past or present be identified that raise the issue of possible misconduct and/or non-compliance with relevant legislation, these matters will be referred to the appropriate bodies for investigation.

7.8.69 Mr Bentley was aware of an impending QAO audit and of the new government's concerns. There was no urgency to make the payments to the Executives. Notwithstanding, Mr Bentley voted in favour of the resolution instructing Mr Carter to make the payments.

7.8.70 It also appears that Mr Bentley applied some pressure on Mr Carter to make the payments and quickly. Mr Carter's notes of a conversation with Mr Bentley record him saying "Don't stop the payments".[421] Mr Bentley's motives for doing so remain unclear, but could not have been the best interests of RQL.

Conclusion

7.8.71 The evidence before the Commission suggests that Mr Bentley's conduct should be examined by ASIC to consider if he acted in breach of the duties he owed to RQL and whether he acted recklessly.

7.8.72 It is submitted on his behalf that it would be

> *...extraordinary, and manifestly unfair, in light of the evidence and the contemporaneous documents, particularly the legal advice received from two respected firms of solicitors, if the Commission were to conclude that any of the directors or employees acted dishonestly.*[422]

7.8.73 That submission fails to consider that a director may act improperly with no intention of acting dishonestly or otherwise than in the best interests of the company as a whole.[423] Acting *improperly* does not necessarily equate to dishonest conduct.[424]

7.8.74 Mr Bentley has had long experience as a director. Yet many of his actions demonstrate that he acted recklessly in the face of substantial risks (of which he was well aware) and, perhaps for reasons other than those which he expressed.

Mr Ludwig

7.8.75 As a member of the RNC, Mr Ludwig should have been involved in the renegotiation of the Executives' contracts to a greater degree than other members of the board. However, following the RNC meeting on 14 April 2011, Mr Ludwig's involvement was at no more than board level.

7.8.76 Mr Ludwig:

- at the RQL board meeting on 5 August 2011, voted in favour of the resolutions approving the amendments to the Executives' employment contracts which were not in the best interests of RQL (for the reasons discussed above)

421 Statement of Adam Carter, 2 August 2013, Attachments.
422 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-8 para 37.
423 *Chew v R* (1992) 173 CLR 626 at 640.
424 *Kwok v R* (2007) 64 ACSR 307 at [80] (per Santow JA).

- on 28 March 2012, at the RQL board meeting on that day, voted in favour of the resolution instructing Mr Carter to make payments to the Executives in accordance with the amended employment terms.

RQL board meeting on 5 August 2011

7.8.77 As a member of the RNC, Mr Ludwig had duties to the board as its delegate to consider issues such as the Executives' contracts. However, no evidence has emerged to conclude other than that Mr Ludwig relied upon Mr Bentley to perform those duties.

7.8.78 Mr Ludwig also appears to have relied upon Mr Bentley's board papers in deciding to vote in favour of the proposed changes. His evidence was that he:

- could not recall seeing any of the legal advices[425]
- was primarily concerned that RQL was not seen as a "bad employer" paying employees at an incorrect rate and was mainly interested in fixing the remuneration rates[426]
- did not recall the material adverse change clause, or any discussion about it; he commented in evidence to the Commission that he did not pay much attention to it because he did not think there would be a change of government and that the redundancies would never be activated.[427]

7.8.79 At no time in his statements or evidence to the Commission did Mr Ludwig express any appreciation of his duty to act in the interests of RQL. When challenged in the public hearings about whether he acted in the best interests of RQL his tone was that of barely concealed contempt for the Commission.

7.8.80 A director is entitled to rely on the judgment, information and advice of management and other officers, but that reliance will be unreasonable where a director knows, or by the exercise of ordinary diligence justifying his appointment as a director, should have known, any facts that would deny reliance.[428]

7.8.81 A director must make an independent assessment of the information or advice, having regard to the director's knowledge of the company and the complexity of its structure and operations.[429] In order to satisfy the requirement of an independent assessment, a director must at least consider relevant views and material and bring his or her own judgment to bear.[430]

7.8.82 Mr Ludwig's evidence suggests that he did not exercise an independent assessment when voting in favour of the amendments to the Executives' contracts. As a member of the RNC he had a duty to acquaint himself with the issues to a much greater extent than his evidence demonstrated.

RQL board meeting on 28 March 2012

7.8.83 Mr Ludwig and the other directors relied upon the review by BDO to justify approving the payments. BDO's advice did not, and did not purport to, address whether the payments should be made; the advice concerned only the correct quantum of the payments.

7.8.84 A company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it.[431] The resolution on 5 August 2011 was valid and the Executives were entitled to press for their entitlements under their amended contracts.

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425 Transcript, William Ludwig, 27 September 2013, page 41 lines 17-20, page 43 lines 3-5, page 43 line 19, page 45 line 16, page 46 lines 33-38, page 47 lines 5-8.
426 Transcript, William Ludwig, 27 September 2013, page 32 lines 35-40, page 33 lines 24-27, page 34 lines 45-46, page 35 lines 17-21, page 38 lines 17-46, page 39 lines 13-16.
427 Transcript, William Ludwig, 27 September 2013, page 36 lines 5-6, page 37 lines 5-14, page 38 lines 3-14, page 39 lines 38-39, page 45 lines 12-13, page 45 lines 46-47.
428 *Re HIH Insurance; Australian Securities Investments Commission (ASIC) v Adler* (2002) 41 ACSR 72.
429 *Corporations Act 2001*, section 189.
430 *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1990) 3 ACSR 207 at 225; *Blackwell v Moray* (1991) 5 ACSR 255.
431 *Corporations Act 2001*, section 124.

7.8.85 Nonetheless, if an officer has acted in breach of his or her duties to the company, the company may elect to avoid any resulting contract. The directors did not even consider this possibility, or at least, potentially delaying the payments in order to take considered legal advice.

7.8.86 Mr Ludwig and the board were aware of an impending QAO audit and the new government's concerns about possible misconduct. There was no urgency to make the payments to the Executives. Notwithstanding, Mr Ludwig seconded the motion and voted in favour of the resolution instructing Mr Carter to make the payments.

Conclusion

7.8.87 The evidence before the Commission suggests that Mr Ludwig's conduct should be examined by ASIC to consider if he acted in breach of the duties he owed to RQL and whether he acted recklessly.

The other directors

7.8.88 The other directors' involvement was at board level, where they:

- voted in favour of the resolutions approving the amendments to the Executives' employment contracts which were not in the best interests of RQL at the RQL board meeting on 5 August 2011 (for the reasons discussed above)
- voted in favour of the resolution instructing Mr Carter to make payments to the Executives in accordance with the amended employment terms on 28 March 2012, at the RQL board meeting on that day.

RQL board meeting on 5 August 2011

7.8.89 Similarly to Mr Ludwig, the other directors relied heavily on Mr Bentley. However, directors are not a *rubber stamp* and must take positive steps to confirm that information provided to them is accurate.[432] The Code of Conduct confirmed that the board was required to ensure that they were fully informed and to take all reasonable steps to be satisfied about the soundness of board decisions.

7.8.90 Mr Lette said that it was not unusual to delegate such issues to the chairman or the RNC.[433] However, the RNC had advisory powers only.[434] The board was responsible for making the decision. Authorities also suggest that directors cannot abdicate responsibility for important decisions by delegating to a fellow director.[435]

7.8.91 A director remains responsible for the actions of a delegate unless the director reasonably believed, after making proper inquiries, that the delegate was reliable and competent.[436] The evidence produced to the Commission indicates that the directors failed to make inquiries or take any steps to confirm that Mr Bentley's recommendations were accurate or in the interests of RQL.

7.8.92 Mr Bentley's board papers made no reference to a succession plan in the event that the Executives were to resign. The Commission has seen no evidence to suggest that the directors considered the practical implications for RQL if the Executives were to resign. In circumstances where the board's position was that the Executives were critical to RQL's operations, some thought should have been given to a succession plan. It was, at best, naïve for them not to contemplate the very real possibility, if not probability, that all of the Executives would immediately resign after the next State election. A moment's reflection would have brought the realisation that the Executives would never have it as good financially as at that moment.

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432 *Vines v Australian Securities and Investments Commission (ASIC)* [2007] NSWCA 75.
433 Statement of Robert Lette, 30 July 2013, page 7 para 14.
434 RQL, *Racing Queensland Limited* constitution, 14 July 2010, Clause 17.12.
435 *Australian Securities and Investments Commission (ASIC) v Macdonald* (No 11) (2009) 256 ALR 199 at [260].
436 *Corporations Act 2001* (Cth), section 190.

7.8.93 Several board members, including Mr Lette, Mr Ludwig and Mr Bentley believed that the Executives were being underpaid.[437] Mr Lette said he knew from his position as the deputy chairman of Harness Racing Australia that Mr Tuttle's peers interstate were paid significantly more.[438] Mr Lette said that this was discussed at board level,[439] but there is no mention of those discussions in any of the board minutes.

7.8.94 The 30 per cent increase in the Executives' TRV is said to be unremarkable. On the other hand, the other *key managers* identified in the 6 May 2011 board minutes and resolution received a three per cent increase in their TRV.[440] Minutes of the RNC meeting on 3 August 2011 noted that the overall increase in salaries for all RQL employees was "within the 3% budget already approved" by the board.[441] In view of the glaring disparity in the TRV increase for *key managers*, board members should have enquired further about the basis for the 30 per cent increase for the Executives.

7.8.95 Board members, including Mr Hanmer, Mr Lette and Mr Bentley, gave evidence that they understood that the next State election could have been called in as little as three weeks after the 5 August board meeting. They formed the view that it would be called much later.[442] However, there is no evidence of any discussions on that topic assessing that risk and the significant financial impact on RQL had the election been called early.

7.8.96 In his examination before the Commission, Mr Lette seemed to recall a discussion about the possibility of a retention bonus, but said it was not supported by the Executives.[443] There was no mention of this discussion in the minutes and, if it occurred, it suggests that the board permitted the Executives to dictate terms.

7.8.97 The board adopted the draft minutes of the meeting on 5 August 2011 as accurate in the board meeting of 2 September 2011. Cases suggest that directors may have an obligation to take reasonable steps to ensure that minutes are not false or misleading.[444] The primary obligation to maintain the minutes fell on Ms Reid and Mr Bentley, but all directors were responsible to ensure that they accurately reflected the discussions.

7.8.98 The impression gained from contemporaneous documents and the evidence given to the Commission was that the directors exhibited no independent assessment of Mr Bentley's board papers.

RQL board meeting on 28 March 2012

7.8.99 The directors were surprised by the Executives' resignations and reluctant to make the payments:

- In an email to the other directors on 27 March Mr Ryan said:
  - *Given the quantum of the payments I would suggest we all satisfy ourselves that the payments are in accordance with the contracts*
  - *I would suggest that all directors be given appropriate time to consider this before payment is made.*[445]

437 Transcript, Robert Lette, 15 October 2013, page 14 lines 34-40; Statement of William Ludwig, 26 July 2013, page 8 para 24; Transcript, Robert Bentley, 24 September 2013, page 48 lines 19-22.
438 Transcript, Robert Lette, 15 October 2013, page 13 lines 45-47, page 14 lines 4-12.
439 Transcript, Robert Lette, 15 October 2013, page 14 lines 16-20.
440 Letter from Malcolm Tuttle to Peter Smith, 5 August 2011; Letter from Malcolm Tuttle to Warren Williams, 5 August 2011; Letter from Malcolm Tuttle to Col Truscott, 5 August 2011; Letter from Malcolm Tuttle to Adam Carter, 5 August 2011; Letter from Malcolm Tuttle to David Rowan, 5 August 2011.
441 RNC, Meeting Minutes, 3 August 2011.
442 Transcript, Anthony Hanmer, 26 September 2013, page 114 lines 1-45; Transcript, Robert Lette, 15 October 2013, page 17 line 35 – page 18 line 9; Statement of Robert Bentley, 21 October 2013, page 5; para 14-15.
443 Transcript, Robert Lette, 15 October 2013, page 29 lines 3-6; Transcript, ASIC Interview, Robert Bentley, 20 December 2012, pages 101-102.
444 *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 286 ALR 501.
445 Email from Bradley Ryan to Robert Lette, Robert Bentley, Anthony Hanmer, Wayne Milner, William Ludwig, Adam Carter, 27 March 2012, 10.29am.

- Mr Lette replied:

  I am concerned that the agreements gave them the right to terminate without having to work out a notice period. I certainly was aware that a change of govt was a trigger to give notice but not to walk out and get paid without working out the notice period.[446]

- Mr Carter's notes of a conversation with Mr Hanmer on 28 March 2012 record "Not proceed with pmts", "Staggered with the quantum", "I was surprised as he was" and "Has to be collision [collusion]".[447]

7.8.100 In statements to the Commission Mr Hanmer and Mr Milner said that as the calculations were checked by BDO they felt it appropriate to pass the resolution to make the payments. [448] There is no suggestion that the payments were incorrectly calculated, and from a strictly legal perspective the QAO concluded:

> *The separation payments made to Messrs Tuttle, Orchard and Brennan and Ms Reid were nonetheless properly approved and accurately calculated in accordance with their respective contracts of employment and leave records, and the terms of the RQL redundancy policy introduced also by the Board in August 2011.*[449]

7.8.101 However, the evidence produced to the Commission shows no consideration by the directors of any possible options available to RQL to avoid the contracts, or at least, payment of the increased amounts. There was no urgency in making the payments, but the board appears not to have considered delaying, even for a short period, to obtain legal advice.

7.8.102 The Executives were asked and agreed to give reasonable assistance to RQL after their resignations as required by their contracts. Mr Lette, however, conceded that there was no succession planning in the event of all four leaving.[450] Mr Lette gave oral evidence at the Commission's hearings that he thought six weeks notice was required.[451]

7.8.103 The appropriate time for consideration of these issues was at the board meeting on 5 August 2011. When confronted with the Executives' abrupt resignations and the significant financial burden on RQL, the contemporaneous documents and the evidence given to the Commission suggest that the board did not consider whether it was in the interests of RQL to make the payments, rather, they did little more than *rubber stamp* the payments.

Conclusion

7.8.104 The evidence before the Commission suggests that the directors' conduct should be examined by ASIC to consider whether they acted in breach of the duties they owed to RQL and whether they acted recklessly.

7.9 Did the executives act consistently with their responsibilities, duties and legal obligations?

Ms Reid

7.9.1 Ms Reid was integrally involved in the renegotiation of the Executives' contracts on behalf of both RQL and the Executives. Her roles became blurred. She acted:

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446 Email from Robert Lette to Bradley Ryan cc: Robert Bentley, Anthony Hanmer, Wayne Milner, Robert Lette, William Ludwig, Adam Carter, 27 March 2012, 12.24pm.
447 Statement of Adam Carter, 2 August 2013, Attachment ABC-217.
448 Statement of Anthony Hanmer, 18 October 2013, page 10 para 18; Statement of Wayne Milner, 19 October 2013, page 10 para 18.
449 Queensland Audit Officer 2012, *Racing Queensland Limited: Audit by arrangement - report to parliament* 1:2012-13, Queensland Government, Brisbane, page 8.
450 Transcript, Robert Lette, 15 October 2013, page 21 lines 20-27.
451 Transcript, Robert Lette, 15 October 2013, page 19 lines 42-46.

- as company secretary and corporate counsel for RQL
- on her own behalf in negotiations with Mr Bentley about the terms of her employment.

7.9.2 Ms Reid:

- had duties to RQL which were in conflict with her personal interests
- failed to disclose (or cause to be disclosed) to the board, or to any member of the board other than Mr Bentley, the existence or contents of the First CU Advice
- failed to disclose (or cause to be disclosed) to the board, or to any member of the board, the existence or contents of the Draft NR Advice
- failed to disclose those advices in circumstances where they:
  - related to the best interests of RQL concerning amendments to the employment terms
  - may have caused the board of RQL to question whether the amendments sought by the Executives, and the amendments ultimately made, were in the best interests of RQL.

Conflict

7.9.3 The QAO found that both Ms Reid and Mr Tuttle stood to benefit and were actively involved in the renegotiation of the Executives' contracts, placing them in a clear conflict.

7.9.4 Fiduciary duties do not arise in respect of every act of any employee, and in particular, in negotiations relating to the terms of their employment an employee has no duty of disclosure.[452] There is no contractual standard implied by law that requires parties to act in good faith in negotiating an employment contract.

7.9.5 Ms Reid was not subject to a duty to RQL in relation to seeking the amendments to the terms of her employment. If this were the case no employee could ever seek a promotion or increased salary.

7.9.6 However, Mr Reid acted as RQL's company secretary and corporate counsel throughout. That she was acting in this capacity is clear from:

- the board's instructions for her to prepare contracts for the executive assistants and another employee[453]
- the board's instructions for her to obtain comparable salary figures[454]
- the board's instructions for her to provide the Final July Advice to Clayton Utz for "review and opinion"[455]
- her numerous references to the solicitors that she was providing instructions on behalf of the board[456]
- her receipt of the advices of Clayton Utz and Norton Rose, both of which were addressed to the board
- her execution of Norton Rose's first client agreement on behalf of RQL (specifically noting her capacity to do so as company secretary).

7.9.7 It is submitted by the RBG Parties that Ms Reid was not advising the board but was acting in her own interests.[457] The latter proposition may well be accepted, but, overtly, the overwhelming impression she gave to RQL's solicitors was that she was fulfilling her role as company secretary and corporate counsel.

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452 *Stoelwinder v Southern Health* [2001] FCA 115.
453 RQL, Board Meeting Minutes, 6 May 2011.
454 RQL, Board Meeting Minutes, 8 July 2011.
455 RQL, Board Meeting Minutes, 20 July 2011.
456 File Note, Norton Rose, 4 August 2011, 11.47am; File Note, Norton Rose, 4 August 2011, 8.46am; Email from Shara Reid to Kristin Gamble, 4 August 2011, 2.57pm; Statement of Murray Procter, 9 September 2013, page 5 paras 51-54; Norton Rose, File Note, 19 July 2011, 6.02pm.
457 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-27 para 118.

7.9.8 It is submitted that it was incumbent upon Clayton Utz and Norton Rose to inform Ms Reid that they considered it inappropriate for her and for Mr Tuttle to be providing instructions.[458] However, Ms Reid expressly held herself out as representing the board. It was her responsibility as corporate counsel/company secretary to manage her position to avoid conflicts.

7.9.9 Ms Reid was in a position of conflict that was impossible to manage. In particular, when she received advices addressed to the board, which related to her own contract, her duties to RQL directly conflicted with her own personal interests. Ms Reid had a duty to avoid conflicts, and was clearly aware of this duty.

7.9.10 It should not be controversial that a party will be in a position of conflict when acting as Ms Reid did. It appears that the directors other than Mr Bentley were unaware that Ms Reid was providing instructions to the solicitors about the amendments to the Executives' contracts. Mr Lette agreed that it was not the right thing to do[459] and said that Mr Bentley put her in that position.[460]

7.9.11 Ms Reid sent advices addressed to the board to the Executives. On any view, Clayton Utz were retained to advise the board. Ms Reid did not have the board's authority to waive privilege to that advice and, by providing it to the Executives, she did not act consistently with her obligations as a solicitor and her duties of confidentiality and good faith owed to RQL.

7.9.12 The QAO found that board minutes did not adequately reflect the level of discussions and deliberations undertaken, and that much of the information given was verbal not written.[461] As company secretary, Ms Reid was responsible for maintaining board minutes.

7.9.13 The minutes of the board meeting on 5 August 2011 record that Ms Reid attended. In her QAO interview Ms Reid said:

> *I was asked to leave while the matter was discussed. I was permitted to return to the board Meeting once the resolution had been made and was given instructions.*[462]

7.9.14 There is no evidence in the minutes that this occurred, a deficiency in itself.

Failure to disclose advice

7.9.15 The Commission has found no evidence to suggest that the First CU Advice and the Draft NR Advice were provided to the board. The full terms of those advices were clearly material for the directors to consider the proposed amendments.

7.9.16 Ms Reid received the First CU Advice. That advice contained important warnings to the board that remained relevant even as the Executives' proposals developed. The Final CU Advice made reference to those warnings, and should have been provided to the board.

7.9.17 The First CU Advice also contained suggestions for alternative strategies to retain the Executives. Those alternatives were not attractive to the Executives and similar suggestions made by Norton Rose were deleted on instructions from Ms Reid and Mr Tuttle. As such, the board never received advice on those possibilities.

7.9.18 Ms Reid was the board's delegate in communications with (at the very least) Clayton Utz. There are authorities to suggest that officers holding a similar position to that of Ms Reid can breach their statutory duties by failing properly to advise their board and protect the company from legal

458 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-11 para 54, page 5-15 para 69, page 5-18 para 84.
459 Transcript, Robert Lette, 15 October 2013, page 29 lines 10-38.
460 Transcript, Robert Lette, 15 October 2013, page 29 lines 40-44.
461 Queensland Audit Officer 2012, *Racing Queensland Limited: Audit by arrangement - report to parliament* 1:2012-13, Queensland Government, Brisbane, page 8.
462 Transcript, QAO Interview, Shara Reid, 1 May 2012, page 4.

risk.[463] An officer of a company may act without due care by failing to bring material information to the notice of the board.[464] Ms Reid clearly did not properly advise the board when she failed to provide the First CU Advice to them.

7.9.19 Ms Reid also received the Draft NR Advice. The Executives submit that "[w]hen the draft advice was provided to them for their consideration, they were under no compulsion to provide it to their employer".[465] However, that submission fails to take into account that Ms Reid received the advice in her capacity as company secretary/corporate counsel and expressly provided instructions to Norton Rose on behalf of the board.

7.9.20 Ms Reid has not provided evidence to explain why the amendments to the Draft NR Advice were made. Mr Tuttle said they were made to

> *...put in there a concise set of outcomes for the – for the executive[s] which is more reflective of the note that I'd sent to Shara Murray in relation to some fairly concise outcomes that we're looking for.*[466]

7.9.21 The Executives submit that:

> *The suggestion that thereafter the employees [Executives] liaised with Norton Rose to have removed from the advice any parts which alerted the directors of RQL to potential dangers in proceeding with the renegotiated contracts, and which gave the board warnings of pitfalls is, with the greatest respect, fanciful.*[467]

7.9.22 However, Mr Tuttle's desire for conciseness does not explain the amendments. They were favourable to the Executives and removed very important warnings to the board:

- increasing the acceptable TRV range was solely for the benefit of the Executives
- removing the possibility of a longer notice period for termination without cause of not more than 12 months meant the board was unaware of this option as an alternative
- removing references to incentive bonuses was solely for the benefit of the Executives
- the addition of the change of State government trigger was only for the benefit of the Executives
- removing references to a clause limiting the payments to the Executive's average annual base salary meant the board could not consider the desirability of this course
- removing the reference to adopting the cap under Part 2D.2 of the Corporations Act meant the board was not advised, and likely would remain unaware, of this very sound measure of the reasonableness of the redundancy payments.

7.9.23 Ms Reid was obliged to advise the directors of their statutory requirements and to ensure that RQL complied with the Corporations Act. By removing the important warnings to the board she failed to give practical effect to her duty.

7.9.24 The Executives submit that:

> *Certainly the final advice was going to be shown to the Board. There is no evidence that the draft advices were to be given to the Board.*[468]

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463 *Shafron v Australian Securities and Investments Commission (ASIC)* (2012) 286 ALR 612; *Australian Securities and Investments Commission (ASIC) v Macdonald* (No 11) (2009) 256 ALR 199.
464 *Australian Securities and Investments Commission (ASIC) v Macdonald (No 11) (2009) 256 ALR 199; Biodiesel Producers Ltd (ACN 099 165 876) v Stewart* [2007] FCA 722.
465 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-25 para 111.
466 Transcript, Malcolm Tuttle, 30 September 2013, page 90 lines 14-16.
467 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-26 para 112.
468 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-28 para 123.

That submission is contrary to logic, particularly as the draft NR Advice was provided to Ms Reid to gauge her views on the board's approach.

7.9.25 Mr Bentley agreed in his evidence to the Commission that if the board had received the Draft NR Advice, the end result of the negotiations would have been different.[469] This emphasises the significance of Ms Reid's failure to bring the advice to the attention of the board.

7.9.26 As corporate counsel/ company secretary Ms Reid had a duty to bring the Draft NR Advice to the attention of the board. Plainly, she acted inappropriately when instructing Norton Rose to make the substantial amendments to their advice.

Conclusion

7.9.27 The evidence before the Commission suggests that Ms Reid's conduct should be investigated by the Legal Services Commissioner (LSC) to assess whether she acted in accordance with her ethical duties as a solicitor. Her actions in instructing Norton Rose to amend their advices to remove warnings to the board in particular demonstrated what might be considered a lack of integrity.

7.9.28 Ms Reid's conduct should also be examined by ASIC as to whether she acted in breach of the duties she owed to RQL. Many of Ms Reid's actions showed little appreciation for her duties as an officer of RQL.

Mr Tuttle

7.9.29 In his supplementary statement to the Commission Mr Tuttle says that he did not consider himself to be "lead negotiator" in negotiating the variations to the Executives' employment agreements.[470] The evidence suggests to the contrary - Mr Tuttle appears to be a driver of the process. He initially drafted the termination clauses and was subsequently instrumental in discussions at a number of meetings with both Clayton Utz and Norton Rose over the course of the negotiations.

7.9.30 Mr Tuttle:

- had duties to RQL which were in conflict with his personal interests
- failed to disclose (or cause to be disclosed) to the board, or to any member of the board other than Mr Bentley, the existence or contents of the First CU Advice
- failed to disclose (or cause to be disclosed) to the board, or to any member of the board, the existence or contents of the Draft NR Advice
- failed to disclose those advices in circumstances where they:
  - related to the best interests of RQL concerning amendments to the employment terms
  - may have caused the board of RQL to question whether the amendments sought by the Executives, and the amendments ultimately made, were in the best interests of RQL.

Conflict

7.9.31 The QAO found that both Ms Reid and Mr Tuttle stood to benefit and were actively involved in the renegotiation of the Executives' contracts, placing them in a clear conflict.

7.9.32 Mr Tuttle maintained that there was no conflict regarding his duties to RQL and his personal interests because the board received their own legal advice from Clayton Utz and the Executives received their own legal advice from Norton Rose.[471] Mr Tuttle has not appreciated the inherent

469 Transcript, Robert Bentley, 24 September 2013, page 71 lines 7-9.
470 Statement of Malcolm Tuttle, 23 October 2013, page 12 para 33.
471 Statement of Malcolm Tuttle, 23 October 2013, page 14 para 35(c).

conflict in him providing instructions to Clayton Utz and Norton Rose about a matter relating to his personal interests when both firms were advising the board.

7.9.33 It is submitted for Mr Tuttle that he was not advising the board but was acting in his own interests.[472] There is no suggestion that Mr Tuttle was precluded from negotiating the most favourable terms possible with RQL. However, similarly to Ms Reid, Mr Tuttle did not act solely on his own behalf, since he, too, provided instructions to Clayton Utz and Norton Rose on behalf of the board.

7.9.34 Mr Tuttle was in clear position of conflict. He favoured his own interests when he:

- drafted clauses not contemplated by the 6 May 2011 board resolution
- received advices addressed to the board and provided instructions on behalf of RQL, but failed to pass those advices to board members
- gave unauthorised instructions to Norton Rose to amend their advice, which was addressed to the board.

7.9.35 In his further supplementary statement to the Commission Mr Tuttle points out that the documents show that most communications were between the lawyers and Ms Reid.[473] However, Mr Tuttle also provided instructions to Norton Rose and, in particular, in relation to the amendments to the Draft NR Advice. Even so, as CEO of RQL, Mr Tuttle also had an obligation to ensure that other RQL employees complied with the Code of Conduct.

7.9.36 Mr Tuttle was significantly involved in the meeting on 14 June 2011 with Clayton Utz where the phrase *poison pill* appears. Mr Dunphy says that it was never suggested to him that

> *...the intention of the Board of Racing Queensland Limited was to cause downstream damage to any future administration of the company.*[474]

7.9.37 This observation is contrary to the common commercial usage of the phrase. It is not necessary to determine who used the phrase *poison pill*, but Mr Dunphy says it could have been Mr Tuttle. At the least it represented Mr Dunphy's interpretation of the instructions that were being given, which were that the Executives were to be given the right to terminate their contracts unilaterally in the event of a change of government. Such a clause was not in the interests of RQL and Mr Tuttle favoured his interests in giving those instructions.

Failure to disclose advice

7.9.38 Mr Tuttle received both advices. In so far as the Draft CU Advice is concerned, similarly to Ms Reid, Mr Tuttle's position at RQL required him to bring material legal advice to the board's attention.

7.9.39 Mr Tuttle said in his evidence to the Commission that he considered the lawyers at Norton Rose were responsible for bringing the advice to the board's attention, or any concerns they had prior to issuing their final advice.[475] However, Mr Tuttle and Ms Reid were providing instructions to Norton Rose on behalf of the board (expressly in some instances) and held themselves out as the board's representatives.

7.9.40 In evidence before the Commission, Mr Tuttle admitted that the amendments to the Draft NR Advice were all favourable to the Executives.[476] He acted inappropriately when instructing Norton Rose to make the substantial amendments to their advice. Similarly to Ms Reid, Mr Tuttle should have brought the Draft NR Advice to the attention of the board.

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472 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-27 para 118.
473 Statement of Malcolm Tuttle, 23 October 2013, page 12 para 33.
474 Statement of Barry Dunphy, 13 November 2013, page 2 para 9.
475 Transcript, Malcolm Tuttle, 30 September 2013, page 82 line 11 – page 83 line 7, page 91 lines 23-34.
476 Transcript, Malcolm Tuttle, 30 September 2013, page 90 lines 5-25.

Conclusion

7.9.41 The evidence before the Commission suggests that Mr Tuttle's conduct should be examined by ASIC as to whether he acted in breach of the duties he owed to RQL.

Messrs Brennan and Orchard

7.9.42 Because of their limited involvement, Mr Brennan and Mr Orchard can be dealt with together.

7.9.43 Ms Reid and Mr Tuttle were representing the Executives in their dealings with Mr Bentley and the board. Mr Tuttle commented that he and Ms Reid would discuss the issues, update Mr Brennan and Mr Orchard and seek their feedback as required.[477] The process was primarily driven by Mr Tuttle and Ms Reid.

7.9.44 There is no evidence to suggest that Mr Brennan and Mr Orchard were acting or purporting to act on behalf of the board at any time. They were entitled to negotiate for themselves the most favourable terms possible.

7.9.45 The evidence suggests they received the First CU Advice and the Draft NR Advice. However, Mr Tuttle and Ms Reid were undertaking the majority of the dealings with the solicitors.

7.9.46 The scope of an officer's duties to a company will be determined by the nature of their position. In circumstances where Ms Reid and Mr Tuttle were the Executives' representatives and Mr Brennan and Mr Orchard were not acting on behalf of the board, it was not incumbent on them to bring the advices to the attention of the board.

Conclusion

7.9.47 A careful analysis of the evidence before the Commission does not suggest that either Mr Brennan or Mr Orchard acted inconsistently with their duties to RQL.

7.10 Part 2D.2 – Restrictions on termination payments

7.10.1 Section 200B of the Corporations Act provides that an *entity* must not give a benefit in connection with a person's retirement from an office or position of employment if the person holds a *managerial or executive office* in the company or a related body corporate.

7.10.2 It is accepted that Mr Tuttle, Mr Brennan and Ms Reid were directors of related entities for the purposes of section 200AA(3)(b) of the Corporations Act.[478] As such, they held a managerial or executive office and the provisions of Part 2D.2 potentially apply.

7.10.3 *Giving a benefit* is defined to include, where the benefit is a payment, *making* the payment.[479] The RBG Parties submit that the judgment in *Silver v Dome Resources NL*[480] is authority for the proposition that what is prohibited by section 200B is the payment of a benefit in breach of Part 2D.2 and not the entering into the agreement.[481] That judgment records

> *...it is not until a company actually makes a payment (or otherwise gives a benefit) that any transgression occurs.*[482]

477 Statement of Malcolm Tuttle, 23 October 2013, page 12 para 33.
478 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-44 para 186.
479 *Corporations Act 2001*, sections 200A(1)(b)(i).
480 *Silver v Dome Resources NL* (2007) 62 ACSR 539.
481 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-44 para 187.
482 *Silver v Dome Resources NL* (2007) 62 ACSR 539 at [55], citing Fox v GIO Australia Ltd (2002) 56 NSWLR 512.

7.10.4 Since that judgment was delivered, Part 2D.2 has been amended to:

a) insert section 200 to confirm that:

For the purposes of this Division, in determining whether a benefit is given:

(a) give a broad interpretation to benefits being given, even if criminal or civil penalties may be involved; and

(b) the economic and commercial substance of conduct is to prevail over its legal form

b) broaden the definition of a *benefit* by inserting section 200AB:

1) For the purposes of this Division, a benefit includes any of the following:

(a) a payment or other valuable consideration;

(b) any kind of real or personal property;

(c) any legal or equitable estate or interest in real or personal property;

(d) any legal or equitable right;

(e) a thing specified in regulations made for the purposes of this paragraph.

7.10.5 The Explanatory Memorandum for these amendments states:

The definition of a termination benefit has been clarified and expanded. The Bill requires a broad interpretation of the term benefit and requires that the substance should prevail over its legal form.[483]

7.10.6 The Commission has been unable to locate any cases specifically considering whether these amendments extend the prohibition in section 200B beyond making a payment. It is not necessary to decide here, but the addition of "any legal or equitable right" may mean that a company "otherwise gives a benefit" when it enters into the relevant agreement.

7.10.7 Section 200A(1)(a) provides that a benefit is given in connection with a person's retirement from an office or position if the benefit is given:

(i) by way of compensation for, or otherwise in connection with, the loss by the person of the office or position; or

(ii) in connection with the person's retirement from the office or position;

7.10.8 Cases suggest that *in connection with* is of wide meaning and merely requires a relation between one thing and another.[484] Retirement from office or position includes loss of the office or position or resignation.[485]

7.10.9 In the circumstances, it would appear that the payments made to the Executives would attract the operation of Part 2D.2. The Commission has calculated that those payments exceed the cap provided for in section 200F of the Corporations Act (see table below).

	Year 3 (from 5/8/11)	Year 2 (from 1/7/10)	Year 1	Average salary (not including income from related bodies corporate)	TRV payout + severance
Tuttle	390,000	300,000	231,220	**307,073**	**499,998**
Brennan	234,000	180,000	150,000	**188,000**	**299,999**
Reid	156,000	120,000	100,000	**125,333**	**197,247**

483 Parliament of the Commonwealth of Australia, *Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, Explanatory Memorandum*, page 9.

484 *White v Norman (Re Forest Enterprises Australia Ltd (receivers and managers appointed) (in administration)* [2012] FCA 33.

485 *Corporations Act 2001*, section 200A(1)(e).

7.10.10 The Executives will potentially be caught by these provisions as section 200D provides that a *person* who is a *managerial or executive officer* must not receive a *benefit* that contravenes section 200B. If the payments to the Executives were found to contravene section 200B, the Executives would hold the funds on trust for RQL (or perhaps QACRIB as its successor) and would be obliged to repay the funds immediately.[486]

7.10.11 A director or officer may breach his or her duties by allowing a company to contravene the Corporations Act, particularly in circumstances where that contravention is likely to result in jeopardy to the company's interests.[487] Further, directors and officers who cause a company to pay to them benefits on retirement or loss of office are subject to the usual fiduciary and statutory duties in relation to such actions.[488] The provisions of Part 2D.2 supplement these duties.[489]

7.10.12 Additional obligations are imposed by Section 200B on *an entity. Entity* is defined to include directors of the company.[490]

7.10.13 Section 200B provides that retirement benefits generally need member approval in accordance with the conditions found in section 200E. RQL was clearly alive to this issue as a resolution (specifically described as a resolution of members) was obtained in 2010.

7.10.14 The RBG Parties submit that there was member approval as the board of RQL approved the payments at the board meeting on 28 March 2012.[491]That submission is contrary to RQL's constitution as clause 16.1 confirms that the board cannot exercise powers that are required by the Corporations Act to be exercised at a general meeting. Section 200E contains conditions on member approval that have not been met. Relevantly, those conditions include that:

- the giving of the benefit must be approved by a resolution passed at a general meeting of the company[492]
- details of the benefit must be set out in, or accompany, the notice of the general meeting that is to consider the resolution; the details must include the amount of the payment.[493]

7.10.15 No general meeting of RQL was called; rather a board meeting took place on 28 March 2012. The evidence produced to the Commission suggests that no written notice calling a general meeting of RQL (or even the board meeting) was sent prior to the meeting on 28 March 2012 and that the board meeting was informally arranged.

7.10.16 Clause 8 of the constitution of RQL sets out the requirements for general meetings. Whilst a general meeting may be convened at any time by the board,[494] at least 28 days written notice must be given to all members who are entitled to receive notice.[495] The notice of the general meeting must contain all information required by the Corporations Act.[496]

7.10.17 Plainly, the requirements of section 200E and RQL's constitution were not met. It is submitted that any irregularity about those requirements would not invalidate the resolutions passed at the board meeting[497] and that:

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486 *Corporations Act 2001*, section 200J.
487 *Australian Securities and Investments Commission (ASIC) v Maxwell* [2006] NSWSC 1052 at [104].
488 *Cummings v Claremont Petroleum NL* (1992) 9 ACSR 583.
489 See for example section *Corporations Act 2001*, 200E(4)).
490 *Corporations Act 2001*, sections 200B(1AA) and 11(a).
491 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-45 para 188.
492 *Corporations Act 2001*, section 200E(1B).
493 *Corporations Act 2001*, section 200E(2).
494 RQL, *Racing Queensland Limited* constitution, 14 July 2010, Clause 8.1.
495 RQL, *Racing Queensland Limited* constitution, 14 July 2010, Clause 8.2.
496 RQL, *Racing Queensland Limited* constitution, 14 July 2010, Clause 8.3; and see: *Corporations Act 2001*, section 249L.
497 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-45 para 189.

[a] Court would undoubtedly make an order under s. 1322 Corporations Act to remedy the substantial injustice that would occur if it was found that by reason of some procedural irregularity the meeting that approved the payments was improperly described as a directors' rather than a members' meeting.[498]

7.10.18 A court must not make an order under section 1322 unless it is satisfied:

- that the act, matter or thing, or the proceeding, is essentially of a procedural nature
- that the person or persons concerned in or party to the contravention or failure acted honestly; or
- that it is just and equitable that the order be made; and
- in the case of an order relieving a person from civil liability, that the person subject to the civil liability concerned acted honestly, and
- in every case that no substantial injustice has been or is likely to be caused to any person.[499]

7.10.19 Commentators suggest that holding a meeting or passing a resolution which breaches the duty of the meeting or the directors is not a procedural irregularity which may be validated by section 1322.[500]

7.10.20 Cases also suggest that there will be substantial injustice where there would have been a different result but for the irregularity.[501] Had the correct period of notice for calling the meeting been given, RQL would have received the correspondence from the Deputy Premier requesting RQL not to make termination payments to any staff and the payments to the Executives would not have been made.

7.10.21 It is, then, at least arguable that a court would not make orders under section 1322.

7.10.22 The evidence before the Commission suggests that ASIC should examine whether Mr Tuttle, Mr Brennan and Ms Reid received benefits in breach of section 200D of the Corporations Act. The evidence also suggests that ASIC should examine whether the directors caused RQL to give a benefit in breach of section 200B of the Corporations Act.

7.11 Conclusions and Recommendations

7.11.1 The relevant events are set out in detail above and do not need restating.

7.11.2 It is plain that, whilst the justification for the renegotiation of the Executives' contracts was said to be their retention, the result was that each Executive resigned at the earliest possible time and received the maximum payout. The amendments to their contracts were simply not in the interests of RQL.

7.11.3 It is also plain that the Executives were anxious in the lead up to the 2012 State election to resign as soon as possible whilst securing their payouts. On their abrupt resignations, the payments were made to the Executives in circumstances of unjustified urgency. Had those payments been delayed by as little as one hour they would not have been made.

Recommendations

7.11.4 Mr Bentley's conduct should be examined by ASIC to consider if he acted in breach of the duties he owed to RQL and whether he acted recklessly. The evidence before the Commission suggests that he failed to exercise care and diligence, acted recklessly in the face of substantial risks (of which he was well aware) and did not act in the best interests of RQL.

498 Submission of Rodgers Barnes & Green, 30 October 2013, Part 5 page 5-46 para 191.
499 *Corporations Act 2001*, section 1322(6).
500 Lexis Nexis, *Australian Corporations Practice,* [14.280].
501 *Cordiant Communications (Aust) Pty Ltd v Communications Group Holdings Pty Ltd* [2005] NSWSC 1005.

7.11.5 Mr Ludwig's conduct should be examined by ASIC to consider if he acted in breach of the duties he owed to RQL and whether he acted recklessly. The evidence before the Commission suggests that he did not discharge his duties as a member of the RNC and failed to exercise an independent assessment of the matters put before him.

7.11.6 The other directors' conduct should be examined by ASIC to consider whether they acted in breach of the duties they owed to RQL and whether they acted recklessly. The evidence before the Commission suggests that they made no independent assessment of the matters put before them and acted as no more than a rubber stamp.

7.11.7 Ms Reid's conduct should be investigated by the LSC to assess whether she acted in accordance with her ethical duties as a solicitor. Her actions in instructing Norton Rose to amend their advices to remove warnings to the board in particular demonstrated what might be considered a lack of integrity.

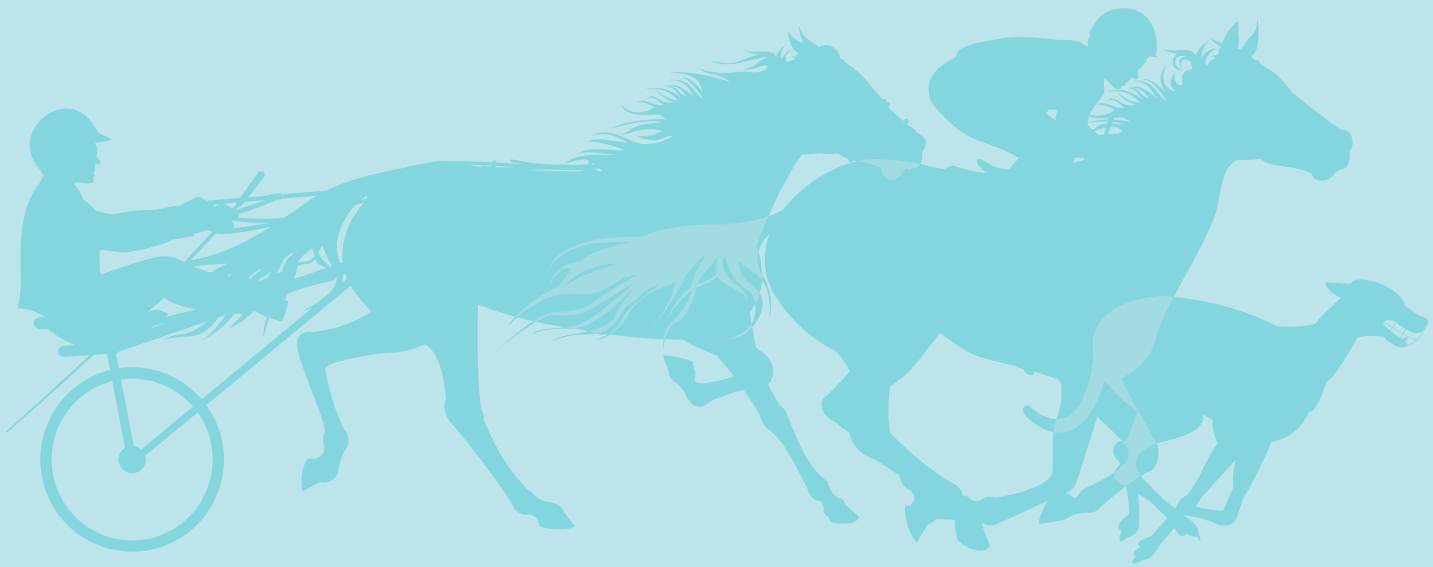
7.11.8 Ms Reid's conduct should also be examined by ASIC as to whether she acted in breach of the duties she owed to RQL. The evidence before the Commission suggests that many of Ms Reid's actions showed little appreciation for her duties as an officer of RQL.

7.11.9 Mr Tuttle's conduct should be examined by ASIC as to whether he acted in breach of the duties he owed to RQL. The evidence before the Commission suggests that he was in a position of inherent conflict, in which he favoured his own interests, and acted inappropriately when instructing Norton Rose to make the substantial amendments to their advice.

7.11.10 An analysis of the evidence before the Commission does not suggest that either Mr Brennan or Mr Orchard acted inconsistently with their duties to RQL.

7.11.11 The evidence before the Commission suggests that ASIC should examine whether Mr Tuttle, Mr Brennan and Ms Reid received benefits in breach of section 200D of the Corporations Act. The evidence also suggests that ASIC should examine whether the directors caused RQL to give a benefit in breach of section 200B of the Corporations Act.

Schedules for Chapter 7



Schedule A – Payout calculations

Summary

	TRV payout	Annual Leave payout	LSL payout	Severance pay	Superan-nuation	Total
Old Contract						
(a) resignation on change of government	-	114,787	202,357	-	-	**317,145**
(b) employment terminated	980,357	114,787	202,357	-	88,232	**1,385,733**
(c) redundancy on RQL ceasing to be control body	980,357	114,787	202,357	157,913	88,232	**1,543,646**
New Contract						
(d) resignation on change of government	1,154,893	144,877	255,402	199,308	103,940	**1,858,421**

Old Contract

(a) If resignation on change of government

	Annual Leave payout	Long Service Leave payout	Total
Brennan	31,893	57,336	89,229
Reid	2,994	-	2,994
Orchard	22,864	-	22,864
Tuttle	57,036	145,021	202,057
	114,787	**202,357**	**317,145**

(b) If RQL terminated on change of government

	Original TRV - 1 July 2011 - includes 3% CPI	Original TRV less employer super con-tribution	If termina-tion as at end March 2012 - 15 mths pay	Annual Leave payout	Long Service Leave payout	Severance Pay	Superan-nuation	Total
Brennan	185,400	170,086	212,607	31,893	57,336	-	19,135	320,971
Reid	123,600	113,391	141,738	2,994	-	-	12,756	157,489
Orchard	236,900	217,332	271,665	22,864	-	-	24,450	318,979
Tuttle	309,000	283,477	354,346	57,036	145,021	-	31,891	588,294
	854,900	**784,285**	**980,357**	**114,787**	**202,357**	**-**	**88,232**	**1,385,733**

(c) If RQL ceased to be the control body

	Original TRV - 1 July 2011 - includes 3% CPI	Original TRV less employer super contribution	If termination as at end March 2012 - 15 mths pay	Annual Leave payout	Long Service Leave payout	Severance Pay	Superannuation	Total
Brennan	185,400	170,086	212,607	31,893	57,336	39,251	19,135	360,223
Reid	123,600	113,391	141,738	2,994	-	23,987	12,756	181,475
Orchard	236,900	217,332	271,665	22,864	-	29,257	24,450	348,236
Tuttle	309,000	283,477	354,346	57,036	145,021	65,419	31,891	653,713
	854,900	**784,285**	**980,357**	**114,787**	**202,357**	**157,913**	**88,232**	**1,543,646**

New Contract

(d) When RQL exec mgt team of 4 resigned due to the change of government

	Increased TRV - includes 30% CPI	Original TRV less employer super contribution	In accordance with 15.2(a) - 14 mths pay	Annual Leave payout	Long Service Leave payout	Severance Pay	Superannuation	Total
Brennan	234,000	214,672	250,459	40,254	72,366	49,540	22,541	435,160
Reid	156,000	143,114	166,972	3,779		30,275	15,028	216,053
Orchard	299,000	274,303	320,031	28,858		36,926	28,803	414,617
Tuttle	390,000	357,786	417,431	71,987	183,037	82,567	37,569	792,591
	1,079,000	**989,875**	**1,154,893**	**144,877**	**255,402**	**199,308**	**103,940**	**1,858,421**

Schedule B – Norton Rose advice comparison

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
Addressee	*"The Chairman* *Racing Queensland Limited* *c/o Ms Shara Murray* *Senior Corporate Counsel* *Racing Queensland Limited"*	Unchanged	Unchanged
Purpose	*"We have been instructed to advise the Board of Directors of Racing Queensland Limited (Board) in relation to a retention strategy for the following executives of Racing Queensland Limited (RQL)..."* *"The Board has instructed us to advise on options available to it to address the ongoing need to retain and reward high performing executives in an environment of uncertainty, taking into account the legal obligations imposed on the Board in determining an appropriate level of remuneration and benefits."*	Unchanged	Unchanged
	"In this letter we have: *(1) considered the general obligations imposed on the Board under the Corporations Act 2001(Cth) (Act);* *(2) considered the specific requirements, if any, to avoid breaching the Act in relation to any benefits to be provided; and* *(3) provided an overview of the types of benefits that we consider would be appropriate in the circumstances that the Board may wish to consider."*	Unchanged	Unchanged

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
Basis for proposed amendments	*"Our suggestion of appropriate benefits that are not disproportionate and that would be in the interests of RQL is as follows:"*	*"Our suggestions for appropriate benefits that are not disproportionate, are the most straightforward* *and that are in the interests of RQL are as follows"*	Amendment accepted
TRV	Executive summary recommends TRV increase of 10 - 20%.	Executive summary recommends TRV increase of up to 30%	Amendment accepted
	"6.4 In our view and taking into account the need to retain the Executives, we would consider a moderate increase to the Executive's remuneration of between 10% and 20% would be reasonable in the circumstances. However, the precise increase depends whether other options are implemented by the Board."	*"6.4 In our view and taking into account the need to retain the Executives, we consider an increase to the Executive's remuneration of up to 30% would be reasonable in the circumstances. This is the most straightforward way to address the retention concerns"*	*"6.5 Taking into account the need to retain the Executives, we consider an increase to the Executive's remuneration of up to 30% would be reasonable, because that is the most straightforward way to address the retention concerns and would not constitute a breach of the Board's relevant legal obligations in our view."*
	"6.5 We consider that it is in the interests of RQL to maintain a moderate increase to each of the Executive's TRV whilst placing greater protection around longevity by implementing the retention options discussed below"	Deleted	Deletion accepted
Term	Inclusion of a new 5 year term commencing August 2011	Retention of the current 3 year term with an obligation on RQL to renegotiate before 31 December 2012	Amendment accepted
Notice period	Executive summary recommends *"a notice period for termination of the Executive Employment Agreement by either party without cause, which should be an amount (to be decided by the Board and agreed with the Executive) of no more than 12 months."*	Deleted	Deletion accepted

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
	"6.12 As notice of termination is taken into account in the calculation of termination payments under the Act, it would be appropriate here to limit the amount to that which would not breach the Act. Under the Act, the actual period of notice should not, when combined with the value of all other termination benefits, exceed the Cap. Any amount higher than this could be viewed as being inconsistent with the duties the Board owes to RQL under the Act. *6.13 So in the normal course, we would suggest that a notice period of up to 12 months would be reasonable depending on the seniority of the Executives. That amount would be reduced pro-rata if notice of termination is given in the final year of the term, but in that case, the retention payment would be payable. For that reason, we recommend setting the retention payment at the same amount as the notice period."*	*"6.12 RQL could consider increasing the notice required on termination without cause. In the normal course, we would suggest that a notice period of up to 12 months would be reasonable depending on the seniority of the Executives. That amount would be reduced pro-rata if notice of termination is given in the final year of the term, but in that case, the retention bonus would be payable.* *6.13 If there is an increase in this way to the notice period, the Board should consider restricting the increase to remuneration we have recommended (up to 30% of each Executive's TRV) to a more moderate amount (10% to 20%)."*	Deleted
Redundancy policy	Executive summary recommends the implementation of a company-wide redundancy policy, with payments based on length of service in a particular position	No change	No change

15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
	"6.18 You should note that the introduction of an RQL-wide redundancy policy would result in a cost impost on RQL in the event RQL decides to make any employee redundant. This is because for some employees, the current redundancy requirements contained in the FW Act are lower. *6.19 However:* *(1) the reason for implementing an RQL-wide redundancy policy is to increase the defensibility of a severance payment made to the Executive on termination of employment, equivalent to redundancy, on the basis that the redundancy component is no more than what other employees would receive; and* *(2) the introduction of a RQL-wide policy in this way reflects current employment practices."*	Paragraph 6.18 deleted and "*However*" in paragraph 6.19 replaced with "*In this context*"

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
Incentive bonuses	Executive summary recommends "*the inclusion of two incentive bonuses as follows:* *(a) a performance bonus linked to the achievement of certain outcomes, with payment of the bonus deferred (say, until half-way through the term and then at the end of the term) and conditional on the Executive remaining employed with RQL at that time, unless the Executive's employment is terminated by RQL earlier, in which case the bonus becomes immediately payable; and* *(b) a retention bonus of, say, 12 months of the Executive's TRV, payable on completion of the term by the Executive unless the term is renewed for a further period, or if the Executive's employment is terminated by RQL during the final year without cause."*	Deleted	Deletion accepted

15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
6.6 Under the Executive Employment Agreements there is currently no entitlement to a short or long term incentive. *6.7 In our view, it would be reasonable for RQL to put in place a short term incentive plan. We consider that this plan should have two limbs:* *(1) a performance bonus linked to the achievement of certain outcomes, with payment of the bonus deferred (say, until half-way through the term and then at the end of the term) and conditional on the Executive remaining employed with RQL at that time, unless the Executive's employment is terminated by RQL earlier, in which case the bonus becomes immediately payable; and* *(2) a retention bonus of, say, up to 12 months of the Executive's TRV, payable on completion of the term by the Executive unless the term is renewed for a further period, or if the Executive's employment is terminated by RQL during the final year without cause.*	Addition of: *"6.10 In our view however, if RQL was to incorporate an incentive plan into the Executive's remuneration, a more moderate increase to remuneration (10% to 20%) should be considered."*	Entire section on incentives deleted

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
	6.8 We recommend that the deferred bonus plan is determined having regard to comparable plans in the market. Relevantly, bonuses or incentives determined by the achievement of measurable targets are not included in the calculation of "benefits" for the purpose of the Cap. *6.9 The retention bonus, on the other hand, would be considered as a "benefit" for the purpose of the Cap as it is payable in connection with termination or cessation. However, in this case the other benefits such as payment in lieu of notice, redundancy, or payment on the occurrence of a material adverse change would not apply."*		
Material adverse change clause	Executive summary recommends inclusion of a material adverse change clause *"with a trigger that includes RQL ceasing to be a control body for the purpose of the Racing Act 2002 (Qld), a change to either the make up of the RQL Board, reporting lines for the Executive or an organisational restructure, or a reasonable expectation by the Executive of any of these triggers occurring."*	*"Change in State government"* is inserted as a trigger and the term *"reasonable expectation by the Executive of any of these triggers occurring"* is deleted.	Amendment accepted

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
	Payment to be: *"(a) a fixed amount equivalent to 12 months of each Executive's TRV as a material adverse change severance payment;* *(b) any accrued incentives (including any deferred incentives); and* *(c) all other legal entitlements (such as accrued leave);*	Payment to be: *"(a) a payment equivalent to the amount of each Executive's TRV that they would have received had the Executive remained employed by RQL to the completion of the term, plus an amount of severance pay equivalent to the RQL-wide redundancy pay payment, as a material adverse change severance payment; and* *(b) all other legal entitlements (such as accrued leave)"*	Amendment accepted
Cap on payments	Executive summary recommends: *"the inclusion of a clause limiting the payments of benefits (as defined in the Act) paid in connection with the termination to the Executive's average annual base salary (as defined in the Act)."*	Deleted from executive summary.	Deletion accepted
	In the concluding paragraph of the executive summary: *"the general effect of these benefits is that in circumstances of a termination or cessation other than for misconduct, an Executive would become entitled to a payment of up to... 12 months TRV"*	In the concluding paragraph of the executive summary: *"the general effect of these benefits is that in circumstances of termination or cessation due to a material adverse change, an Executive would become entitled to resign and trigger a payment equivalent to the amount each Executive would have received to the end of the term and a redundancy payment. We consider that this will provide the Executives with the protection they are seeking and satisfy RQL's desire to maintain the Executives' employment."*	No change from previous draft, except for insertion of words *"in the current environment"* in relation to the protection the Executives are seeking.

	15 July Draft	19 July Draft 1 (3.41pm)	19 July Draft 2 (8.01pm)
Justifications for amendments	*"We are instructed that without implementing a reasonable executive retention strategy, RQL considers it faces a real risk of the resignation of one or more of the Executives. Not only would a resignation of the Executives have serious implications for the ongoing operations of RQL, but it also places at risk a smooth transition to an alternate structure if one was implemented as a result of a change in the State Government."*	*"We are instructed that without implementing a reasonable executive retention strategy, RQL considers it faces a real risk of the resignation of one or more of the Executives.* *A resignation of the Executives would have serious implications for the ongoing operations of RQL."*	Amendment accepted
Part 2D.2 of the Corporations Act	Concludes that Part 2D.2 does not apply to RQL as: • none of the Executives have been appointed in the last 3 years as a director of RQL or related body corporate; and • RQL is not a disclosing entity for the purposes of Part 2D.2 of the Act.	Unchanged	Unchanged
	"4.12 Despite Part 2D.2 of the Act not applying, we consider the Board should take Part 2D.2 of the Act into account in determining the termination benefits to provide to the Executives, because, in our view, ostensible compliance with these provisions would provide RQL with a defensible position that the termination benefits are reasonable and in the best interests of RQL"	Unchanged	Deleted

Schedule C – Proposal evolution

	6 May 2011 RQL board resolution	24 May 2011 Tuttle draft clauses	2 June 2011 Clayton Utz draft advice	4 July 2011 meeting: Clayton Utz, Bentley, Tuttle and Reid	
TRV Increase				50% uplift in salary until 31 January 2012 (figure not finalised)	
Material adverse change clause		Triggers for redundancy if RQL received a show cause notice, ceased to be control body, or if any director received a show cause notice to cease being a director	*"...the proposed variations are not the optimal means for the Board to achieve its objectives."* Commented that no board resolution confirming changes		
Contract Term Length	Term for 9 executives and another employee until 30 June 2014 Term for 6 executive assistants until 30 June 2013	30 June 2014 Renegotiate before 30 June 2013	Extended contract term enlarges the TRV to be paid on redundancy	All contracts terminated 31 January 2012 From 1 February 2012 to 1 July 2012 Executives enter temporary contracts If State government did not change, then permanent contracts reoffered	
Redundancy payment		*"payment will be at least equivalent to the TRV you would have been entitled to receive had you remained employed for the period of the term of the contract."*	Tuttle clauses *"significantly extend[ed] the triggers for redundancy"* Giving employees option to take redundancy is not a true redundancy Redundancy payment quantum seems overly generous	When contract terminated 31 January 2012, Executives paid redundancy payment being the balance of their contract Repayable if State government did not change and permanent contracts executed	

	Draft Norton Rose Advice	Tuttle and Reid's instructions to Norton Rose	20 July 2011 Bentley board paper	5 August 2011 board paper/board resolution
	10 - 20% salary increase	30% salary increase from 1 July 2011	30% salary increase from 1 July 2011	30% salary increase from 1 July 2011
	Triggers: RQL ceasing to be control body under the Racing Act; change to the RQL board; change to reporting lines for the Executives or organisational restructure, allowing Executives to take voluntary redundancy and receive fixed amount equal to 12 months TRV, accrued incentives and leave	*"In the event of a change of government, LNP policy... triggers material change and redundancy payment in favour of employee for balance of term and entitlements"* Other triggers would include change of board member, or change of board.	Triggers: change in state government, RQL ceasing to be a control body, a change to the make-up of the RQL Board or reporting lines for the Executive or an organisational restructure, entitling each Executive to a payment, equivalent to the amount of each Executive's TRV, that they would have received had the Executive remained employed by RQL to the completion of the term plus an amount of severance pay equivalent to the RQL-wide redundancy pay payment and all other accrued entitlements	Triggers including change of State government A termination payment equivalent to a max of 14 months TRV Any accrued but unpaid entitlements
	5 year term commencing August 2011	30 June 2013 Renegotiate term before 31 December 2012	30 June 2013 Renegotiate term before 31 December 2012	Retention of current 3 year term with obligation to renegotiate before 31 December 2012
	Payment of a fixed amount equivalent to 12 months of each executive's TRV as a material adverse change severance payment, any accrued incentives (including any deferred incentives) and all other legal entitlements (such as accrued leave) Inclusion of a clause limiting the payments of benefits (as defined in the Act) paid in connection with the termination to the executive's average annual base salary	Remove reference to clause limiting the payments	Payment equivalent to the TRV the Executives would have received had they remained employed for the remainder of their contract Severance pay All other entitlements	A severance payment calculated in accordance with RQL redundancy policy

	6 May 2011 RQL board resolution	24 May 2011 Tuttle draft clauses	2 June 2011 Clayton Utz draft advice	4 July 2011 meeting: Clayton Utz, Bentley, Tuttle and Reid	
Incentive payments			Suggests a retention bonus paid in instalments annually to retain services; suggested amount of TRV split over 3 years, or 6 months TRV over 3 years Short term incentive payments for each key performance measure achieved		
Notice period/ waiver		6 weeks Option of shorter notice period, or complete waiver of notice period If notice waived, RQL obliged to pay out the notice period in full			

	Draft Norton Rose Advice	Tuttle and Reid's instructions to Norton Rose	20 July 2011 Bentley board paper	5 August 2011 board paper/board resolution
	Inclusion of two incentive bonuses; a performance or retention bonus	Remove references to incentive payments		
	Notice period for termination of the executive employment agreement by either party without cause, which should be an amount (to be decided by the board and agreed with the executive) of no more than 12 months	Reduce notice period to 7 days Include provision to be waived		Although not in board resolution, notice period of 7 days with option for chairman to waive

Chapter 8

TattsBet – Race Fields Information – Term of Reference 3(f)

"[T]he arrangements between Queensland Race Product Co Limited and the Tatts Group (comprising Tatts Group Limited ACN 108 686 040 and each of its subsidiaries, including TattsBet Limited ACN 085 691 738), and formerly UNiTAB, concerning fees paid by the Tatts Group for Queensland wagering on interstate races through TattsBet, in particular;

i. how Queensland Race Product Co Limited responded to the introduction of race information fees;

ii. whether the Boards of the relevant entities and/or Queensland Race Product Co Limited sought expert legal advice or other advice regarding the effect on fees payable by the Tatts Group to Queensland Race Product Co Limited as a consequence of race information fees being introduced and if not, why this advice was not sought;

iii. the reasons why any expert advice sought at any time following the introduction of race information fees was or was not acted upon; and

iv. whether the directors and senior executives of both the relevant entities and Queensland Race Product Co acted in good faith and consistently with their responsibilities, duties and legal obligations and the best interests of the company at the material time race information fees were introduced, or at any other time and whether their actions may have been influenced by any conflict of interest in being both a director of the relevant entities and/or Queensland Race Product Co Limited and/or the Tatts Group or by a relationship with any other person, or whether they used their position/s to gain a personal advantage ..."

8.1 Background

Early events

8.1.1 The Terms of Reference define the relevant period as commencing on 1 January 2007. However, to appreciate the issues relevant to this Term of Reference, it is necessary to refer to events which occurred prior to that date.

8.1.2 TAB Queensland Limited was incorporated on 1 July 1999. In November 1999, it was privatised. The name of the company changed to UNiTAB Limited in 2002. UNiTAB Ltd was delisted when Tattersalls Limited, now called Tatts Group Limited (Tatts Group), acquired all of its shares in November 2006. UNiTAB Limited later changed its name to TattsBet Limited (TattsBet).[1] TattsBet remains a wholly owned subsidiary of Tatts Group.

8.1.3 Since 1 July 1999, TattsBet has conducted a wagering business in Queensland using *Australian Racing Information* supplied to TattsBet by the three control bodies and then the amalgamated control body for the three codes of racing in Queensland.

1 ASIC 2013, *TattsBet Limited Company Report*. Available from: ASIC. [14 June 2013]. All references to TAB Queensland Limited, UNiTAB Ltd, UNiTAB Wagering and Tatts have been changed to TattsBet in this Chapter (with the exception of Schedule C).

8.1.4 *Australian Racing Information* is all the information relating to racing throughout Australia that is necessary for "the efficient and effective conduct of Race Wagering on Racing in Australia".[2] It includes interstate racing calendars and racing programs for each State and Territory, racecourse details, race details, thoroughbred/horse/dog details, jockey/driver details, race events, race results and other general racing industry information.[3]

Queensland Race Product Co Limited

8.1.5 As at 28 June 1999, the three control bodies for racing were the Queensland Principal Club (QPC), Queensland Harness Racing Board (QHRB) and the Greyhound Racing Authority (GRA). Amendments to the *Racing and Betting Act 1980* (Qld)[4] enabled these three control bodies to establish a corporation whose functions would include encouraging animal racing and coordinating meetings approved under the Act by the various control bodies as well as entering into an agreement with TattsBet.[5] For the purpose of encouraging animal racing in Queensland, those three control bodies established Queensland Race Product Co Limited (Product Co) to act as agent for the Queensland racing industry in its relationship with TattsBet.[6]

8.1.6 The constitution of Product Co required that there be six directors, four of whom were to be appointed by the control body for thoroughbred racing and one each for the other two codes.[7] The directors were given power under the constitution of Product Co to elect a director as chairman of the directors' meetings.[8]

8.1.7 By 1 January 2007, the directors of Product Co were Mr Anthony Hanmer (chairman), Mr William Ludwig, Mr William Andrews, Mr Michael Lambert, Mr Robert Lette and Mr Phillip Bennett (who was replaced on 4 August 2008 by Ms Kerry Watson).[9] They were the directors until December 2009 when Mr Andrews and Mr Lambert were replaced by Mr Bradley Ryan and Mr Wayne Milner.

The Product and Program Agreement

8.1.8 On 9 June 1999 the three control bodies and Product Co entered into a written agreement with TattsBet, called the Product and Program Agreement (the PPA), whereby Product Co agreed to supply *Australian Racing Information*, the *Queensland Racing Calendar* and the *Queensland Racing Program* to TattsBet.[10] The PPA remains in force in the same terms. The exclusivity period of the agreement expires on 30 June 2014.[11]

8.1.9 This information, noted above, was to be provided in a format specified by TattsBet. TattsBet used and uses the information in its race wagering business which it conducts in accordance with a race wagering licence granted pursuant to the *Wagering Act 1998* (Qld)[12]. The PPA provides that Product Co is obliged to supply the information to TattsBet and the three control bodies ensure that Product Co meets and performs its obligations under the agreement.[13] Further, Product Co has undertaken not to supply that information to any other person for use relating to wagering without the consent of TattsBet.[14]

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2 *Product and Program Agreement*, 9 June 1999, clause 1.1 "Australian Racing Information".
3 *Product and Program Agreement*, 9 June 1999, schedule 1.
4 *Racing Legislation Amendment Act 1998* (Qld).
5 Sections 8, 9, 16 and 23 of the *Racing Legislation Amendment Act 1998* (Qld) extended the functions, powers and duties of the Queensland Principal Club, Harness Racing Board and Greyhound Authority.
6 Queensland Race Product Co Limited (QRPC) 1999, Constitution, adopted by special resolution of members, 28 June, clause 3.1.
7 QRPC 1999, *Constitution*, adopted by special resolution of members, 28 June, clause 14.3.
8 QRPC 1999, *Constitution*, adopted by special resolution of members, 28 June, clause 20.1.
9 ASIC 2013, *Queensland Race Product Co Ltd Company Report*. Available from: ASIC. [14 June 2013].
10 *Product and Program Agreement*, 9 June 1999, recital B.
11 15 years from 1 July 1999. Sections 4 and 16 of the *Wagering Act 1998* (Qld).
12 *Product and Program Agreement*, 9 June 1999, recital B and clause 1.1.
13 *Product and Program Agreement*, 9 June 1999, recital C.
14 *Product and Program Agreement*, 9 June 1999, clauses 9.4(b) and 7.5.

8.1.10 The PPA provides that consideration for the supply be paid by TattsBet as a monthly fee to Product Co as agent for the three control bodies.[15] The calculation of the fee has varied over time; however by the commencement of the relevant period TattsBet was obliged to pay 39 per cent of its *gross wagering revenue* for the term of the PPA. This revenue is defined in the PPA to be the amount wagered by, and not refunded to, customers of TattsBet in the course of conducting race wagering on racing in Australia and in jurisdictions other than Australia.[16]

8.1.11 More particularly, the obligation to supply the information to TattsBet is provided in clause 9 as follows

> *9. SUPPLY OF AUSTRALIAN RACING PRODUCT*
>
> *9.1 Obligation to Supply the Australian Racing Product.*
>
> *Product Co must supply Australian Racing Product to [TattsBet]*
>
> *Timing of Supply of Australian Racing Product*
>
> *9.2 Product Co will supply [TattsBet] with Australian Racing Product in relation to each Race on which [TattsBet] offers wagering and in each case in sufficient time as will enable the effective and efficient conduct of Race Wagering.*
>
> *9.3 Format*
>
> *...*
>
> *9.4 Exclusivity of Supply of Australian Racing Product*
>
> *(a) Subject to clause 9.5 ... Product Co will be the exclusive supplier of Australian Racing Product to [TattsBet] for use in the Race Wagering Business.*
>
> *(b) Subject to clause 7.5(b) Product Co and the Queensland Control Bodies will not ... supply or grant any rights in relation to Australian Racing Product, Australian Racing Information ... to any other person for any use directly or indirectly relating to wagering on Racing without the written consent of [TattsBet]).*
>
> *...*
>
> *9.5 Inability to Supply Australian Racing Product*
>
> *(a) If Product Co cannot procure the Australian Racing Product it is required to supply to [TattsBet] or cannot comply with the requirements of [TattsBet] in relation to the format in which [TattsBet] requires Australian Racing Information pursuant to clause 9.3 then for the period [TattsBet] reasonably believes after consultation with Product Co, Product Co will not be able to procure Australian Racing Product, [TattsBet] may procure the equivalent of the Australian Racing Product from any other source and incur a Third Party Charge.*
>
> *(b) The amount of any Third Party Charge must be reasonably commercial in the circumstances, having regard to the need to maintain continuity of Australian Racing Product.*
>
> *(c) [TattsBet] may pay any Third Party Charge incurred pursuant to clause 9.5(a) and the Product Fee, in accordance with clause 10.2(c) will correspondingly be reduced by the amount of that Third Party Charge.*
>
> *... .*

15 *Product and Program Agreement*, 9 June 1999, clause 10.1.
16 *Product and Program Agreement*, 9 June 1999, clause 1.1, the definition of "Gross wagering revenue".

8.1.12 A *Third Party Charge* as used in clause 9.5 (c) is defined to mean

> *The amount of any fee payable or other consideration given by [TattsBet] to obtain the equivalent of the Australian Racing Product and the costs and expenses incurred by [TattsBet] in procuring the equivalent of the Australian Racing Product from a source other than Product Co.* [17]

8.1.13 Clause 10.2 records that TattsBet is irrevocably authorised to deduct and "set off from the fee payable pursuant to clause 10.1 ... the *Third Party Charge*".[18]

Queensland Racing Industry Inter-code Agreement

8.1.14 On 30 June 1999, the three control bodies entered into the Queensland Racing Industry Inter-code Agreement (the Inter-code Agreement) which established arrangements between the three codes for the distribution of revenue received by Product Co pursuant to the PPA.[19] Each code's share of the revenue was fixed at the following percentages:

- Thoroughbred Code 76.0%
- Harness Code 14.5%
- Greyhound Code 9.5%.

8.1.15 It is of some importance to note that the Inter-code Agreement was affected by the amalgamation of the three control bodies which occurred on 1 July 2010. Due to amalgamation, the Inter-code Agreement had no further application.[20] Despite the Shanahan Report recommending that the fund allocations remain in place until 2014,[21] the board of RQL considered the Inter-code Agreement extinguished and notified Product Co of their resolution on this issue.[22]

Supply of racing information to TattsBet

8.1.16 Racing Information Services Australia Pty Limited (RISA) was registered on 20 August 2003.[23] RISA was formed by the control bodies of thoroughbred racing in a number of Australian States and Territories (excluding Queensland). In 2003, these control bodies entered in to an agreement named the RISA Participation Agreement.[24] The primary objective of RISA was the "encouragement and promotion of horse races" via a "national consolidated racing information services business".[25] This involved developing a national standardised system for the collection, processing, storage, dissemination and protection of racing information.[26]

8.1.17 On 1 July 2007, the control body for thoroughbred racing in Queensland, Queensland Racing Limited (QRL), became a participant in RISA by a written agreement entitled the Deed of Accession.[27]

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17 *Product and Program Agreement*, 9 June 1999, clause 9. See also *Product and Program Agreement*, 9 June 1999, clause 1.1, the definition of "Third Party Charge".
18 *Product and Program Agreement*, 9 June 1999, clause 10.2(c).
19 *Queensland Racing Industry Inter-code Agreement*, 30 June 1999, recital G.
20 Memorandum of advice from Roger Derrington SC to David Grace, 23 December 2010; Memorandum of advice from Declan Kelly SC to Shara Reid, 19 January 2011; Letter from Barry Dunphy to Shara Reid, 31 May 2011.
21 That Commission recommended that a statutory board be established to "be responsible for the commercial functions of each code of racing" and that the allocation percentages (set out in the Inter-code agreement) be enforced by inclusion in the Act or subordinate legislation. Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report*, 30 August, page 12.
22 RQL, Board Meeting Minutes, 7 June 2011; Letter from Robert Bentley to Anthony Hanmer, 7 June 2011.
23 ASIC 2013, *Racing Information Services Australia Pty Limited Company Report*. Available from: ASIC. [24 July 2013].
24 The agreement was amended in December 2005. Memorandum from Shara Reid to the board of QRL, *Nominated Arrangements*, undated.
25 Racing Information Service Australia Pty Ltd 2008, *Constitution*, July, clause 2.1 and 2.1(a).
26 RISA 2008, *Constitution*, July, clause 2.1.
27 Memorandum from Shara Reid to the board of QRL, *Nominated Arrangements*, undated.

8.1.18 RISA charges wagering operators, and other customers, for the supply of race information. Under the RISA constitution, Participating Principal Racing Authorities receive a percentage of surplus funds as grants, subsidies or other financial assistance.[28] QRL was, after 1 July 2007, entitled to 18 per cent of surpluses.[29]

8.1.19 The control bodies in Queensland collate racing information from race clubs including licensing and registrations, handicapping, race results, files and reports in internal databases. This information is then recorded in national online databases either hosted by, or provided to, RISA.[30]

8.1.20 Queensland thoroughbred information is recorded in online databases hosted by RISA.[31] Queensland harness racing information is entered into an online system hosted by Racing Information Services Enterprise (RISE),[32] a subsidiary of Harness Racing Victoria. RISE provides this information to RISA for supply. Queensland Greyhound information is provided to Greyhound Racing Victoria (the national data repository) which then supplies the information to RISA.[33]

8.1.21 RISA supplies racing information for all three codes to TattsBet under a supply agreement. The charges made by RISA are in addition to the PPA fee paid by TattsBet. The RISA fee is a charge for the provision of racing information in the required format.[34]

The Gentlemen's Agreement

8.1.22 Traditionally, wagering by residents in Queensland involved betting on, among other things, interstate races, particularly prestigious thoroughbred races such as the Melbourne Cup. This type of wagering was largely conducted through local TABs and on-course bookmakers. [35] When this occurred there was "no requirement for wagering operators to pay interstate racing authorities for use of their product".[36] This was the result of a "so-called Gentlemen's Agreement in which:

- Betting and racing information could be freely exchanged between the States and Territories throughout Australia
- TABs and bookmakers would accept wagers on interstate racing without paying for the privilege (rather, payment was made to the local racing industry)
- TABs refrained from competing for customers outside their State or Territory".[37]

8.1.23 As stated by the Australian Productivity Commission in its Report on Gambling in Australia

> *...the Gentlemen's Agreement initially allowed each state to maximise the revenue [for] their racing industry. However, over time, it meant that the growth of a [state's] racing industry was proportional to the amount of wagering undertaken in that [state] on races all over Australia, rather than the amount of wagering on races actually held [there].*[38]

8.1.24 In each State and Territory, TABs hold an exclusive licence to "operate totalisators and to offer retail off-course wagering services".[39] As such, TABs pay a combined fee to the racing industry of the jurisdiction in which they operate. In Queensland, this is paid by TattsBet to Product Co under the PPA.

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28 RISA 2008, *Constitution*, July, clause 2.1(c).
29 RISA 2008, *Constitution*, July, schedule 4.
30 Letter from Scott Sharry to Executive Director (Commission), 18 October 2013.
31 IRIS and RoR (Registration of Racehorses) databases. Diagram, *Information flow to Tatts – Thoroughbreds*, Adam Carter, 28 October 2013.
32 This is a national database called "Harvey". Diagram, *Information flow to Tatts – Harness Racing*, Adam Carter, 28 October 2013; Letter from Scott Sharry to Executive Director (Commission), 18 October 2013.
33 The Queensland database is called "GRARUN". Diagram, *Information flow to Tatts – Greyhounds*, Adam Carter, 28 October 2013.
34 Lambert, M 2008, *Board Paper: 2.2 "Race Fields Legislation and the 'Gentlemen's Agreement'"*, 8 August, paragraph 5.
35 Australian Productivity Commission (APC) 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries – 16.17 and 16.18.
36 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.17 and 16.18.
37 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.17 and 16.18.
38 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.18.
39 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, box 16.2 at 16.6.

Corporate bookmakers and betting exchanges

8.1.25 In the 1950s, the racing industry had struggled "to deal with the growth in illegal off-course bookmakers who did not pay the racing industry for the right to bet on races, and took market share from the on-course bookmakers who did".[40] As outlined by the Australian Productivity Commission, this problem arose because

> *...the underlying legal framework [did] not protect the intellectual property produced by the racing industry. [It] allowe[d] some wagering operators to "free ride" on the contributions to the racing industry made by their competitors, without paying anything themselves.*[41]

8.1.26 A similar issue arose in the early 1990s when new entrants to the market changed the wagering landscape in Australia. The "advent of the internet along with the liberalisation of the wagering market to allow phone betting have facilitated the growth of corporate bookmakers and betting exchange providers" such as Betfair Pty Ltd.[42] By operating over the internet and by telephone (24 hours a day), these wagering operators are able to offer cheap and innovative wagering products to consumers. [43]

8.1.27 The differing business models between wagering operators with respect to profit margins were considered by the High Court in *Betfair Pty Ltd v Racing New South Wales*.[44] In the judgment, the court adopted the following passage from the joint reasons in *Betfair Pty Ltd v Western Australia*[45]

> *One form of betting lawfully conducted in Australia has been pari-mutuel or totalisator or 'TAB' betting. This is commonly called 'starting price' betting. It involves the determination of dividends in respect of a particular event by reference to the size of the betting pool (less the commission charges of the operator) and the number of successful bets; one consequence of this system ... is the absence of risk to the totalisator relating to the outcome of the event.*
>
> *Another form of betting is 'fixed odds' betting which is conducted by licensed bookmakers ...*
>
> *The evidence shows that, at the present day, when provided by bookmakers, 'fixed odds' involves the punter always placing a 'back' bet that an outcome (a win or place) will occur, whilst the bookmaker is always 'laying' the bet by betting that the outcome will not occur; however, the bookmaker may seek to balance the 'book' (and reduce risk) by 'betting back', that is to say, by placing bets with another bookmaker in favour of the result which has been wagered not to occur.* [46]

8.1.28 The court also noted that:

> *An essential difference between fixed odds betting conducted by Betfair and that conducted by bookmakers is that Betfair does not 'hold a book' and does not carry any risk on the outcome of the event. Another is that whilst punters cannot back an entrant to 'lose' when placing bets with a bookmaker (or on a [totalisator system]), they can do so with Betfair...*[47]

8.1.29 Wagering operators, particularly in regard to horse racing (totalisator, bookmakers and betting exchanges), offer similar products to consumers[48] and their respective business models affect their competitiveness. Betting exchanges, in particular, are low cost operators who offer lower commission rates.[49] Many corporate bookmakers operate within the Northern Territory and

40 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.2.
41 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.2.
42 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.5.
43 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.5.
44 [2012] HCA 12.
45 [2008] HCA 11.
46 *Betfair Pty Ltd v Racing New South Wales* at [27] adopting *Betfair Pty Ltd v Western Australia* [2008] HCA 11 at [50] and [51].
47 *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12 [28] adopting *Betfair Pty Ltd v Western Australia* [2008] HCA 11 at [57].
48 *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12 [25] referred to the "close substitutability between the various methods of wagering".
49 *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12 [33]; *Betfair Pty Ltd v Western Australia* [2008] HCA 11 at [59]

benefit from the lower rates of taxation and a more permissive regulatory regime.[50] TABs in comparison charge higher prices and offer lower rates of return due to their retail monopolies and additional operational costs.[51]

8.1.30 Initially, bookmakers and betting exchanges were not required to pay product fees to the racing industry and their lower cost business models enabled them to increase their share of the wagering market rapidly. [52] These wagering operators were not only taking a "free ride"; they were diminishing the market share of the TABs (or equivalent) in each State or Territory.[53]

Race fields legislation

Introduction

8.1.31 As corporate bookmakers and betting exchanges increased in prominence, certain States and Territories began introducing race fields legislation. This legislation established the basis and the level of remuneration that wagering operators were obliged to provide to the racing industry for the right to "use" and "publish" racing fields. Each State and Territory in Australia, with the exception of the Northern Territory, has now enacted race fields legislation.

8.1.32 In 2005, Victoria was the first State to introduce legislation restricting the publication of race information by wagering operators.[54] New South Wales[55] and Western Australia[56] followed in 2006.

8.1.33 Prior to 1 July 2008, TattsBet was not required to pay race field information fees in these States. Under the Racing Victoria Policy, developed in 2006, TattsBet was not charged to publish Victorian race fields as it was the primary source of funding for the Queensland racing industry.[57] In addition, the control bodies in WA and NSW did not seek to apply race field information charges against TattsBet.[58] The Gentlemen's Agreement remained in place despite the introduction of race fields legislation. However, this was about to change.

Legislation in NSW

8.1.34 In 2006, the *Racing Legislation Amendment Act 2006* (NSW) was enacted, which amended the *Racing Administration Act 1998* (NSW). These amendments made provision with respect to the publication of information (whether in NSW or elsewhere) about intended races of horses or greyhounds to be held at race meetings on licensed racecourses in NSW. In general, the amendments provided that it would be an offence for a person to publish a NSW race field (as defined in the Act) unless the person was authorised to do so.[59]

8.1.35 This situation changed, however, with the introduction of the *Racing Administration Amendment (Publication of Race Fields) Regulation 2008* (NSW) on 27 June 2008. These Regulations applied from 1 July 2008.[60] The Regulation amended the *Racing Administration Regulation 2005* (NSW) to prescribe, among other things, fees that may be imposed for race field publication approvals granted by relevant racing control bodies in NSW. The Regulation provided that a control body could impose, as a condition under a licence, a fee for the publication of NSW race fields. This fee was up to 1.5 per cent of the holder's wagering turnover relating to a race covered by the approval.[61] These provisions were enforced by NSW control bodies from 1 September 2008.

50 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.19.
51 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.7.
52 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.5.
53 APC 2010, *Gambling, Report no. 50*, Canberra, Chapter 16: Developments in the racing and wagering industries, 16.5 & 16.7.
54 The *Racing and Gambling Acts (Amendment) Act 2005* (Vic) inserted section 2.5.16A into the *Gambling Regulation Act 2003* (Vic).
55 *Racing Legislation Amendment Act 2006* (NSW) inserted section 33 into the *Racing Administration Act 1998* (NSW).
56 *Betting and Racing Legislation Amendment Act 2006* (WA) inserted section 27D into the *Betting Control Act 1954* (WA).
57 Crown Law advice from Jennifer Jones to Michael Kelly, 6 August 2008.
58 Lambert, M 2008, *Board Paper: 2.2 "Race Fields Legislation and the 'Gentlemen's Agreement'"*, 8 August, paragraph 5.
59 *Racing Administration Act 1998* (NSW), section 33 (version in effect from 1 July – 2 December 2008).
60 *Racing Administration Amendment (Publication of Race Fields) Regulation 2008* (NSW), section 2.
61 *Racing Administration Amendment (Publication of Race Fields) Regulation 2008* (NSW), section 16.

Subsequent legislation

8.1.36 Other States and Territories responded to the NSW amendments by either introducing or enforcing existing race fields legislation. Existing Victorian race fields legislation (amended in 2007) was enforced from September 2008.[62] In 2008 legislation was introduced in South Australia,[63] Tasmania[64] and Queensland.[65] In 2009 the ACT[66] enacted legislation and Western Australia amended and enforced existing race fields legislation.[67]

8.1.37 TattsBet was required to pay race information fees in these jurisdictions once legislation was enforced by control bodies.

The erosion of the Gentlemen's Agreement

8.1.38 In broad terms, race fields legislation targeted the *publication or use* (or both) of race fields information in the conduct of a wagering business.

8.1.39 For example, the *Racing Legislation Amendment Act 2006* (NSW) inserted section 33 into the *Racing Administration Act 1998* (NSW) which provided:

> ***33. Publication of NSW race fields restricted***
>
> *A person must not, whether in New South Wales or elsewhere, publish a NSW race field …*

8.1.40 However, the *Racing Administration Amendment Act 2008* (NSW), assented to on 3 December 2008, amended section 33 of the *Racing Administration Act 1998* (NSW) by changing the word "publish". The new section provided:

> ***33. Use of NSW race field information restricted***
>
> *(1) A wagering operator or prescribed person must not use NSW race field information …*

8.1.41 Section 32A, "meaning of use NSW race field information", was also inserted into the Act:[68]

> ***32A Meaning of "use NSW race field information"***
>
> *For the purposes of this Division, a person* ***uses NSW race field information*** *only if the person, whether in Australia or elsewhere:*
>
> *(a) publishes any NSW race field information, or*
>
> *(b) communicates any NSW race field information to a person (regardless of whether the person already knew the information), or*
>
> *(c) acknowledges or confirms any NSW race field information communicated to the person (including acknowledging or confirming the information by accepting, or facilitating the making of, a bet), or*

62 The *Gambling Legislation Amendment (Problem Gambling and Other Measures) Act 2007* inserted section 2.5.19B into the *Gambling Regulation Act 2003* (Vic). Date of effect outlined in *TAB Limited v Racing Victoria Limited; TAB Limited v Greyhound Racing Victoria* [2009] VSC 338.
63 *Statutes Amendment (Betting Operations) Act 2008* (SA) inserted sections 62E and 62G into the *Authorised Betting Operations Act 2000* (SA). These provisions took effect from 1 September 2008.
64 The *Racing Regulation Amendment (Race Fields) Act 2008* (Tas) inserted section 54A into the *Racing Regulation Act 2004* (Tas). These provisions took effect from 1 July 2009.
65 The *Revenue and Other Legislation Amendment Act (No.2) 2008* (Qld) inserted sections 113C and s113E into the *Racing Act 2002* (Qld). The provisions took effect from 1 September 2008.
66 The *Racing Amendment Act 2009* (ACT) inserted section 61F into the *Racing Act 1999* (ACT). The legislation took effect from 1 March 2010.
67 The *Betting and Racing Legislation Amendment Act 2006* (WA) inserted section 27D into the *Betting Control Act 1954* (WA). This section was amended by the *Racing and Wagering Legislation Amendment Act 2009* (WA). A levy was imposed from 1 September 2008 as per section 4 of the *Racing Bets Levy Act 2009* (WA).
68 *Racing Administration Act 1998* (NSW) as amended by the *Racing Administration Amendment Act 2008* (NSW).

(d) makes a written or electronic record (such as a betting ticket, statement of account or notice) that contains or refers to any NSW race field information (regardless of whether the record is communicated to any person), or

(e) uses any NSW race field information in a manner prescribed by the regulations, or

(f) causes any of the activities referred to in paragraphs (a) – (e) to occur.

8.1.42 On 16 July 2008 TattsBet wrote to Racing NSW in respect of publication of NSW race fields:

[TattsBet] is the principal source of funding for the racing industries in Queensland, South Australia and the Northern Territory. Through its arrangements with the Queensland and South Australian racing industries, [TattsBet] makes payments to the respective racing industries of 39% of race wagering revenue. In the Northern Territory, the Racing Industry is funded from the wagering taxes paid to the Northern Territory Government.

Considering the above we are somewhat perplexed as to why the mutuality conventions which have, until the introduction of this legislation, been applied between the various TABs and their respective racing industry bodies, are not recognised by your application process. It is even more difficult to understand when this is considered in the light of the fact that NSW thoroughbred racing information is currently provided to [TattsBet] via a commercial arrangement with RISA, being an organisation in which each of the principal racing authorities (including Racing NSW) are shareholders.

We therefore consider that a direct contribution to NSW Racing from [TattsBet] is not required, and request that pursuant to regulation 15 of the Racing Administration Regulation 2005, NSW Racing recommend to the Minister that the publication of NSW thoroughbred race fields by [TattsBet] be authorised by Minister.

If [TattsBet] is not able to procure and subsequently publish NSW thoroughbred race fields, it should be noted that the respective State racing bodies and Northern Territory Government have an obligation to secure such information for [TattsBet] under the various product supply and racing distribution agreements. [69]

8.1.43 By letter dated 22 July 2008 Racing NSW responded:

I refer to your letter dated 16 July 2008 which Racing NSW received yesterday.

*The recently proclaimed amendments to the Racing Administration Act 1998 (NSW) ("**the Act**") require all wagering operators, amongst persons, to obtain the approval of Racing NSW to any publication of a NSW thoroughbred race field (whether that publication occurs in NSW or elsewhere).*

No exemptions from the requirement to obtain approval from Racing NSW under the Act have been granted to any wagering operator. Racing NSW would strenuously object to any such exemption being granted to [TattsBet] or any other wagering operator.

*Accordingly, [TattsBet] will need to apply to Racing NSW for approval under the Act to publish NSW thoroughbred race fields. In accordance with the Racing Administration Regulation 2005 (NSW) ("**the Regulations**"), such application is ordinarily required to be lodged with Racing NSW at least 30 days in advance ... .*

[TattsBet's] arrangements with RISA, which expire in November 2008, relate to the supply to [TattsBet] of formatted, consolidated wagering information for which [TattsBet] pays a fixed annual data processing and formatting fee. These arrangements are different in kind to, and do not confer, an approval to publish NSW race fields for the purpose of the Act.[70]

69 Letter from Barrie Fletton (TattsBet) to Keith Bulloch (Racing NSW), 16 July 2008.
70 Letter from Peter V'landys (Racing NSW) to Barrie Fletton, 22 July 2008.

8.1.44 The view of the chairman of QRL, Mr Bentley, was that if NSW Racing were to go ahead with the approach made plain in the above correspondence, it would have a major impact throughout Australia.[71]

8.1.45 Indeed, as each of the States introduced legislation with regulations to the same effect, control bodies elected to impose fees on all wagering operators including those bodies that were, or remained, the TAB for each State. As such, the historical arrangement between the States changed and the effect of the Gentlemen's Agreement came to an end.

The PPA challenged

8.1.46 For the first time, commencing on 1 September 2008, TattsBet was obliged to pay fees for the use of NSW race fields when its Queensland customers wagered on NSW racing. On 10 October 2008, TattsBet delivered its monthly invoice for September to Product Co. The invoice recorded that TattsBet had deducted the race field fees, paid to the NSW control bodies, from the 39 per cent share of its wagering revenue which TattsBet was obliged to pay to Product Co.[72] TattsBet continued to deduct the race fields fees imposed on it for the publication or use of NSW race fields and thereafter commenced to deduct the charges imposed by other State and Territory control bodies.

8.1.47 Each month, TattsBet delivered an invoice to Product Co reporting the share of its wagering revenue payable pursuant to the PPA and recording the particulars of deductions for each of the codes. The deductions made are set out in Schedule A to this Chapter. Interstate fees were passed onto Product Co as follows:

a) NSW from September 2008
b) Victoria from January 2009
c) South Australia from March 2009
d) Western Australia from January 2010
e) ACT from March 2010
f) Tasmania from August 2011.

8.1.48 These interstate race field fees were not anticipated in 1999. Hence, from September 2008, a new issue arose for the control bodies in Queensland and for Product Co as to whether the terms of the PPA entitled TattsBet to deduct race field fees from the amount payable to Product Co.

8.2 The Grace advice

Background

8.2.1 Soon after 1 July 2008, with the introduction of the *Racing Administration Amendment (Publication of Race Fields) Regulation 2008* (NSW), TattsBet communicated to QRL the position it intended to take should the NSW control bodies impose charges on them for publication of NSW race fields. By letter dated 24 July 2008, TattsBet wrote to QRL:

> ***Re Publication of NSW race fields by Australian wagering operators***
>
> ...
>
> *Clause 9.5 and 10.2 of the Product and Program Agreement relevantly provide that should Product Co be unable to procure the supply of Australian Racing Product as required by*

71 Email from Robert Bentley to Dick McIlwain, 9 July 2008, 5.13pm.
72 TattsBet, Recipient Created Tax Invoice, 10 October 2008.

*[TattsBet], [TattsBet] may reduce the product fee payable to Product Co by any amount required to be paid by [TattsBet] to procure the Australian Racing Product for use in its race wagering business. In the case of NSW thoroughbred racing, this amount would be equal to 1.5% of wagering turnover on NSW thoroughbred racing (**NSW Race Fields Fee**).*

Please accept this letter as written notification that should [TattsBet] be required to pay the NSW Race Fields Fee or any similar fee to Racing NSW, [TattsBet] will off-set this amount against the product fee payable to Product Co ... [73]

8.2.2 The response of the chairman, Mr Bentley, was to communicate this position to the Minister responsible for racing in Queensland, the Treasurer, Mr Andrew Fraser. Mr Bentley requested that similar race fields legislation be introduced in Queensland:

As you have been aware for some time Queensland Racing Limited (QRL) has been seeking the support of Government to introduce Race Fields legislation similar or parallel with Victoria 2006, West [sic] Australia (WA) 2007, South Australia 2007, to protect the income base of the Queensland industry in the event of a breakdown in the Gentlemen's Agreement.

NSW has recently enacted legislation and is aggressively seeking to charge a product fee, whilst Victoria is currently amending its legislation, which previously recognised the Gentlemen's Agreement, to a more aggressive stance and will not exempt interstate wagering operators ([TattsBet] and WA Tote).

The Queensland industry is exposed to substantial losses of revenue through the lack of corresponding legislation ...

As a result of this fee being levied against [TattsBet], [TattsBet] will pass on the associated cost to the 3 control bodies (refer enclosed letter). The product fee payable to the 3 codes of racing in Queensland will be diminished. As a consequence, QRL remains of the view that the State Government, in consultation with the industry should move quickly to develop similar Race Fields legislation that would, in essence, have the effect of combating the financial impact that the 3 codes of racing in Queensland will feel as a result of [TattsBet] being able to pass on the associated costs to the racing industries in Queensland ...[74]

8.2.3 On 30 September 2008 Mr Bentley wrote again to the Treasurer. He addressed the financial impact of the interstate race fields fees being on-charged to the Queensland control bodies and advanced the case for Queensland race fields legislation to be introduced.[75]

8.2.4 On 4 October 2008 the Treasurer announced, by media release, that the Queensland government would introduce race fields legislation to protect the future of the industry in Queensland.[76]

8.2.5 On 8 October 2008, Mr Bentley contacted Mr David Grace, an experienced commercial solicitor who had acted for QRL previously on many occasions. Mr Bentley had a high regard for Mr Grace as a commercial lawyer.[77] Indeed, by 2008, fees charged to QRL by Cooper Grace Ward were in the order of $250,000 per year.[78]

73 Letter from Barrie Fletton to Malcolm Tuttle, 24 July 2008.
74 Letter from Robert Bentley to Andrew Fraser cc: Anthony Hanmer, Robert Lette, Kerry Watson, William Andrews, William Ludwig, Michael Lambert, 29 July 2008.
75 Letter from Robert Bentley to Andrew Fraser, 30 September 2008.
76 A Fraser, "Queensland to Introduce 'race fields' legislation to protect future of racing", *Ministerial Media Statements*, 4 October 2008.
77 QRL, Board Meeting Minutes, 4 August 2006.
78 See schedule of QRL/RQL legal fees – Schedule B to this Chapter.

8.2.6 On that occasion, Mr Bentley discussed the history of the PPA with Mr Grace. He indicated to Mr Grace that its intent was that TattsBet "be not worse off by force of Queensland Racing supplying race information elsewhere". [79] The indication, in the discussion, was that if there was a problem, a renegotiation with TattsBet should take place and should be undertaken by Mr Grace for QRL.[80]

8.2.7 Mr Bentley did not have the authority of the board of QRL to consult Mr Grace nor the authority to appoint him to conduct a renegotiation with TattsBet.[81] Further, the negotiation of the arrangement would require the input of the control bodies for the other two codes and Product Co, as they too were parties to the PPA.

8.2.8 Mr Bentley certainly had no authority to act for Product Co, as Mr Hanmer (its chairman) made plain in his oral evidence to the Commission.[82]

8.2.9 On 10 October 2008 TattsBet forwarded an invoice to Product Co which noted, for the first time, the deduction of race fields fees in the following sums:

- Thoroughbreds $483,624.27
- Harness $ 69,886.85
- Greyhounds $ 98,977.79.[83]

8.2.10 On 13 October 2008, the board of Product Co met. Those at the meeting included Mr Hanmer, Mr Ludwig, Mr Lambert (by teleconference), Ms Watson, Mr Lette and executive staff from QRL and Queensland Harness Racing Limited (QHRL) (Mr Malcolm Tuttle, Ms Shara Reid, Mr Adam Carter and Mr Damien Raedler). Mr Andrews was not in attendance.

8.2.11 Despite the oral evidence of a number of witnesses (who were in attendance)[84] that Mr Bentley did not attend that meeting, there is evidence to indicate that he did. Two versions of draft minutes were produced to the Commission as part of the records of Product Co and its directors.[85] Both versions have handwritten notations recording Mr Bentley being present. Further, Mr Lambert recalls that Mr Bentley did attend at least one meeting of Product Co.[86]

8.2.12 The board of Product Co resolved at that meeting that each control body would consider its position and provide feedback in relation to the race fields legislation issue.[87]

8.2.13 On 14 October 2008, Mr Hanmer forwarded a letter to the Treasurer in relation to the discussion of the race fields legislation issue by the board of Product Co. The letter was copied to Mr Bentley, Mr Lette, Ms Watson and Mr Michael Kelly of the Office of Racing. In it, Mr Hanmer informed the Minister that Product Co would continue to keep the government "briefed in relation to our considerations as they relate to Race Fields Legislation".[88]

79 Diary note (handwritten and typed up copy), David Grace, 8 October 2008, 7.20am.
80 Diary note (handwritten and typed up copy), David Grace, 8 October 2008, 7.20am.
81 Transcript, Robert Bentley, 20 September 2013, page 21 lines 1-14; Transcript, Anthony Hanmer, 26 September 2013, page 17 lines 1-15.
82 Transcript, Anthony Hanmer, 26 September 2013, page 18 lines 3-15, 35; page 21 lines 20-35.
83 UNiTAB, Recipient Created Tax Invoice, 10 October 2008.
84 Transcript, Anthony Hanmer, 26 September 2013, page 3 lines 8-25; page 4 lines 4-40; Transcript, Malcolm Tuttle, 1 October 2013, page 24 line 42-page 25 line 5; Transcript, William Andrews, 30 September 2013, page 16 lines 24-39.
85 QRPC, Draft Board Meeting Minutes, 13 October 2008.
86 Transcript, Michael Lambert, 30 September 2013, page 23 lines 11-24; Mr Lambert recalled Mr Bentley attending "at least one meeting involving "race fields legislation": Transcript, Michael Lambert, 30 September 2013, page 28 lines 21-43.
87 QRPC, Board Meeting Minutes, 13 October 2008.
88 Letter from Anthony Hanmer to Andrew Fraser, 14 October 2008.

8.2.14 On 29 October 2008, Mr Tuttle emailed Mr Grace in the following terms:

> *Following our discussions today [please] find attached the draft Bill and Regulations. Below is an email that has been sent to the Board with the attachments. The Board did have a teleconference meeting and the main points raised were,*
>
> 1. ***Ensure that the draft Bill enables QRL to appoint an agent for the purpose of collecting wagering information.***
> 2. ***The legislation should provide an option to have mutual agreements with interstate parties in terms of the exchange of Racing Information (it is understood that this exists in SA and Vic legislation but not NSW).***
>
> *...*
>
> *We require CGW to advise on the draft Bill and Regs and in particular the implementation framework that we will put in place. The advice from you on these matters will follow in time after we have completed more work.*
>
> *In the meantime it is important that we understand the implications that exist as a result of existing agreements in particular the Product and Program Agreement and also agreements with RISA (Racing Information Service Australia). ... [TattsBet] as a result of Product and Program (PP) Agreement passes these costs onto Product Co and in turn the codes of racing including QRL.* ***Refer to PP agreement 10.2(c). We need to confirm that [TattsBet] is entitled to do this. I suspect that 7.4(f) confirms this without doubt but would like to be certain. ...***[89]
>
> (emphasis added)

8.2.15 Clearly enough, Mr Tuttle was seeking the advice from Mr Grace for QRL.

8.2.16 On 31 October 2008, Mr Bentley and Mr Tuttle met with Mr Grace. At the public hearings, they had no clear recollection of the discussion at that meeting.[90] However, the exchange was recorded in a diary note made at the time by Mr Grace. Mr Grace provided the Commission with a typed transcription of his handwritten note.[91]

8.2.17 Mr Bentley explained to Mr Grace the background to the PPA and identified issues which had arisen because of the introduction, among other things, of interstate race fields legislation and the impact on the PPA fee payable by TattsBet.

8.2.18 It is not clear whether Mr Grace gave legal advice orally to Mr Bentley and Mr Tuttle at that meeting. Mr Bentley could not remember the meeting.[92] Mr Tuttle's evidence was that he did not believe that Mr Grace expressed a view in relation to the proper construction of the PPA.[93] However, subsequent conduct suggests that he had done so.

8.2.19 The next day, on Saturday 1 November, Mr Bentley emailed Mr Dick McIlwain, the chief executive officer of TattsBet (and copied to Mr Grace and Mr Tuttle). The subject was "meeting or discussion with David Grace":

89 Email from Malcolm Tuttle to David Grace, 29 October 2008, 3.47pm.
90 Transcript, Robert Bentley, 20 September 2013, page 17 lines 18-26; Transcript, Malcolm Tuttle, 1 October 2013, page 12 lines 6-15.
91 Handwritten (and typed up) file note, David Grace, 31 October 2008
92 Transcript, Robert Bentley, 20 September 2013, page 17 lines 18-26.
93 Transcript, Malcolm Tuttle, 1 October 2013, page 12 lines 19-41.

Dick,

David Grace of Cooper Grace Ward is acting for Queensland Racing and will contact you as soon as possible on Monday morning to discuss what appears to be ***an unintended outcome of the race fields legislation as it relates to clause 7.5(d) and clause 10.2(c) of the Product and Programme Agreement.***

Malcolm Tuttle is handleing [sic] the issue for Queensland Racing and is available and authorised to discuss the matter for Queensland Racing.

Kind regards,

Bob

Malcolm [telephone number]
David Grace [telephone number][94]

(emphasis added)

8.2.20 On 3 November, Mr Tuttle had a further conference with Mr Grace. Mr Grace's note, made at the time (the handwriting was transcribed by him for the Commission), recorded the following:

You do not require that I look at legin [legislation] or regins [regulations] overnight.

In 2008

does giving effect to the 1999 agreement→ slc in market for wagering in Qld; because the race field legin [legislation] means that each other State Control body gets revenue which is denied to QRC – 10.2(c).

9.4(b)

look at 9.4(b) QCB will not supply or grant any rights to Australian Racing Product, Aust Racing Info, ATC or the M'kting rights to any other person for any use directly or indirectly in relation to wagering on Racing without written consent of [TattsBet].

Requires [TattsBet] consent to supply info to Tagcorp. …

Is there to be a minimum project for Qld Racing Info no matter what.

Why should [TattsBet] agree to vary the advantage under 7.5

This does not fall under Force Majeure.[95]

8.2.21 At 1.40pm on 3 November, Mr Tuttle emailed Mr Grace on the subject "Dick McIlwain [TattsBet]":

David

Can you pls call me re Dick McIlwain. I've left a message on your voice mail. My understanding is that we may be able to sort this out with an initial call and follow up letter.

Tks Mal.[96]

8.2.22 On 3 November, Mr Grace had a telephone conversation with Mr McIlwain at 3.45 pm.[97] The substance of the discussion is apparent from documents created after the conversation.

94 Email from Robert Bentley to Dick McIlwain cc: David Grace, Malcolm Tuttle, 1 November 2008, 11.09am.
95 Handwritten (and typed up) file note, David Grace, 3 November 2008.
96 Email from Malcolm Tuttle to David Grace cc: Dick McIlwain, 3 November 2008, 1.40pm.
97 File note, David Grace, 3 November 2008.

8.2.23 On 4 November, Mr McIlwain emailed Ms Anne Tucker (TattsBet legal counsel)[98] about "Product Agreement – QRI":

> *Anne,*
>
> *David Grace and Malcolm Tuttle called this morning. They now consider that 7.5(c) applies only to entities listed in Schedule 4 and that 7.5(b) applies to the supply of Racing Information to other racing bodies. They also said that the legislation only refers to charging for using the product, not supplying race fields. Eerie eh! Consequently they are now OK.*
>
> *I encouraged them to get the legislation approved (I think they were probably holding it up) and begin charging. I've told him that we would give them approval to supply the information for the purpose of recovering our deductions from the PPA anyway. I made it clear that I didn't believe that the PPA ever contemplated that we could double dip and it wasn't our intention to double-dip in any event.*
>
> *If you think that there is any exposure here, let me know.*
>
> *Dick McIlwain*[99]

8.2.24 It would seem likely that the "unintended outcome" (mentioned by Mr Bentley in his email of 1 November 2008) was a reference to the view, held by Mr Grace, that TattsBet was not entitled to deduct fees paid by it to NSW Racing as a *Third Party Charge* under the PPA.[100] That was certainly the view held by Mr Tuttle at the public hearings.[101] That said, it would appear that Mr Tuttle was, at that stage at least, comfortable that if QRL was charged by TattsBet for the interstate race field fees paid by TattsBet, then so long as TattsBet did not seek to clawback the fees charged by QRL pursuant to Queensland race fields legislation (then in contemplation) that outcome was acceptable. This position was reflected in the statement received by the Commission from Mr Tuttle after the public hearings.[102]

8.2.25 On 11 November, Mr Grace forwarded a letter to Mr McIlwain of TattsBet:

> ***Qld Racing Ltd – Product and Program Agreement***
>
> *We refer to our telephone discussion with you on 3 November and our further discussion, including Mr Malcolm Tuttle of Queensland Racing Ltd on 4 November 2008.*
>
> *...*
>
> *We further note your comment that if [TattsBet] was requested to consent to the supply of information for a consideration or benefit, it was not the intention of the agreement that there be a provision for double dipping and that you would consent to the provision of Australian Racing Information even if a consideration or benefit was to be directly or indirectly received by Queensland Racing Ltd, or Product Co.*
>
> *We further note your support that race day legislation be introduced into Queensland as soon as possible and your general support that Queensland Racing charge as provided for in the draft legislation. ...*[103]

98 Transcript, Robert Bentley, 20 September 2013, page 29 lines 37-44.
99 Email from Dick McIlwain to Anne Tucker, 4 November 2008, 11.35am.
100 Submission of Rodgers Barnes & Green (on behalf of Messrs Bentley, Hanmer, Ludwig, Milner, Orchard, Tuttle, Brennan, and Ms Reid), 30 October 2013, Part 6 page 6-23 para 93, stated that it was "most unlikely that the reference to an unintended outcome was to the fees paid by Tatts in NSW deducted from the fees payable under the PPA". Indeed, that was the expected outcome on the oral evidence of Mr Hanmer: 25 September 2013, page 81 lines 6-14; 26 September 2013, page 57 lines 31-33. What was unexpected was that Mr Grace considered it was not able to be deducted.
101 Transcript, Malcolm Tuttle, 1 October 2013, page 29 lines 8-33; also, the letter of advice of Mr Grace created subsequently supports the conclusion.
102 Statement of Malcolm Tuttle, 23 October 2013, page 6 para 19.
103 Letter from David Grace to Dick McIlwain, 11 November 2008.

8.2.26 The comment of Mr McIlwain, as to the intention of TattsBet if it was requested to consent to the supply of information for consideration or benefit, addresses a contingency which did not come to pass. Indeed, as Mr Grace was to advise on 11 November 2008 (at first in draft), the race fields legislation to be introduced in Queensland was not concerned with the supply of information for a fee, but a fee for use of information already held.

The letter of advice of 18 November 2008

8.2.27 Having transmitted a draft of the letter of advice on 11 November, Mr Grace sent his final letter of advice to Mr Tuttle on 18 November 2008 (the letter of advice).[104]

8.2.28 What is of concern is that the members of the board of QRL, other than Mr Bentley, who were also board members of Product Co, had no involvement in these events. Nor were they involved in the decision to retain Mr Grace to provide the advice.[105]

8.2.29 This is remarkable because the directors of QRL sought to manage Mr Bentley's conflict (of duty to QRL and duty to Tatts Group) by having such matters involving dealings with the Tatts Group, particularly in relation to the PPA, dealt with by Product Co, of which he was not a board member.

8.2.30 Mr Bentley informed Mr Kelly of the Office of Racing that he was careful to manage his potential conflict by this means. Mr Bentley also stated that he did not receive Product Co minutes as an "added precaution".[106]

8.2.31 The issues addressed by Mr Grace in the letter of advice involved a consideration of the proposed entitlement (under the draft Queensland legislation) for the Queensland control bodies to impose a fee on wagering operators in respect of the *use* of Queensland racing information. Mr Grace makes the point that the charge was for the publication or the *use* and not *supply* and as a consequence was not caught by clause 7.5 of the PPA.

8.2.32 Clause 7.5(c) restricts Product Co and the control bodies *supplying* the Queensland Racing Calender or Program to "any other person for any use directly or indirectly relating to wagering on racing without the prior written consent of [TattsBet]".[107] The draft bill for the Queensland race fields legislation did not contemplate the *supply* of Queensland race fields. As with the other States, it focused upon *use* of that information which was assumed to be already held by them.

8.2.33 Mr Grace, in his letter, confirmed his instructions that "RISA supplie[d] the information". He concluded that any fee paid by TattsBet to RISA for the supply of information would be deductible from the amount payable, as this product fee legitimately fell within the definition of a *Third Party Charge*.[108]

8.2.34 The letter of advice also addressed the entitlement of TattsBet to deduct race field fees imposed on it and paid to interstate control bodies. Mr Grace set out his conclusions as follows:

> ***Summary***
>
> 1. *Queensland Racing will be entitled to impose a fee in respect of the* ***use*** *of Queensland Racing information to any licensed wagering operator (as defined to include:*
>
> *"a wagering operator that holds a licence or other authority –*
>
> *(a) under the law of a State or foreign Country; or*

104 Email from David Grace to Malcolm Tuttle, 11 November 2008, 5.52pm; Email from David Grace to Malcolm Tuttle, 18 November 2008, 1.13pm.
105 Transcript, Robert Bentley, 20 September 2013, page 21 lines 1-25.
106 Email from Robert Bentley to Michael Kelly, 3 January 2010, 1.17pm; Statement of Robert Bentley, 26 July 2013, pages 14 and 15 para 43(c).
107 *Product and Program Agreement*, 9 June 1999, clause 7.5(b).
108 Letter from David Grace to Malcolm Tuttle, 18 November 2008.

(b) *issued by a control body, or a principal racing authority to another State or a foreign Country authorising it to conduct a wagering business."*

2. *The amount to be charged to [TattsBet] in respect of an authorisation to use that information provided under PPA will take account of the amount payable under clause 10.1 of PPA.*

3. *In our opinion, the amount of the product fee payable under 10.1 will not be the subject of any offset or deduction under 10.2(c) and by way of a Third Party Charge in respect of monies paid to anyone else for the provision of Australian Racing Product (as defined under the PPA) where that* ***fee is not paid for obtaining or procuring*** *the amount but rather for* ***the use or publication of it*** *under legislation empowering that body to charge a fee in respect of the publication or use of that information, as distinct from obtaining or procuring it.*[109]

8.2.35 It is relevant to note that the introduction to the letter of advice referred to meetings which had occurred on 31 October and 4 November 2008. The first involved Mr Bentley, Mr Tuttle and Mr Grace despite the protestations made by Mr Bentley that he did not involve himself in such issues where he had the potential for a conflict of duty to QRL and his duty to Tatts Group.[110]

8.2.36 The letter of advice also recorded the following after the "summary" of Mr Grace's conclusions:

> ***In discussion,*** *the question as to whether an argument that a charge for the right to use or publish information obtained at a cost (obtained or procured or supplied) may be seen as somewhat of semantics, that concern would arise because no party would commercially obtain, procure or have supply of information which did not carry with it the right to use it. ...*
>
> *We understand that it is the intent of Parliament that the financial arrangements within Wagering be restructured to provide a benefit to industry through payments raised by the control body pursuant to the amending legislation. Accordingly, it is quite proper that these charges be collected without deduction. They are a charge imposed under statute which alters the way industry is funded by transferring a part of the wagering turnover to the industry control body for the benefit of the industry it serves ...*
>
> *Clause 9.5 enables [TattsBet] to procure the equivalent of that information from another source and incur a Third Party Charge which in turn will be deducted under 10.2(c) from the amount of the Product Fee payable under clause 10.1. Again, the amount of the Third Party Charges is in respect of the procurement (see the language of clause 9.5(a) and the definition of Third Party Charge – "obtaining" and "procuring"). The charges imposed elsewhere are for the publication (New South Wales) (perhaps to become "use" through an amendment to the law) are not for the "supply" or "procuring" or "obtaining" of that information and therefore are not a Third Party Charge for the purpose of the PPA. Hence they are not deductible from the amount of the Product Fee payable under clause 10.1 by reason of anything provided in clause 10.2 ...*[111]
>
> (emphasis added)

Is the advice compelling?

8.2.37 Whether the view advanced by Mr Grace would be accepted as the proper construction of the PPA by a court, which may finally adjudicate the question, cannot be predicted with certainty. A different view exists and it is entirely possible that a court may reach that view.

109 Letter from David Grace to Malcolm Tuttle, 18 November 2008.
110 Transcript, Robert Bentley, 19 September 2013, page 30 lines 25-47, page 31 lines 4-13.
111 Letter from David Grace to Malcolm Tuttle, 18 November 2008.

8.2.38 It is not the role of the Commission to determine that question and this Report does not do so, nor purport to do so.

8.2.39 However, it is important for consideration of the corporate governance issues which are alive here, to investigate whether the view expressed in the letter of advice raised a seriously arguable case for Product Co and the control bodies to resist the deductions being made by TattsBet. If it did, whether or not it transpires that a court determining the matter takes a different view, is not to the point. The existence of a serious argument on the point from November 2008 raises questions about the action (or inaction) taken in response and whether the directors and senior executives involved acted in accordance with their duties in that regard. Alternatively, if the view advanced in the letter of advice was *clearly* not sustainable, that itself might justify different conclusions about the directors' responses. A number of the directors of Product Co dismissed the view expressed in the advice as wrong or not sustainable and lacking a commercial perspective. If that were the case they may have been justified, even as non-lawyers, in dismissing it.

8.2.40 Submissions were made by TattsBet that "the Commission should not make 'observations' about the correctness of the Grace Advice" as that issue was outside the Term of Reference.[112] Further, it was submitted that, as TattsBet intended to proceed to the Supreme Court of Queensland for a determination of the question of its entitlement to make the deductions as a *Third Party Charge*, no utility would be served.[113]

8.2.41 Submissions were also made on behalf of some directors and executives of QRL that

> *...any commentary on the correctness or otherwise of the Grace advice is outside the Terms of Reference. To make observations on the correctness or otherwise of the Grace advice is to necessarily comment on the proper interpretation of the Product and Program Agreement. Given that TattsBet Limited intends to apply to the Supreme Court of Queensland for declaratory relief as to the correct interpretation of the Product and Program Agreement, the approach foreshadowed by the Commission is improper.*[114]

8.2.42 These submissions fail to focus upon the Commission's task defined by paragraph 3(f) of the Terms of Reference.

8.2.43 First, the Commission is required to identify the responses taken to the letter of advice by the directors and senior executives. One reason which has been identified in the evidence for not taking action to prevent TattsBet continuing to deduct charges made to it by interstate control bodies, is that some directors considered the advice was wrong and did not raise a serious question to justify further consideration.

8.2.44 The second task is, in respect of this ground for inaction, to assess whether the directors' actions were justified or whether they amounted to a breach of the officers "responsibilities, duties and legal obligations". This Commission does not have to reach a view on the correctness of the advice. The proper analysis of the response of the company officers relates to whether the advice raised a serious question that should not have been dismissed so readily.

8.2.45 Hence, the Commission's approach is governed by the following cautions:

- This Term of Reference does not indicate that the Commission is required to determine the issue
- The Commission has no jurisdiction to determine the issue
- The Commission has not had the benefit of all the evidence and submissions from all parties interested in the outcome that a court would have
- A court may, in the future, be asked to determine the issue between the relevant parties.

112 Submission of TattsBet, 25 October 2013, para 4.
113 Submission of TattsBet, 25 October 2013, paras 7-9.
114 Submission of Rodgers Barnes & Green, 30 October 2013, Part 6 page 6-4 para 9.

8.2.46 After careful deliberation, the Commission has concluded that the advice from Mr Grace, insofar as he concludes that the race field fees charged by interstate control bodies do not amount a *Third Party Charge* under the PPA, is compelling. The advice raised a serious legal issue for the parties to the PPA from November 2008.

8.2.47 Mr Grace reached his conclusions in November 2008 in relation to the NSW race fields legislation as it existed at that time. He also took into account amendments then contemplated for that legislation. Those amendments were assented to in December 2008.[115]

8.2.48 The expression "NSW race field" was defined in the NSW legislation[116] to mean information that identifies, or is capable of identifying, the names or numbers of horses or dogs which have been nominated or which will take part in an intended race to be held at any race meeting on a licensed racecourse in New South Wales.[117]

8.2.49 Section 33 of the NSW Act[118] did not prohibit trafficking in such information; instead it strikes at the act of *publishing* the information. Section 33A(2) envisaged the payment of a fee as a condition of the grant of a race field publication approval. Upon the grant of such an approval, the excuse in section 33(a) of the Act is triggered, so that a person who possesses an approval and who then publishes race field information will not commit an offence in doing so. That is, the fee payable in respect of an approval granted under section 33A(1) is a fee in respect of the grant of a permission to *publish* a New South Wales race field.

8.2.50 The term *publish* has a meaning which may vary according to the context in which it appears. Thus, in the context of defamation a publication may be constituted by a communication from one person to a single other person; the normal English meaning of the word, as the word itself suggests, involves a communication to the public or to a section of the public. The Oxford English Dictionary relevantly contains the following definitions:

> *To make publicly or generally known; to declare or report openly or publicly; to announce; to tell or noise aboard; also, to propagate, disseminate ...*
>
> *To bring under public observation or notice; to give public notice of ...*
>
> *To make generally accessible or available for acceptance or use; to place before or offer to the public ...*

8.2.51 The use of the term in the context of defamation is also included in the Oxford English Dictionary but in that connection it is, of course, a legal term of art.

8.2.52 In many statutory contexts the word *publish* and its analogues have been held to involve making information available to the public.[119]

8.2.53 The use of the term *publish* in section 33 of the *Racing Administration Act 1998* (NSW) accords with its generally accepted meaning, namely the communication of racing information to the public at large or to a section of the public. This must be so because the evident object of these provisions is to gain money from the desire of a wagering business to publish the information to the racing public, rather than from any limited communication of it. Such information is not, after all, confidential information.

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115 As already discussed, the *Racing Administration Amendment Act 2008* (NSW) amended section 33 of the *Racing Administration Act 1998* (NSW) by substituting the word "publish" with "use".

116 Section 27 of the *Racing Administration Act 1998* (NSW) as inserted by the *Racing Legislation Amendment Act 2006* (NSW)

117 The *Racing Legislation Amendment Act 2006* (NSW) inserted s7 "*NSW race field*" into the *Racing Administration Act 1998* (NSW).

118 *Racing Administration Act 1998* (NSW). This provision was in effect from 1 July 2008 to 2 December 2008.

119 *Infabrics Ltd v Jaytex Ltd* [1981] 1 All ER 1057 at 1061; *Flinn v James McEwan and Co Pty Ltd* [1991] 2 VR 434 at 442; *Avel Pty Ltd v Multicoin Amusements Pty Ltd* [1990] 171 CLR 88 at 93.

8.2.54 Consequently, it is difficult to argue that Product Co "cannot procure the Australian racing product it is required to supply to TABQ" in the terms required by clause 9.5(a) of the PPA. Product Co is able to procure such information and is able to supply it to TattsBet. Nothing in the NSW legislation prevented TattsBet from learning the content of the information or, indeed, using it, provided it did and does not *publish* NSW race fields.

8.2.55 The problem arises at the point when TattsBet wishes to publish the information to its customers. In order to avoid committing an offence against section 33 of the Act when it publishes the fields, TattsBet was obliged to apply for and obtain race field publication approval and pay any fees required as a condition of that approval. The fees are not paid in order to procure or obtain information.

8.2.56 That position is not unusual. Many objects of commerce may be freely traded, although the use of such products for their intended purpose may be subject to a regulatory regime which requires a payment of a fee to a government as a condition of the grant of approval to use the object. Motor vehicles can be freely traded and changes in ownership and possession are wholly unregulated. Even use of vehicles on private land is largely unregulated. However, the use of any such motor vehicle on a public road is conditional upon the payment to the state of motor vehicle registration fees and other charges. Contracts for the sale of cars make express provision when such fees are included in the purchase price. It is, otherwise a cost borne by the user.

8.2.57 There is no provision in the PPA to the effect that statutory charges in relation to publication are deductible from the fees payable to Product Co. Nor is there any warrant to imply a term that such an approval fee is deductable; such a term would conflict with clause 10 which expressly prescribes the only payments which are deductible.

8.2.58 As indicated, Mr Grace anticipated the NSW legislation would change, as indeed it did. Existing provisions in the Racing Administration Act 1998 (NSW) were amended by the Racing Administration Amendment Act 2008 (NSW). These amendments took effect from 3 December 2008. The words "publication" and "publish" were omitted from race field provisions, wherever they appeared, and the expression "use" was substituted.[120]

8.2.59 The significant change in the legislation was to substitute a new section 33 in the Act which made it an offence to "use NSW race field information". The scope of prohibited conduct was widened by means of the definition of "uses NSW race field information" in section 32A. Thereafter, such use could be constituted not only by publication of such information but also any communication of it – even to a single person – as well as by the making of a written or electronic record containing the information or by using it in a manner prescribed by the regulation.

8.2.60 However, whereas the original offence applied to any person, the substituted offence applied and applies only to "a wagering operator". A "wagering operator" is defined to include a person who operates a totalisator and, therefore, includes TattsBet.[121] Section 33(2) made it a defence to a prosecution for an offence against this section if the wagering operator could prove that the use of the information did not occur in connection with the making or accepting of a bet and did not occur in the course of the business of a wagering operator.[122]

8.2.61 The effect of the amendments was to sterilise the information in the hands of a wagering operator. It could be possessed but it could not be used.

120 See, in particular, section 33(1) of the *Racing Administration Act 1998* (NSW) which took effect from 3 December 2008.
121 *Racing Administration Amendment Act 1998* (NSW) inserted this definition in section 27 of the *Racing Administration Act 1998* (NSW).
122 *Racing Administration Act 1998* (NSW), section 33(2).

8.2.62 However, nothing in the Act was or is an obstacle to the *supply* by Product Co of Australian racing product to TattsBet pursuant to clause 9.1 of the PPA. Product Co is not a wagering operator and is not subject to the Act. It is free to use the information as it chooses. Nor is Product Co unable to "procure the Australian racing product it is required to supply" to TattsBet within the meaning of clause 9.5(a).

8.2.63 Moreover, if TattsBet were to procure the information from a third party the same prohibition on use would apply.

8.2.64 The Act introduced in December 2008, just like the original Act, does not strike at trafficking in information; instead it targets the *use* of information which the Act assumes is already in the hands of the wagering operator.

8.2.65 Consequently this view, as expressed in the letter of advice from Mr Grace, is a view that is soundly based. The letter of advice indicated that the better view of the proper construction of *Third Party Charge* did not include *publication* or *use* as used in the two versions of the New South Wales race fields legalisation.

8.2.66 Mr Grace did not consider legislation in other States. However no relevant distinction is apparent when reference is made to the legislation in Victoria. Amendments to the *Gambling Regulation Act 2003* (Vic) in 2007 inserted a new section 2.5.19B which restricts the "publication and use" of race fields by wagering service providers.[123] This section, contained within the current Victorian Act, reads:

> *A wagering service provider must not, in Victoria or elsewhere, publish, use or otherwise make available, a race field in the course of business unless –*
>
> *(a) the wagering service provider has obtained the publication and use approval of the appropriate controlling body; and*
>
> *(b) the wagering service provider complies with the conditions (if any) to which the approval is subject.*

8.2.67 Indeed the emphasis in the race fields legislation in other States (excluding South Australia) is upon *use* rather than *supply* or *procurement* in the same way. Western Australian legislation refers to publishing or "otherwise making available" a WA race field in the course of business;[124] ACT legislation restricts the use of "race field information in the ACT or elsewhere, for the conduct of the operator's wagering business";[125] and Tasmanian legislation restricts the "publication" of Tasmanian race fields by a wagering operator.[126]

8.2.68 In South Australia the situation is even clearer. In the race fields legislation introduced in 2008[127] which amended the *Authorised Betting Operations Act 2000* (SA), section 62E reads:

> *A person (the operator) must not conduct betting operations in relation to a race held in this State by a racing club (SA race betting operations) unless the operator has entered into an integrity agreement and a contribution agreement with the relevant racing controlling authority...*

123 As amended by the *Gambling Legislation Amendment (Problem Gambling and Other Measures) Act 2007* (No. 72 of 2007) (Vic). This section appears in the current version of the Act.

124 Section 27D of the *Betting Control Act 1954* (WA) (as amended by the *Betting and Racing Legislation Amendment Act 2006* and the *Racing and Wagering Legislation Amendment Act 2009* (WA). This section appears in the current version of the Act as section 27(2A).

125 Section 61F of the *Racing Act 1999* (ACT) as amended by the *Racing Amendment Act 2009* (ACT). This section appears in the current version of the Act.

126 Section 54A of the *Racing Regulation Act 2004* (Tas) as amended by the *Racing Regulation Amendment (Race Fields) Act 2008*. This section appears in the current version of the Act.

127 *Authorised Betting Operations Act 2000* (SA) as amended by the *Statutes Amendment (Betting Operations) Act 2008*. This section appears in the current version of the Act.

8.2.69 At the public hearings, counsel assisting sought to explore the contrary views held by some directors of Product Co and by Mr Bentley. None articulated either a non-legal reason or any legally coherent case to dismiss the view of Mr Grace.

8.2.70 The chairman of Product Co, Mr Hanmer, gave evidence that he disagreed with Mr Grace's advice.[128] Mr Hanmer considered the Queensland race fields legislation rather than the interstate legislation in seeking to address this question; this, in itself, demonstrates his failure to comprehend the issue.[129]

8.2.71 Mr Lette, on the other hand, gave evidence that he did not consider the NSW race fields legislation but reached his view that Mr Grace was wrong, by reading the PPA and conferring with a partner in his legal firm.[130] He did not consider the terms of the interstate legislation at all.[131]

8.2.72 Mr Bentley held a view contrary to that of Mr Grace without reading the letter of advice.[132] He, too, offered no rationale which might support the view which he claimed that he held on the issue.

8.2.73 It may have been the case that a view contrary to that held by Mr Grace was not founded upon a legal interpretation at all. These expressions of opinion really may have reflected a subjective judgment of the "commercial intention" of the arrangement between TattsBet and Product Co.

8.2.74 However, the true issue raised for the directors and senior executives by the letter of advice was this: if a court were to adjudicate the question as to whether TattsBet was entitled to deduct the interstate race field charges it paid from the product information fee owed to Product Co, there was a respectable legal view that a court would be likely to answer *no*.

8.3 The letter of advice provided to board members and senior staff

Product Co.

8.3.1 By 4 December 2008 the letter of advice had been forwarded to all directors of Product Co.

8.3.2 Although the actual method of communication of the letter of advice is not clear from the documentary evidence available to the Commission, the circumstances surrounding it justify a finding that they each received it and had the opportunity to consider it and discuss it with Mr Grace. Some senior executives of the control bodies did too.

8.3.3 In a file note dated 5 December 2008, Mr Tuttle recorded that on 19 November he met with Mr Hanmer at the Sofitel Hotel in Brisbane at 7.30am to discuss the letter of advice.

8.3.4 On 20 November, Ms Reid sought the approval of the chairman of Product Co, Mr Hanmer, and the chief operations manager of QRL, Mr Tuttle, to deliver board papers which she had prepared in draft for the board meeting of Product Co to be held on 4 December.[133]

8.3.5 In her email of 20 November, Ms Reid included attachments for the meeting which are now unavailable to the Commission.[134] It is likely that these attachments included the letter of advice.

8.3.6 At 4.45 pm on 20 November, Mr Hanmer responded to the email and approved the attachments to go out to directors.[135]

128 Transcript, Anthony Hanmer, 25 September 2013, page 88 lines 1-12, page 90 lines 4-18.
129 Transcript, Anthony Hanmer, 26 September 2013, page 71 lines 1-3.
130 Transcript, Robert Lette, 15 October 2013, page 37 lines 4-8, page 40 lines 8-33, page 45 lines 30-34, page 46 lines 10-18.
131 Transcript, Robert Lette, 15 October 2013, page 38 lines 7-46, page 39 lines 1-20.
132 Transcript, Robert Bentley, 20 September 2013, page 34 lines 40-44; Transcript, Robert Bentley, 23 September 2013, page 52 lines 1-27.
133 Email from Shara Reid to Anthony Hanmer and Malcolm Tuttle, 20 November 2008, 2.29pm.
134 Email from Shara Reid to Anthony Hanmer and Malcolm Tuttle, 20 November 2008, 2.29pm.
135 Email from Anthony Hanmer to Shara Reid and Malcolm Tuttle, 20 November 2008, 4.45pm.

8.3.7 On 1 December, Mr Hanmer emailed Mr Tuttle indicating that the advice had previously been provided to the directors of Product Co:

> *I thought a great deal about material which needs to accompany the board papers. Apart from* ***David Grace's already suppl;ied*** *[sic] advice ...*[136]
>
> (emphasis added)

8.3.8 On 5 December, Mr Tuttle prepared the file note (already mentioned) in respect of the letter of advice dealing with his interaction with Mr Hanmer as chairman of Product Co. He recorded, among other things, a conversation with Mr Hanmer on 4 December:

> *On the morning of the meeting, I spoke with Tony Hanmer, as Secretary and Chairman, at approximately 8.30 AM and it was Tony Hanmer's view that David Grace's opinion was rather poor and that he had spoken with Mr Bob Lette, and there were two other opinions that were in conflict with David Grace's opinion.*[137]

8.3.9 Mr Hanmer and Mr Lette confirmed in oral evidence[138] to the Commission that they had discussed the letter of advice prior to the meeting of 4 December.

8.3.10 As to that discussion it seems that Mr Lette had left a voice message for Mr Hanmer which was later transcribed into a handwritten note. That note indicates the message was left for Mr Hanmer on 2 December 2008 at 4.15pm:

> *Tony – Bob Lette, mate just on that I've run all that just past one of my partners who is very much into constitutional law, interpretation of stuff and he totally agrees with me – he said the bow they are trying to pull is so long that if you had to go to court on an interpretation it would be probably lost on the basis that the intended, you know, supply of the Product whatever it is, unless there's conditions on how you use it means you got unfettered discretion to use it no matter what – so if you pay to buy it you're entitled to use it and that is really what this prod. co. agreement says.*[139]

8.3.11 On 4 December, the board of Product Co met. Mr Lette and Mr Lambert were the only members not present. Mr Lambert had provided Mr Hanmer with his proxy and Mr Michael Godber, the CEO of the harness control body, had been given Mr Lette's proxy and was in attendance.[140]

8.3.12 At the meeting, Mr Grace's letter of advice was noted and recorded in the minutes:

> ***2.2 Letter from David Grace of Cooper Grace Ward***
>
> *Mr Hanmer updated the meeting on advice he had sought from alternative legal practitioners and the Racing Office, and on the letter received from Cooper Grace Ward. This letter, already previously circulated to all members, addressed to Queensland Racing, is code specific. However its contents were* ***NOTED*** *by the board.*[141]

8.3.13 On 5 December, the board of QRL met. The board members present were the chairman Mr Bentley, Mr Hanmer, Mr Andrews and Mr Ludwig. Mr Lambert is noted as giving his apologies. Other persons recorded as present included Messrs Tuttle, Orchard, Carter, Brennan, Mr Peter Smith, Ms Reid and Ms Donna Biddle (board secretary).

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136 Email from Anthony Hanmer to Malcolm Tuttle, 1 December 2008, 4.12pm.
137 File note, Malcolm Tuttle, 5 December 2008; its contents were confirmed by Mr Hanmer: Transcript, Anthony Hanmer, 26 September 2013, page 23 lines 5-22.
138 Transcript, Anthony Hanmer, 25 September 2013, page 96 lines 15-24; Transcript, Robert Lette, 15 October 2013, page 47 line 20, page 48 line 13.
139 Diary note (handwritten), 2 December 2008.
140 QRPC, Board Meeting Minutes, 4 December 2008, para 1.
141 QRPC, Board Meeting Minutes, 4 December 2008, para 2.2.

8.3.14 The minutes relevantly record:

> ***2.3 Queensland Race Product Co Meeting***
>
> *The Chairman offered to exit the meeting if there was any conflicting matters. The QRPC Chairman stated that this was a report for noting. The QRPC minutes to be included in QRL minutes.*
>
> *Mr Hanmer updated the board re Queensland Race Product Co Meeting held on Thursday 4 December 2008.*
>
> *The board **NOTED** above.*[142]

Mr Bentley

8.3.15 In his oral evidence, Mr Bentley accepted that he knew of the letter of advice and that it recorded Mr Grace's view that TattsBet were not entitled to deduct the race fields fees charged by interstate control bodies as a *Third Party Charge* under the PPA.[143]

8.3.16 As indicated earlier, it may have been that Mr Bentley first learned of Mr Grace's view from his meeting with Mr Tuttle and Mr Grace on 31 October 2008. He denied this, as discussed above.[144]

8.3.17 Certainly at the meeting of QRL held on 5 December, the only director of QRL for Mr Hanmer to update, as to the events of the day before (when the board of Product Co met), was Mr Bentley.

8.3.18 Further, Mr Bentley accepted, as did Mr Hanmer, that he and Mr Hanmer discussed their views on the issue and that he came to appreciate that his view was shared by Mr Hanmer, namely, that TattsBet were, under the PPA, entitled to deduct the interstate race field fees.[145] He also accepted that he appreciated that Mr Grace did not share this view and indeed considered that the proper legal construction of the PPA was that TattsBet were not entitled to deduct.[146]

8.3.19 Mr Bentley denied receiving a copy of the letter of advice.[147]

8.3.20 On 12 December, Mr Hanmer as chairman of Product Co, forwarded a letter to Mr Bentley, as chairman of QRL, in respect of the 4 December meeting of the board of Product Co enclosing a copy of the minutes which noted the letter of advice from Mr Grace.[148]

8.3.21 As a consequence, all directors of QRL had the opportunity to consider the views expressed in the letter of advice and came to know of its substance, particularly in relation to his view that TattsBet was not entitled to deduct substantial charges which it was purporting to make as a *Third Party Charge* under the PPA.

Harness Board

8.3.22 Mr Hanmer gave evidence that the letter of advice was passed on to QHRL.[149]

8.3.23 As noted above, Mr Godber, the CEO of QHRL, attended the meeting of Product Co on 4 December.

142 QRL, Board Meeting Minutes, 5 December 2008, para 2.3.
143 Transcript, Robert Bentley, 20 September 2013, page 36 lines 36-44; Anthony Hanmer, 26 September 2013, page 5 lines 1-43.
144 Transcript, Robert Bentley, 20 September 2013, page 22 lines 18-44.
145 Transcript, Robert Bentley, 23 September 2013, page 52 lines 23-27; Transcript, Anthony Hanmer, 26 September 2013, page 5 lines 1-43.
146 Mr Bentley accepted that he knew there was an "argument about" the deductions issue 20 September 2013, page 36 lines 36-44 and there was a "dispute" 20 September 2013, page 37 lines 1-4.
147 Transcript, Robert Bentley, 20 September 2013, page 34 lines 40-44.
148 Letter from Anthony Hanmer to Robert Bentley, Kerry Watson and Robert Lette, 12 December 2008.
149 Transcript, Anthony Hanmer, 25 September 2013, page 87 lines 1–8; Transcript, Anthony Hanmer 26 September 2013, page 37 lines 9–23.

8.3.24 On 11 December, he prepared a board paper titled *Race Fields Legislation and Product Co Meeting* for the board meeting of the QHRL for 19 December 2008. In that paper he recorded:

> *The other matter tabled for information of Directors was a legal opinion from Cooper Grace and Ward regarding [TattsBet] deducting the race fields levies charged by other states from the codes product payments. The opinion was that a case could be made that [TattsBet] had no right to on charge the fees. While this was only for information only it was clear that the opinion was not supported by any of the Directors present.*[150]

8.3.25 On 12 December, the chairman of Product Co forwarded a letter to Mr Lette, as chairman of QHRL, which enclosed the 4 December 2008 minutes of the meeting of Product Co, which had noted the letter of advice.[151]

8.3.26 On 19 December, the board of QHRL met. Mr Lette and Ms Janice Dawson were the directors present (with apology from Mr Kevin Seymour). Mr Godber was in attendance with Ms Tracey Harris (company secretary). The letter of 12 December from Product Co was discussed and the attached minutes were ratified.[152]

8.3.27 It is reasonable to infer that all directors of QHRL, except Mr Seymour,[153] knew of the existence of the letter of advice. It is not known, however, whether Ms Dawson and Mr David Knudsen knew of the substance of the letter of advice.[154] Ms Harris gave evidence to the Commission that she was never provided with a copy of the letter.[155]

Greyhounds Queensland

8.3.28 Mr Hanmer gave evidence that he passed on the letter of advice to Greyhounds Queensland Limited (GQL).[156]

8.3.29 On 12 December, Mr Hanmer sent a letter to Ms Watson, the chair of GQL, enclosing the minutes of the 4 December 2008 meeting of the board of Product Co noting the letter of advice.[157]

8.3.30 On 19 December 2008, the board of GQL met at Albion Park. Those present were board members Ms Watson (chair), Mr Christopher Williams, Mr David Stitt, Mr Paul Felgate as well as the general manager, Mr Darren Beavis, and the executive assistant, Ms Julie MacKenzie. Others in attendance were the financial controller, Mr Abhendra Kumar, and the chairman of stewards, Mr Danny Ryan. The minutes of that meeting record that the minutes of Product Co for 4 December 2008 were noted.[158]

8.3.31 Although these minutes would suggest that those present knew of the letter of advice and had the opportunity to investigate its substance, many of the GQL directors and Mr Beavis gave evidence to the Commission that they had no knowledge of the letter or the issues addressed in it.[159]

150 Godber, M 2008, *Board Paper: Race Fields Legislation and Product Co Meeting*, 11 December 2008.
151 Letter from Anthony Hanmer to Robert Bentley, Kerry Watson and Robert Lette, 12 December 2008.
152 QHRL, Board Meeting Minutes, 19 December 2008.
153 Transcript, Kevin Seymour, 15 October 2013, page 15 lines 27–43.
154 Transcript, Michael Godber, 14 October 2013, page 67 lines 11–37. No submission or statement was received by the Commission for Ms Janice Dawson. Mr David Knudsen is deceased.
155 Statement of Tracey Harris, 1 November 2013, page 2 para 7–9.
156 Transcript, Anthony Hanmer, 25 September 2013, page 87 lines 1–8; Transcript, Anthony Hanmer, 26 September 2013, page 37 lines 9–23.
157 Letter from Anthony Hanmer to Robert Bentley, Kerry Watson and Robert Lette, 12 December 2008.
158 GQL, Board Meeting Minutes, 19 December 2008.
159 Statement of Christopher Williams, 24 October 2013, pages 1-2 paras 6–8; Statement of David Stitt, 25 October 2013, pages 1-3 paras 2-6; Statement of Paul Felgate, 24 October 2013, page 1 paras 3–6; Statement of Darren Beavis, October 2013, page 1 para 1.

Officers of the control bodies knew of the letter of advice

8.3.32 In these circumstances, it appears that all of the members of the board of Product Co and QRL knew that TattsBet was deducting the race fields fees charged by interstate control bodies and that Mr Grace held a view that TattsBet was not entitled to make those deductions. The senior executives of QRL knew of the advice and probably knew of its substance too.[160]

8.3.33 It is more difficult to draw conclusions about the knowledge of the directors and senior executives of QHRL and GQL. In particular, it would appear that members of GQL, with the exception of Ms Watson, had no knowledge of the letter of advice.

8.3.34 In an endeavour to assess the likelihood that these officers appreciated the significance of the letter of advice, it is important to remember that the letter addressed quite a number of additional issues relating to race fields legislation (in existence and proposed) both in NSW and in Queensland. In particular, it was also concerned with the matter of the three control bodies becoming entitled, under the Queensland legislation, to charge race fields fees to wagering operators using Queensland race fields information in those wagering businesses, whether in Queensland or elsewhere.

8.3.35 Further, without the benefit of explanation or discussion, the meaning and consequences of the advice relating to the *Third Party Charge* may not have been understood by all those who read it.

8.4 The action taken

8.4.1 As mentioned, on 20 November 2008, Ms Reid commenced email correspondence with Mr Hanmer and Mr Tuttle in relation to the meeting of the board of Product Co set for 4 December. It had been proposed that Mr Grace be invited to attend to explain the letter of advice. Mr Hanmer opposed his attendance. His emails (below) make that very clear.

8.4.2 On 21 November at 8.22am, he emailed Mr Tuttle and Ms Reid:

> *Malcolm, Just for absolute clarity David Grace will NOT be attending the Product Co. Board Meeting. I need to have the authority from the Board to spend the costs of David Grace attending. I do not have that authority and I am in breach of my covenants as a Director. I want the Board to discuss this issue after reading the material and if at that time they consider it necessary to get clarification from David Grace or anyone else we will pass a resolution to that end.*
>
> *The other directors are all sound in mind, wind, and limb and can read David's advice without the need for explanation.*[161]

8.4.3 On 21 November, Mr Tuttle responded and expressed his belief that "it is important that Product Co should be fully informed in respect of this issue and that David Grace as the lawyer who has provided the initial opinion is well placed to provide any clarity in respect of the legal nature of his opinion".[162]

8.4.4 However, this brought an odd response from Mr Hanmer

> *... The directors do need to be fully informed but, there has to be process. David's note is quite explicit, it is a very serious issue. I cannot be accused of pushing an agenda. Product Co operates under corporations law, I am obliged to not only keep the directors informed*

160 Messers Tuttle, Carter, Brennan and Ms Murray attended the QRPC meeting of 5 March 2009 where the letter of advice was discussed. QRPC, Board Meeting Minutes, 5 March 2009.
161 Email from Anthony Hanmer to Malcolm Tuttle and Shara Reid, 21 November 2008, 8.22am.
162 Email from Malcolm Tuttle to Anthony Hanmer and Shara Reid, 21 November 2008, 11.40+1000.

but, also to give them adequate time for discussion. What I propose is that we will have an 'in camera' meeting of the Board of Product Co. before we open it up for discussion to guests. I have to detect the mood and respective views of my fellow Board Directors. ...

On the question of whether David should attend the QR Board meeting this must be a decision for Bob as Chairman. As he is conflicted, I certainly don't want to even broach the subject of Product Co. and its outcomes at anytime with him.

I will leave it to you to approach him.[163]

8.4.5 Mr Tuttle persisted.[164] He received a further rebuff from Mr Hanmer:

Malcolm, all the QR directors except conflict Bob will have been at the Product Co meeting the day before when this whole matter will have been exercised so, I am a bit lost as to why David will be needed as soon after their initial discussion.

Re David Grace – as I have said in my 2nd paragraph below I have already spoken to him and we agreed he would not attend Product Co. on 4th December. He also agrees that he should not attend the Product Co meeting.[165]

8.4.6 Further, on the morning of 4 December before the meeting of the board of Product Co, Mr Tuttle had a conversation with Mr Hanmer at approximately 8.30 am. Mr Tuttle's file note records:

On the morning of the meeting I spoke with Tony Hanmer as secretary and chairman at approximately 8.30 AM and it was Tony Hanmer's view that David Grace's opinion was rather poor and that he had spoken with Bob Lette and that there were two opinions that were in conflict with David Grace's opinion. ...

As I did not attend, I am uncertain of the nature of the discussions surrounding David Grace's advice and whether or not there was any further discussion regarding the two other opinions.

In addition, during our discussion on December 4, Tony Hanmer outlined the opinion he had received was that it was reasonable to interchange the terms 'supply and use' in the Product and Program Agreement, as, in effect, they have the same meaning.

I raised concerns with Tony Hanmer at that point in time, as legislation was due to be passed in Parliament later that day and that legislation was built around the use of information and not the supply of information and I further pointed out that racing information was supplied to [TattsBet] by RISA and that, in my view, the use of that information for the purpose of race wagering should be treated separately to the supply of racing information. He did not share my view, but did not want to continue the conversation.

Tony Hanmer provided his Product Co report to QRL board meeting on December 5, 2008. At this time, I had asked Tony Hanmer if David Grace's advice would form part of the minutes for the Product Co meeting and he confirmed that the information had been provided to Mr Bill Andrews and Mr Bill Ludwig and that the advice would form part of the minutes.[166]

8.4.7 Mr Tuttle gave evidence to the Commission that he recorded this conversation in a file note as he felt that it was unusual that he was not attending the Product Co meeting. He was concerned that a determination would be made in his absence and wanted to record that he had pressed for Mr Grace to attend the meeting.[167]

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163 Email from Anthony Hanmer to Malcolm Tuttle and Shara Reid, 21 November 2008, 11.49am.
164 Email from Malcolm Tuttle to Anthony Hanmer and Shara Reid, 21 November 2008, 12.06+1000.
165 Email from Anthony Hanmer to Malcolm Tuttle, 21 November 2008, 12.09pm+1000.
166 File note (confidential), Malcolm Tuttle, 5 December 2008.
167 Transcript, Malcolm Tuttle, 1 October 2013, page 45 lines 5-25.

8.4.8 As indicated above, Mr Lambert did not attend the meeting of the board of Product Co on 4 December; nor was he in attendance at the meeting of QRL on 5 December 2008. He did however receive a copy of the board papers and letter of advice.[168]

8.4.9 Prior to 2pm on 11 December, Mr Lambert had a discussion with Mr Hanmer about the letter of advice. He suggested that it raised a matter which could have a major impact on TattsBet and expose the members of the board of Product Co to a potential failure to comply with their duties to the company.[169]

8.4.10 After the discussion, Mr Lambert emailed Mr Hanmer:

> *I was and am stunned at your reaction to the issue I raised. I thought I was clear in the way I raised the matter but the verocity [sic] of your reaction must mean I failed in this regard.*
>
> *First, I'm not concerned with how the grace letter arose or the motivation of mal.*
>
> *Second I agree with your lay person interpretation and assessment of the issue.*
>
> *Third I have no problem with how you have handled the matter, at least up to the time of our phone conversatio/diatribe [sic].*
>
> *My sole issue is to ensure that we and qr [Queensland Racing] are not exposed in respect of our duties under corporation law. The matter that has arisen is not a run of the mill matter but has a potential financial impact of 10 m pa, would have a major impact on [TattsBet] and exposes Bob to a potential major conflict of interest issue. My suggestion to avoid these potential problems is simply to get senior counsel advice. I see this as an insurance policy at the modest cost of say 5000 dollars. I also think I am entitled to raise such matters and not to subject [sic] to an emotional dump.*[170]

8.4.11 Had the board of Product Co resolved to seek legal advice about TattsBet's entitlement under the PPA to make the substantial deductions for the NSW race field charges, funding would have been provided.[171] Indeed, shortly after, Product Co required funds for legal fees for a different retainer of Mr Grace in the sum of $15,000 which caused no difficulty.[172]

8.4.12 In the email correspondence that followed, Mr Hanmer sought to emphasise that Mr Lambert's estimate of the cost of obtaining a second advice was too low and would likely be much more:

> *Michael, I'm disappointed that you found my honest appraisal of the Grace advice unpalatable. Taking the point in your notes specially, I disagree with you when you say the origins of the Grace advice are of no concern to you. The Grace letter was briefed without any involvement by Product Co., or any reference to Product Co. The letter is addressed to Queensland Racing and Malcolm Tuttle is not an officer of Product Co. The letter was written code specific to Thoroughbreds, a different outcome could be imagined if it was briefed by the other codes or Product Co. If we all rushed off and sought advice on every issue we would enjoy anarchy. ...*[173]

8.4.13 Mr Lambert maintained his position that the issue was a serious one. His point was that to leave it unresolved might expose the directors to a potential failure to comply with their duties under the Corporations Act.

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168 Transcript, Michael Lambert, 30 September 2013, page 7 lines 16-25.
169 The conversation was referred to in the email from Michael Lambert to Anthony Hanmer, 11 December 2008, 2.03pm.
170 Email from Michael Lambert to Anthony Hanmer, 11 December 2008, 2.03pm.
171 Transcript, Robert Bentley, 20 September 2013, page 76 lines 43-47, page 77 lines 1-14; Transcript, Malcolm Tuttle, 1 October 2013, page 43 lines 41-45, page 50 line 1.
172 Email from Shara Reid to Anthony Hanmer, 19 January 2009, 14:09+1000.
173 Email from Anthony Hanmer to Michael Lambert, 14 December 2008, 12.45pm.

8.4.14 At the meeting of the board of Product Co held on 5 March 2009, Mr Lambert raised the matter again and on this occasion he was supported by Mr Andrews. The other persons present were Mr Hanmer (as chairman), Mr Ludwig, Ms Watson, Mr Godber and also members of the senior executive staff of QRL, Mr Tuttle, Mr Carter, Mr Brennan and Ms Reid. Mr Grace was also present.[174]

8.4.15 The minutes of the meeting record:

> *2.1.3* ***Product and Program Agreement***
>
> *The Board* ***NOTED*** *Mr Grace's letter to Malcolm Tuttle of Queensland Racing Limited dated 18 November 2008.*
>
> *Mr Lambert and Mr Andrews noted advice from Mr Grace, if correct, raised fundamental issues that needed to be formally resolved either by Senior Counsel advice or by obtaining advice from Government of the original intent of the Product and Program Agreement (Agreement).*
>
> *The Chairman expressed his concerns and noted that the Company should meet with [TattsBet] to seek a variation of the Agreement in order to reflect the legal position at hand and the commercial intention of 'supply' and 'use' when the Agreement was first drafted.*
>
> *The Chairman also stated that the Office of Racing was of a similar view; the commercial intention of the Agreement differs to that of the legal position at hand. Mr Godber and Ms Watson concurred with the Chairman.*
>
> *The Board* ***RESOLVED*** *that the chairman correspond with Mr Mike Kelly of the Office of Racing in relation to the matter. The Chairman is to seek the view of Government in relation to the commercial intent of the Agreement when first drafted and the current legal views in relation to the Race Fields Legislation and its impact on the Agreement.*
>
> ***MOVED*** *by Mr Godber.* ***SECONDED*** *by Ms Watson.*[175]

8.4.16 Mr Grace kept a contemporaneous diary note of the events at the meeting:

> *4. We then turned to discuss our letter of 18 November 2008 in relation to the impact of the 2008 amendments on the arrangements with [TattsBet].*
>
> *Mr Lambert raised the issue of what was to be done and what the board's position was. General discussion followed.*
>
> - *The result of the general discussion was that it was agreed a letter would be written to the Director-General of the Department of Racing and a request would be made to provide the Queensland Government understanding of the background to the arrangements behind the Queensland Government's agreement with [TattsBet] (then TABQ). The point of getting that advice was to see whether there was so far as the Queensland Government was concerned an intent that the payments for Race Day legislation be able to be deducted by [TattsBet] from the payment as Third party charge out of payments to Queensland Racing.*
> - *Discussions revolved around directors' duties. I advised that having given a letter of advice to Queensland Racing and that matter had not been taken into the board of Product Co and the board of Product Co hadn't been aware of our views on the interpretation of the Act and its interaction with the product and program agreement, the board would be unwise to ignore the advice because auditors looking at the accounts may, if they became aware of the advice, query the directors' treatment of all*

174 QRPC, Board Meeting Minutes, 5 March 2009.
175 QRPC, Board Meeting Minutes, 5 March 2009, para 2.1.3.

of the contractual arrangements. It was therefore necessary to address the issue and if it was not intended to take any adversarial role with [TattsBet], then to consider whether the existing agreement should be changed in order to remove any ambiguity that may exist as a result of the 2008 amendments to the Racing Act.

- *It was agreed that a letter would be written with a view to seeing if the Queensland Government's view of the arrangements was intended to be the same as was thought by some of the directors, namely that commercially the amounts of these costs should be deductable by [TattsBet] from the amounts payable to Product Co under the product and program agreement.*[176]

8.4.17 Mr Lambert said in the public hearings of the Commission, in response to questioning by counsel representing Mr Hanmer and Mr Ludwig (amongst others), that he did not move a motion to obtain senior counsel's advice or otherwise to take an adversarial position with TattsBet because the majority were clearly against it.[177]

8.4.18 As recorded in the minutes, it was resolved by the board of Product Co that a letter be written to Mr Kelly of the Office of Racing seeking information as to the commercial intent of the Queensland Government in 1999 and the current legal views about the race fields legislation and its impact on the agreement.[178]

8.4.19 By letter dated 31 March 2009, Mr Hanmer wrote on behalf of Product Co to Mr Kelly. The letter failed to address the appropriate question and made reference to the Queensland race fields legislation, rather than the interstate race fields legislation. In his oral evidence, Mr Hanmer accepted this.[179] He had written:

> *In the light of this long standing agreement and the recent legislation passed by the Queensland Government requiring all wagering operators using Queensland Race Information to be authorised to do so, conflicting views in relation to the commercial intent of the Agreement and the impact of the Agreement with the recent introduction of Race Information Legislation has arisen.*
>
> *Therefore, in order to clarify this matter, I seek the Queensland Government's* ***urgent*** *view in relation to the:*
>
> *a. Commercial intent of the Agreement when first drafted in 1999, and*
>
> *b. The implications/effect of the Agreement due the recent introduction of Race Information Legislation.*[180]

8.4.20 On 28 May 2009 Mr Kelly responded:

> *I would recommend that Queensland Race Product Co Ltd obtain its own legal advice on the issues you have raised.*
>
> *The general intent in the Product and Program Agreement is well known. As the control bodies major partner, [TattsBet] provides the principal source of funding for the Queensland racing industry under the Product and Program Agreement. ...*[181]

176 Memo by David Grace, 5 March 2009.
177 Mr Keith Wilson QC represented Mr Bentley, Mr Hanmer, Mr Ludwig, Mr Milner, Mr Tuttle, Mr Brennan, Ms Reid and Mr Orchard; Transcript, Michael Lambert, 30 September 2013, page 34 lines 28-44; page 35 lines 26-30.
178 QRPC, Board Meeting Minutes, 5 March 2009, para 2.1.3.
179 Transcript, Anthony Hanmer, 26 September 2013, page 71 lines 2-4.
180 Letter from Anthony Hanmer to Michael Kelly, 31 March 2009.
181 Letter from Michael Kelly to Anthony Hanmer, 28 May 2009.

8.4.21 On 5 June, Mr Hanmer had a telephone conversation with Mr Grace in which he asked that he draft a letter to be sent by Mr Hanmer to the directors of Product Co. Mr Grace sent a draft later that day. The letter reads:

> *Dear Tony,*
>
> *I refer to our telephone conversation this morning.*
>
> *As requested I set out a note of the wording you may give to your co-directors in relation to the matter you raised this morning:*
>
> *"Dear Fellow Directors*
>
> *I refer to the legal advice given by Cooper Grace Ward to Queensland Racing Limited concerning the application of the 2008 amendments to the Racing Act to the Product and Program Agreement and its implications for that body.*
>
> *The legal advice was given to Queensland Racing Limited and not to Queensland Product Co and as it stands Queensland Product Co is not in receipt of any legal advice in respect of its own position or the position of any other control bodies.* ***We should seek that advice as a matter of urgency and I seek your concurrence with the proposal to obtain it....***[182]
>
> (emphasis added)

8.4.22 Despite the draft from Mr Grace, on 9 June Ms Reid sent an email on Mr Hanmer's behalf to the directors of Product Co in the following terms:

> *Dear Fellow Directors*
>
> *During the Queensland Race Product Co. (Product Co) Board Meeting on Thursday, 5 March 2009, discussion took place following the noting of a letter from Mr David Grace of Cooper Grace Ward (CGW) to Mr Malcolm Tuttle of Queensland Racing Limited (QRL), dated 18 November 2008. At our last board meeting held on 4 June 2009, this matter was again discussed. In reviewing this correspondence, I have realised the advice was given by CGW to QRL concerning the application of the 2008 amendments to the Racing Act 2002 to the Product and Program Agreement and its implications for that Body.*
>
> *The legal advice was given to QRL, not to Product Co, and as it stands, Product Co is not in receipt of any legal advice in respect of its own position or the position of any other control bodies.* ***On this basis, the letter supplied to QRL from CGW was for information of a general nature only.***[183]
>
> (emphasis added)

8.4.23 Mr Hanmer, when giving evidence to the Commission, described the disparity between Mr Grace's draft of 5 June and the email of 9 June as an inadvertent error which occurred when he "cut and pasted" Mr Grace's draft but could not explain the changed ending emphasised above.[184] His explanation that it was just a copying error is not credible.

8.4.24 On 12 June, Mr Lambert again raised the matter of the Grace advice with Mr Hanmer. His email included the following:

> *I refer to your email on the above matter. While there is still no client relationship between product co and GW [Cooper Grace and Ward] the issue still remains. ...*[185]

182 Letter from David Grace to Anthony Hanmer, 5 June 2009.
183 Email from Shara Reid to William Ludwig cc: Anthony Hanmer, 9 June 2009, 5.51pm.
184 Transcript, Anthony Hanmer, 26 September 2013, page 83 lines 8-34, page 84 lines 1-18.
185 Email from Michael Lambert to Anthony Hanmer, 12 June 2009, 12.19pm.

8.4.25 On 15 June, Mr Hanmer emailed Ms Reid and Mr Bentley enclosing a copy of that email from Mr Lambert and recorded the following:

> *I have told him that I will not be speaking to Mr. Kelly on behalf Product Co about a subject Product Co require advice on where we do not have any issue, to report back to a board that have been told that we have no agreement to have advice upon. This catch 22 situation is at an end as far as Product Co is concerned. But, you will now see that Michael wants to do it all over again with QR [Queensland Racing]. In the unlikely event that this does get on to the board papers I'll probably be called upon to carry the day so, I will just need a copy of the minute from the board of QR* ***that killed this letter as far as QR were concerned*** *in the first place. From memory the letter was presented to the board who noted it for no further action ... .*[186]
>
> (emphasis added)

8.4.26 On 15 June, Mr Lambert emailed Ms Reid requesting that the letter of advice be put on the agenda for the meeting of QRL for 26 June 2009.[187] On 17 June Mr Hanmer responded:

> *Mr Grace's letter to Malcolm Tuttle of 18 November 2008 was distributed and viewed by the Queensland Racing Board at that time. It was agreed that no further action be taken. I can see little benefit in the board's schedule to once more have this letter as an agenda item. However you may wish to bring this up as an item of discussion in general business.*[188]

8.4.27 On 23 June, Mr Lambert prepared a board paper styled *Issue Paper*:

> *To determine what course of action to follow in respect of the advice from Cooper Grace and Ward that [TattsBet] has not got a right to pass through to QR [Queensland Racing] any fees that they incur in accessing Australian Race Fields information for the purpose of wagering...*
>
> ***Recommendation***
>
> *It is recommended that a letter be drafted by management to issue to the Minister for Racing seeking to clarify the specific intention of the government in drafting section 10 of the PPA.*[189]

8.4.28 On 23 June, Mr Lambert sent a copy of his *Issue Paper* to his fellow directors, including Mr Bentley.[190]

8.4.29 The board of QRL met on 26 June when Mr Bentley, Mr Hanmer, Mr Andrews, Mr Lambert and Mr Ludwig were in attendance. Mr Bentley removed himself from the meeting during discussions about the PPA and race fields legislation.

8.4.30 The minutes record:

> *Bob Bentley removed himself due to a conflict of interest...*
>
> ***10.4 Product and Program Agreement and Race Fields legislation***
>
> *Mr Lambert previously circulated a paper on the advice QRL had originally received from Cooper Grace Ward Lawyers on 18 November 2008. In essence, this advice related to the distinction between the right of access to race information and the right to use that information for wagering purposes.*
>
> *Mr Lambert informed the board he had spoken to Mr Mike Kelly at the Office of Racing and on Mr Kelly's advice QRL's executive should write to* ***the Minister*** *seeking clarification of Clause 10 of the Product and Program Agreement.*

186 Email from Anthony Hanmer to Shara Reid cc: Robert Bentley, 15 June 2009, 3.18pm.
187 Email from Michael Lambert to Shara Reid, 15 June 2009, 10.58am.
188 Email from Anthony Hanmer to Michael Lambert, 17 June 2009, 4.01pm.
189 Lambert, M 2009, *Product and Program Agreement and Race Fields Legislation*, 23 June.
190 Email from Michael Lambert to Robert Bentley, 23 June 2009, 3.23pm.

***MOVED** by Mr Tony Hanmer **SECONDED** by Mr Bill Andrews.*

Motion carried.[191]

(emphasis added)

8.4.31 In disregard of the resolution, Mr Hanmer directed Mr Tuttle to address the letter to Mr Kelly rather than to the Minister.[192]

8.4.32 On 23 July, as requested, Mr Tuttle wrote to Mr Kelly.

8.4.33 On 4 August, Mr Lambert emailed Mr Hanmer and Mr Andrews. Its tone suggests that communications between Mr Lambert and Mr Hanmer about the issue had become strained:

> *Tony, I am writing this more in sorry [sic] than anger. I continue to be amazed at your capacity for contrariness. The classic is the long running saga of the David Grace advice on Product Co which could have been dealt with expeditiously in late 2008 when it first arose but which you have consistently acted in a way to frustrate the resolution of. Examples of your frustration of the process include:*
>
> - *initially, denying that Product Co has jurisdiction of the issue*
> - *seeking to exclude David's involvement with Product Co to discuss the matter*
> - *excluding QRL management from the Product Co meeting to discuss the matter*
> - *relying upon verbal advice from a lawyer friend to argue that the matter does not need to be addressed*
> - *resolving that as the letter from Grace was not directed to Product Co it cannot be further considered by Product Co*
> - *denying that there is anything to be discussed at QRL and seeking to have it removed as a discussion item*
> - *once it was discussed at QRL, writing a letter that was so totally general and without specific content to Mike Kelly that he had no basis on which to respond other then by way of a letter of similar generality and lack of content.*
> - *once it was further discussed and agreed at QRL, then directing, as a matter of monumental pettiness, that is revised and detailed letter should go to Mike Kelly, not the Minister, despite Mike's advice that it should be sent to the Minister.*
>
> *Hence 9 months later we have a most serious matter, with potential major financial implications and, for the board, legal implications, including duties under Corporations Law, unresolved, largely if not exclusively because of your actions and inactions and with no clear statement of purpose or principle from you at any time.*[193]

8.4.34 It was not until 6 January 2010 that Mr Kelly provided a response to Mr Tuttle's letter of 23 July 2009. It offered no solution to the question:

> *Unfortunately, I advise that this Office, following exhaustive searches of our records and enquiries of relevant Government agencies, including the Office of Liquor and Gaming, is unable to provide you with any definitive view in relation to this matter in addition to what we have already provided.* [194]

191 QRL, Board Meeting Minutes, 26 June 2009, para 10.4.

192 Email from Anthony Hanmer to Shara Reid, William Andrews, William Ludwig, Michael Lambert cc Malcolm Tuttle, 22 July 2009, 9.52am; Email from Michael Lambert to Anthony Hanmer, Shara Reid, William Ludwig and William Andrews, 22 July 2009, 2.40pm; Email from William Andrews to Michael Lambert, Anthony Hanmer, Shara Reid and William Ludwig, 22 July 2009, 15.43+1000; Transcript, Anthony Hanmer, 26 September 2013, page 91 lines 17-24, page 92 lines 20-44; Letter from Malcolm Tuttle to Michael Kelly, 23 July 2009.

193 Email from Michael Lambert to Anthony Hanmer and William Andrews, 4 August 2009, 10.25am.

194 Letter from Michael Kelly to Malcolm Tuttle, 6 January 2010.

Subsequent inaction by directors

8.4.35 Thereafter no action was taken about the letter of advice. The boards of Product Co and the three control bodies permitted TattsBet to continue to deduct these race field fees from the fees due to Product Co.

8.4.36 In the period after receipt of the letter of advice on 18 November 2008, explanations were offered by the directors of Product Co, and in particular Mr Hanmer about the action taken and the action not taken by the company.

8.4.37 At the board meeting of Product Co held on 4 December 2008, Mr Hanmer (and other directors) expressed views contrary to those expressed by Mr Grace, on the basis that his legal analysis should be rejected in favour of the conclusion that TattsBet was indeed entitled to make the deductions pursuant to the terms of PPA.

8.4.38 Personal opinions, feelings and impressions cannot justify the decisions made by the officers of Product Co and the three control bodies. Even if directors held a contrary view to that of Mr Grace, based on legal principle or not, the existence of a serious legal question as to the entitlement of TattsBet to make these very substantial[195] deductions from sums due to Product Co required them to resolve the question appropriately. They were not dealing with their own funds, about which they could be cavalier if they chose, but funds held on behalf of the racing industry in Queensland. The existence of the uncertainty should have dictated that they resolve the issue, rather than allow TattsBet to benefit from their inaction.

8.4.39 Mr Bentley and Mr Hanmer engaged in communication with representatives of TattsBet about the issue.[196] Indeed, Mr Hanmer sought their view on the deductions issue, although he denied speaking to TattsBet directly in relation to the letter of advice.[197] It is quite extraordinary to contemplate that any director acting reasonably would be convinced by, or rely on, a view expressed by a representative of the opposite party, with a different view from that of his company's respected commercial lawyer, and where a significant sum of money was involved.

8.4.40 Mr Hanmer, at the time, had sought to make the point that the letter of advice was addressed to QRL and not Product Co. At the public hearings of the Commission, he accepted that this was irrelevant.[198] His argument had been that it was only for "noting". As emphasised by Mr Lambert, it was the knowledge of the existence of the legal advice that was the relevant circumstance demanding action;[199] that it was addressed to only one of the control bodies could not be relevant to the judgment of a director of another control body or of Product Co.

8.4.41 The resolution of the board of Product Co to investigate the views of the government to gain an understanding of the intention held in 1999 could not justify inaction either. There are two reasons why that is so:

- First, as the proper construction of the PPA was a question of law, the law requires the parties' intention to be gleaned from the terms of the written agreement and not an investigation of what the parties now say they intended by the document in 1999.[200]

195 Counsel Assisting the Commission was criticised in the submissions from Rodgers Barnes & Green for his reference in the public hearings to these monthly deductions being in the order of $500,000: see submissions at Part 6, para 1. However, his statements were conservative as the deductions were much more that $500,000 in most months of the relevant period.

196 Transcript, Robert Bentley, 19 September 2013, page 68 lines 10-46, 20 September 2013, page 53 lines 15-39; Transcript, Anthony Hanmer, 26 September 2013, page 72 lines 25–43, page 73 lines 9–46

197 Transcript, Anthony Hanmer, 26 September 2013, page 72 lines 25–43, page 73 lines 9–46.

198 Transcript, Anthony Hanmer, 26 September 2013, page 40 lines 33–45, page 41 lines 7–10.

199 Email from Michael Lambert to Anthony Hanmer, 11 December 2008, 2.03pm; Email from Anthony Hanmer to Michael Lambert, 12 June 2009, 12.19pm; Email from Michael Lambert to Anthony Hanmer and William Andrews, 4 August 2009, 10.25am.

200 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352 per Mason J; *Western Export Services v JIREH International Pty Ltd* [2011] HCA 45 at [3].

As stated in *Byrnes v Kendle* "contractual construction depends on finding the meaning of the language of the contract – the intention which the parties expressed, not the subjective intentions which they may have had, but did not express".[201]

- Second, this investigation failed to provide direction to the board in any event. It proved a dead end. Yet, still nothing was done.

8.4.42 It was inappropriate for the directors to rely upon any guidance said to have been offered by the Office of Racing.[202] Mr Kelly made clear, on more than one occasion, that he could not offer legal advice in relation to the issue and he said that Product Co should obtain its own legal advice.[203]

8.4.43 Another explanation offered for the inaction on the legal issue was the view held, by at least Mr Bentley and Mr Hanmer, that the legal position (communicated in the letter of advice) did not reflect the "commercial position" or "commercial intention" (that TattsBet should not be liable to pay the interstate race information fee as well as the product fee under the PPA).[204] To judge the commercial intention of the government in 1999, if not according to legal principle, would require an investigation of the "commercial position" or "the commercial intent" of the parties to the PPA; this required personal judgment as to the parties' intentions for their commercial arrangement. Not only that, if Mr Bentley and Mr Hanmer were convinced of their view, they were advised by Mr Grace to enter into renegotiations with TattsBet to clarify the intention for the remainder of the term of the PPA. If that were their view, it does not explain their inaction. There is no evidence of any agreement to amend the PPA.

An "agreement" with TattsBet

8.4.44 After he had given evidence at the public hearings of the Commission, Mr Tuttle swore in a supplementary statement of the existence of an "agreement that was reached between [TattsBet] (through Dick McIlwain) and QRL (through David Grace) in November 2008, whereby QRL would retain any race field fees imposed as a result of the Queensland race fields legislation."[205] Mr Tuttle gave no evidence either in written statements or oral evidence of facts which might justify the conclusion that a legally binding agreement had been reached. Nor did any other witness provide any evidence about this *agreement*.

8.4.45 There are reasons to believe that no agreement was reached; particularly one that would be legally enforceable.

8.4.46 The letter from Mr Grace to Mr McIlwain dated 11 November 2008, mentioned above, records no agreement and certainly no agreement relevant to this issue. That letter records a *comment* by Mr McIlwain as to TattsBet's intention should QRL request consent to the *supply* of information to others (i.e other wagering operators) for consideration or benefit.[206]

8.4.47 Mr Grace makes no reference to an agreement in the letter of advice despite his consideration of the matters (following events in which he was involved during the same month).

8.4.48 Yet, in written submissions made on behalf of some directors and senior executives of QRL, it is contended that approaches to TattBet "resulted in it agreeing that it would not *double dip*, meaning that it would not seek to both deduct fees it paid under interstate legislation and also insist that the Queensland control bodies remit to it any monies they collected under the Queensland legislation".[207]

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201 (2011) 243 CLR 253 at [98]-[101] per Heydon and Crennan JJ
202 Transcript, Robert Lette, 15 October 2013, page 42 lines 40-47; Transcript, Anthony Hanmer, 26 September 2013, page 39 lines 30-43.
203 Letter from Michael Kelly to Anthony Hanmer, 28 May 2009; Letter from Michael Kelly to Malcolm Tuttle, 6 January 2010.
204 Transcript, Anthony Hanmer, 26 September 2013, page 60 lines 14-16; Transcript, Robert Bentley, 23 September, page 52 lines 2-8; Robert Lette, 15 October page 39 lines 31-35, page 40 lines 8-33, page 42 lines 40-47, page 36 lines 7-35.
205 Statement of Malcolm Tuttle, 23 October 2013, pages 2-6 para 6.
206 Letter from David Grace to Dick McIlwain, 11 November 2008.
207 Submission of Rodgers Barnes & Green, 30 October 2013, Part 6 pages 6-23, 6-25, 6-26 paras 94, 95-106.

8.4.49 It was submitted that "Mr Bentley, Mr Tuttle and Mr Grace had engineered a position whereby the Queensland racing control bodies were substantially better off".[208]

8.4.50 Mr Tuttle submitted to the Commission that

> *...my belief is that by confirming an understanding with [TattsBet], QRL has managed to keep about $117 million in race information fees which is certainly more than the $91 million that Counsel Assisting the Inquiry repeatedly asserted that we had lost.*
>
> *Simply put, in the absence of [TattsBet] agreeing to waive the provisions of 7.5(b) and (c) the industry would have been in doubt as to whether it could have collected what I forecast to be in the order of $117 million during the relevant period of the inquiry.* [209]

8.4.51 This is a curious submission. It would seem peculiar that, if any agreement had been reached involving Mr Grace for QRL and TattsBet (relevant to the *Third Party Charge*s being levied by TattsBet), this agreement was not documented, was not mentioned at board meetings and Mr Grace did not mention it in the letter of advice.

8.4.52 To amount to a binding variation to the PPA, the parties to the agreement must be involved (namely Product Co and the other control bodies). There is no suggestion of any participation by these entities. Further, if an agreement of this nature had been reached, it makes the conduct of Mr Grace at the meeting of Product Co on 5 March 2009 (referred to above) particularly inexplicable as there was no discussion of such a deal, which supposedly benefited Product Co, at the meeting. No one else who gave evidence to the Commission, who might have been expected to know about this *agreement*, spoke of it.

8.4.53 Mr Tuttle believed that because race field fees would be collected by the Queensland control bodies pursuant to the Queensland race fields legislation, this had the effect of negating the impact of TattsBet making the deductions for charges it incurred due to interstate race fields legislation.[210]

8.4.54 Mr Tuttle advanced a position that the control bodies in Queensland were unaffected[211] by interstate race fields legislation and, so long as the Queensland Parliament introduced similar legislation, the legal view expressed by Mr Grace was of no importance.

8.4.55 This simplistic view assumes that the position of the control bodies in Queensland was that they appreciated that TattsBet was not entitled to make the deductions but permitted it on the condition that TattsBet did not enforce a right (which it otherwise had available to it) to insist upon repayment from Product Co of all race field fees paid to Product Co pursuant to the Queensland race fields legislation. In other words, this submission advances the position that TattsBet had an entitlement, under the PPA, to claw back the race fields fees charged by the Queensland control bodies.

8.4.56 To assess the submission that Product Co and the control bodies were substantially better off, it is necessary to consider what the position would have been had the alleged deal not been done.

8.4.57 That question was disposed of by Mr Grace in his letter of advice. He indicated that the race fields fee was not for the *supply* of information by QRL to persons other than TattsBet for a fee. Hence, there could be no entitlement to seek, from Product Co, fees it received for *use* of the information.

208 Submission of Rodgers Barnes & Green, 30 October 2013, Part 6 page 6-26 para 106.
209 Statement of Malcolm Tuttle, 23 October 2013, page 6 paras 19-20.
210 Statement of Malcolm Tuttle, 25 October 2013, pages 5-6 paras 16–19.
211 Statement of Malcolm Tuttle, 25 October 2013, pages 5-6 paras 16–19.

8.4.58 Clause 7.5(b) restricts Product Co and the control bodies from *supply* of the Queensland Racing Calendar or the Queensland Racing Program to any other person for use in a wagering business. Further, clause 7.5(c) is not relevant as it relates to supply for a fee to the persons specified in Schedule 4. Again, the race fields fee is not for *supply*.[212]

8.4.59 There is no evidence of any such request being made to supply that information by QRL to, for example, corporate bookmakers.

8.4.60 The submissions received for some directors and senior executives suggested that Mr Grace had not dealt with "Product Co's right to retain race fields fees collected under the Queensland legislation".[213] Indeed, he did, in the following terms:

> *The PPA makes express provision in clause 7.1 for the **supply** of the Queensland Racing Calendar and in 7.2 for the **supply** of the Queensland Racing Program and then after dealing with intellectual property rights in clause 7.3, specifically and separately deals with the permitted **use** of that information, then clause 7.5 deals with **restrictions** on Product Co's and the Queensland Racing's **supply** of information elsewhere.*
>
> *Amendments to the legislation do not authorise Queensland Racing to impose a charge on the supply of information. Indeed, Queensland Racing does not supply Australian Racing Product to other bodies, rather, from what you have instructed us **RISA supplies** the information. The legislation imposes a right on Queensland Racing as the control body under the Racing Act for the thoroughbred code of racing in Queensland, to charge a fee for its **use**. That is, **RISA** will charge a **fee for the supply of information** but **Queensland Racing**, pursuant to its rights created by statute, will be empowered to impose a **charge for its use** subject to the provisions of clause 113E(6) of the draft Bill mentioned above.*[214]

8.4.61 Hence, once Mr Grace had provided the letter of advice, there was no reason for QRL, Product Co or any control body to request consent from TattsBet for anything, or to account for fees charged to corporate bookmakers (as the legislature intended that they contribute to the industry).

8.4.62 The view that race fields legislation in Queensland negated the impact of interstate race fields legislation is without foundation and the evidence does not support the assertion that any such agreement was reached.

8.4.63 As Mr Grace said in the letter of advice:

> *We understand that it is the intent of Parliament that the financial arrangements within Wagering be restructured to provide a benefit to industry through payments raised by the control body pursuant to amending legislation. Accordingly it is quite proper that these charges be collected without deduction. They are a charge imposed under statute which alters the way the industry is funded by transferring a part of the wagering turnover to the industry control body for the benefit of the industry it serves.*[215]

8.4.64 As mentioned earlier, the Queensland legislation was introduced to benefit control bodies by enabling them to collect fees from operators who were not contributing to the industry, not to recoup charges made to TattsBet. The intention of the Queensland Parliament was that the industry control bodies would benefit from all race field fees charged by those control bodies.[216]

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212 *Product and Program Agreement*, 9 June 1999, clause 7.5.
213 Submission of Rodgers Barnes & Green, 30 October 2013, Part 6 page 6-31 para 114.
214 Letter from David Grace to Malcolm Tuttle, 18 November 2008.
215 Letter from David Grace to Malcolm Tuttle, 18 November 2008.
216 A Fraser, "Queensland to Introduce 'race fields' legislation to protect future of racing", *Ministerial Media Statements*, 4 October 2008.

Mr Grace's letter of 3 February 2009

8.4.65 Representatives for Mr Bentley, Mr Hanmer and Mr Tuttle submit that it was "quite extraordinary" that no reference was made by counsel assisting to a second letter of advice given by Mr Grace to QRL on 3 February 2009.[217] The letter from Mr Grace was in the following terms:

> *We refer to our telephone discussion with you of 2 February and to the Product and Programme Agreement made between [TattsBet] (then TABQ), Product Co and the three Queensland control bodies on 9 June 1999 (Agreement).*
>
> *The Agreement provides, inter alia, that there is a definition of "Australian Racing Product" which means Australian Racing Information in the format specified by [TattsBet] to Product Co in accordance with clause 9.3 of the Agreement.*
>
> *Australian Racing Information means all the information relating to Racing in Australia that is necessary for the efficient and effective conduct of Race Wagering on Racing in Australia and includes information of the nature set out in Schedule One of the Agreement.*
>
> *Clause 9 of the Agreement deals with the supply of Australian Racing Product.*
>
> *By clause 9.1 Product Co must supply Australian Racing Product to [TattsBet]. The terms of clause 9 set out the timing and format of the information to be provided and by clause 9.4 Product Co is the exclusive supplier of Australian Racing Product to [TattsBet].*
>
> *Clause 9.5 deals with the position where there is an inability to supply Australian Racing Product.*
>
> *It provides that if Product Co cannot procure the Australian Racing Product it is required to supply to [TattsBet] then [TattsBet] may procure the equivalent of the Australian Racing Product from any other source and incur a Third Party Charge, defined to mean the amount of any fee payable or other consideration given by [TattsBet] to obtain the equivalent of the Australian Racing Product and the costs and expenses incurred by [TattsBet] from procuring it from another source.*
>
> *The amount of that charge must be reasonably commercial in the circumstances, having regard to the need to maintain continuity of Australian Racing Product.*
>
> *The amount of the Third Party Charge will be set off against the Product Fee.*
>
> *By clause 10.2 [TattsBet] is authorised to set off from the fee payable under 10.1 the amount of any Third Party Charge. 10.1 provides the amount of fee to be paid by [TattsBet] to Product Co in respect of its performance of its obligations under the Agreement.*
>
> *That is an amount of $2,833,333 per month and a variable amount equal to 39% of the Gross Wagering Revenue for the month (or pro rated for any part of the month) for which the Agreement applies.*
>
> *Accordingly, the amount of back charge from [TattsBet] appears to be lawful under the Agreement, subject to it being set off against the amounts of charge. There does not appear to be any provision under the Agreement by which it should be paid by a Queensland Control Body, but rather that it be set off against the amount payable by [TattsBet] to the Queensland Control Body through its agent, Product Co under the Agreement.*[218]

8.4.66 The submission does not explain the relevance of the letter to the issue at hand. The relevant question for Mr Grace on this occasion involved whether "the amount of back charge from [TattsBet]" constituted a "Third Party Charge" under clause 10.2 of the PPA. Mr Grace's view was that it did.

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217 Submission of Rodgers Barnes & Green, 30 October 2013, Part 6 page 6-31 para 115.
218 Letter from David Grace to Shara Reid, 3 February 2009.

8.4.67 The issue of the claim of the "back charge" involved a claim that the PPA was a *Nominated Arrangement* under the RISA Participation Agreement. Schedule 6 of the RISA Participation Agreement permitted RISA to sublicense TattsBet the right to exploit the Queensland Racing information until 1 December 2008.[219]

8.4.68 As Racing NSW had charged TattsBet for the period September, October and November 2008, when no fees (it was contended) should have been charged, it was argued that the sum was repayable. QRL invoiced Racing NSW for it.[220] Racing NSW denied the validity of the claim. It was said to have been charged during the moratorium period. In the final result after the letter from Mr Grace dated 3 February, Ms Reid advised that it was for TattsBet to seek repayment from Racing NSW.[221]

8.4.69 On the face of the letter, Mr Grace does not express any variation of his opinion (reflected in the letter of 18 November 2008) on the deductions issue.

8.4.70 When the board of Product Co met on 5 March 2009, with Mr Grace present, he made no reference to the 3 February letter, despite his express warnings to the board that to take no action on his letter of 18 November 2008 might amount to a breach of duty.

8.4.71 Not one witness referred to the letter from Mr Grace of 3 February 2009 as relevant to the question. Indeed, none suggested that Mr Grace varied his views (expressed earlier in his letter of 18 November 2008).

8.4.72 The submission is, therefore, of no assistance to the Commission.

8.4.73 Mr Ludwig held the view that the matter of TattsBet making the deductions was not worth pursuing in the courts as TattsBet would vigorously defend any action and it would be very costly for Product Co and the three control bodies.[222] A director, acting reasonably, could not hold this view as the amount of the deductions being made far outstripped the cost of litigation that might be borne by Product Co.

8.4.74 Those acting for Mr Lette advanced a submission that the "stakeholder Board *were* the company and it was to them that the directors of Product Co owed the relevant duties".[223] The submission involved the following grounds:

- The nature of Product Co and its relationship with the control bodies of the three codes was "a pass through vehicle"[224]
- Product Co had no business of its own and no commercial existence independent of its three owners[225]
- The directors of Product Co had no duty independently to commission legal advice and it would have been a breach of duty to do so[226]
- The company had no funds with which to commission legal advice.[227]

8.4.75 The submission does not accord with the facts.

219 Memorandum from Shara Reid to the board of QRL, "Nominated Arrangements", undated.
220 Letter from Queensland Race Product Co Ltd to Racing NSW, 23 January 2009; Letter from Myles Foreman (RISA) to Peter V'landys (Racing NSW), 23 January 2008; Letter from Racing NSW to Queensland Race Product Co Ltd, 30 January 2009; Memorandum from Shara Reid to the board of QRL, "Nominated Arrangements", undated.
221 Memorandum from Shara Reid to the board of QRL, "Nominated Arrangements", undated.
222 Transcript, William Ludwig, 27 September 2013, page 49 lines 1-18, page 50 lines 1-3, page 52 lines 17-22, page 53 lines 15-18.
223 Submission of Robert Lette, 28 October 2013, page 7 para 19.
224 Submission of Robert Lette, 28 October 2013, page 6 para 14.
225 Submission of Robert Lette, 28 October 2013, page 6 para 15.
226 Submission of Robert Lette, 28 October 2013, page 8 para 22.
227 Submission of Robert Lette, 28 October 2013, page 8 para 22.

8.4.76 There was no impediment to Product Co obtaining funds to secure legal advice when it resolved to do so. This is apparent from the fact that in early 2009, it was seen as necessary to obtain legal advice from Mr Grace and the directors had no difficulty resolving to retain him and budget for $15,000 for that advice.[228] Mr Bentley and Mr Tuttle confirmed that funds were not an issue for Product Co, if needed to procure legal advice.[229]

8.4.77 More importantly, there is no evidence which supports the submission that the control bodies or their directors considered that Product Co was merely a shell without a role other than through which funds received from TattsBet were passed to the three codes. The evidence is to the opposite effect. For QRL, Mr Bentley and the other directors paved the way for his conflict to be managed by allocating to Product Co all matters involving race fields legislation,[230] including making submissions to government, enforcing the liability against wagering operators and all matters associated with the impact of the interstate race fields legislation on the PPA.

8.4.78 More particularly, it was the board of Product Co, as agent for the three control bodies, that purported to address the question of what should be done in response to the legal advice obtained from Mr Grace. It was that board which:

a) resolved to discuss the views expressed by Mr Grace in relation to the *Third Party Charge* imposed by TattsBet and to determine appropriate action to be taken on behalf of the three control bodies[231]

b) requested Mr Grace to attend its meeting on 5 March 2009, to receive his advice and to discuss it[232]

c) received advice from Mr Grace that it was for Product Co to act on the advice one way or the other[233]

d) resolved to act to seek information from the Office of Racing and not to take further legal advice from senior counsel.[234]

8.4.79 The chairs of QHRL and GQL were on that board with four directors of QRL. The directors of Product Co reported to their respective boards about the decisions made. They reported the steps taken by Product Co to advance the best interests of the three codes of racing in Queensland.

8.4.80 The contention that those directors did not owe duties to exercise those powers to determine, for the control bodies, what should be done in response to the Grace letter of advice cannot be accepted. As the submission suggests that the directors on the board of Product Co required "authority and direction" [235] from the individual control bodies to act, which they did not have, the submission is rejected. As indicated earlier, the constitution of Product Co defined its purpose: to act as agent for the three control bodies in its relationship with TattsBet. That is precisely what it was purporting to do.

228 Email form Shara Reid to Anthony Hanmer, 19 January 2009, 14:09+1000.
229 Transcript, Robert Bentley, 20 September 2013, page 77 lines 1-6; Transcript, Malcolm Tuttle, 1 October 2013, page 49 lines 45-46, page 50 line 1.
230 Transcript, Robert Bentley, 19 September 2013, page 30 lines 29 – 47.
231 QRPC, Board Meeting Minutes, 5 March 2009; QRPC Board Meeting Minutes, 4 June 2009.
232 File Note, David Grace, 5 March 2009.
233 File Note, David Grace, 5 March 2009.
234 QRPC, Board Meeting Minutes, 5 March 2009.
235 Submission of Robert Lette, 28 October 2013, page 8 para 23.

8.5 The duty of the directors

Introduction

8.5.1 Term of Reference 3(f) requires a consideration of the conduct of all *directors* and *senior executives* of the control bodies (including RQL) and Product Co from about October 2008[236] concerning fees paid by TattsBet for Queensland wagering on interstate races through TattsBet.

8.5.2 More particularly, the inquiry is:

a) *"whether they acted in good faith and consistently with their responsibilities, duties and legal obligations and (in) the best interests of"* those companies

b) Whether their actions *"may have been influenced by any conflict of interest in being both a director of"* one such company and Tatts Group

c) Whether their actions *"may have been influenced...by a relationship with any other person"*

d) *"Whether they used their position/s to gain a person advantage"*.

Did the directors and senior executives act in good faith and consistently with their responsibilities, duties and legal obligations and in the companies' best interests?

8.5.3 Insofar as this Term of Reference refers to "responsibilities, duties and legal obligations", the Commission interprets this to mean:

a) *Responsibilities* which are associated with the directorship in question; for the senior executives, responsibilities arising out of the terms of their employment in each case

b) *Duties* are those recognised in law as duties arising from the position of director or senior executive

c) *Legal obligations* are the obligations of directors or senior executives which are recognised at law and arise from taking the position of director or by appointment as a senior executive.

8.5.4 Having considered whether there are differences intended by use of the terms responsibilities, duties and legal obligations, an assessment of the legal and equitable duties will appropriately address the responsibilities, duties and legal obligations for each of these relevant officers of the three control bodies and Product Co.

8.5.5 This Term of Reference also requires a consideration of whether each of the directors and senior executives acted *in the best interests* of their respective companies. Much consideration has been given in the law to the meaning and the extent of *the best interests* of a company. This question will be addressed by considering the duty of a director and a senior executive to act in those interests.

Good faith

8.5.6 The duty to act with *good faith*, which is integral to the inquiry, requires officers to exercise their powers for a proper corporate purpose and to avoid actual or potential conflicts between their duties to the company and their personal interests or duties to others. It also requires them to account to the company for business opportunities which come to them by reason of or in the course of holding office as a director.[237]

236 See Term of Reference 3(f)(iv): *"at the material time race information fees were introduced, or at any other time"*.
237 *Chew v R* (1992) 173 CLR 626. *R v Byrnes & Hopwood* [1995] HCA 1 at [30].

8.5.7 Other than to inquire into the management of the conflict of Mr Bentley which is addressed in Chapter 5, no evidence was revealed to the Commission by its inquiries or from others which might justify a conclusion that any person acted (in regard to the introduction of the race information fees) other than for a proper corporate purpose.

8.5.8 Therefore, with the exception noted for Mr Bentley, it cannot be said that any of the relevant persons acted other than in good faith in regard to the actions or inaction of the companies in response to the introduction of interstate race field fees.

Responsibilities, duties and legal obligations and in the best interests of those companies

8.5.9 Section 180 of the Corporations Act requires a director or other officers (including senior executives) to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would in the circumstances.

8.5.10 Section 181 requires a director or other officer to exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose; contravention incurs a civil penalty.

8.5.11 Whether conduct is, or accords with, the conduct of the reasonable director or was in the best interests of a company requires it to be judged on an objective basis.[238] The yardstick is a reasonable director in the circumstances and with the skills and experience of the person in question.

8.5.12 The relevant circumstance here is that a number of the directors of each of the four companies and some senior executives (discussed at 8.3 above) appreciated that a respected commercial lawyer, engaged by QRL to provide legal advice, reached the view that TattsBet was not entitled, pursuant to the terms of the PPA, to make and continue to make, the substantial deductions from the product information fee due to Product Co, as a consequence of the race fields fees it paid to interstate control bodies.

8.5.13 Not to take action in accordance with the letter of advice amounted to a rejection of the advice. In effect, it endorsed the correctness of TattsBet continuing to pay approximately $91 million dollars less to Product Co than might well lawfully be due, pursuant to the PPA during the relevant period.

8.5.14 Failure to resolve the uncertainty as to what was due, by testing the view held by Mr Grace, could never have been in the interests of the control bodies or of Product Co. Nor could it accord with the action of a director acting reasonably.

8.5.15 There is, therefore, a serious issue to be investigated by an appropriate authority such as ASIC, as to whether each of Mr Hanmer, Mr Lette, Mr Ludwig and Ms Watson breached the duties they owed to Product Co and to their respective control bodies.

8.5.16 Mr Lambert and Mr Andrews unsuccessfully agitated for action to be taken. As Mr Lambert said during examination by Mr Wilson QC counsel for some of the directors and senior executives of QRL, there was no point in him moving a formal motion to take action to seek senior counsel's advice as the majority of the directors of Product Co was clearly against any such course.[239]

8.5.17 Individual directors could not justify their failure to act on the basis that they held a different view from Mr Grace. No evidence or any submission made to the Commission could justify such a conclusion. Invitations given to Mr Hanmer[240] and Mr Lette[241] during the public hearings to

238 *Chew v R* (1992) 173 CLR 626 at 644.
239 Transcript, Michael Lambert, 30 September 2013, page 34 lines 28-44, page 34 lines 18-30.
240 Transcript, Anthony Hanmer, 25 September 2013, page 80 line 26 - page 82 line 7; 26 September 2013, page 32 lines 42-47, page 33 lines 1-29: Hanmer considered each director (qualified or otherwise) was entitled to his own view of the proper construction of the PPA.
241 Transcript, Robert Lette, 15 October 2013, page 37 lines 4-8, page 38 lines 7-14, page 39 lines 9-35

explain their conclusion that the view of Mr Grace was not sustainable revealed a gross lack of objectivity on their part, let alone legal acumen. In any event, a contrary view which was legally sustainable could only reinforce the necessity to resolve the competing opinions.

8.5.18 There is sufficient evidence before the Commission to conclude that Mr Bentley may have breached the duties which he owed to QRL. He appreciated all of the relevant circumstances which would have caused a director, acting reasonably, to seek to resolve the uncertainty.

8.5.19 His management of his conflict by remaining isolated from decision-making about TattsBet does not assist him. Indeed, it is a circumstance that, arguably, would have caused a reasonable director in his position and with his experience to seek to influence the board of QRL and even RQL to resolve the uncertainty by action. To do so would not have involved him in preferring one corporation over the other.

8.5.20 As to the other directors of QHRL and GQL (who were not directors of Product Co), their failure to agitate for action is explicable in that they had resolved to have the board of Product Co consider and suggest an appropriate response to the letter of advice. When they received the resolution of the board of Product Co, it is not unreasonable that they did not seek to take contrary action. Indeed, it seems that they did not have the power to take action or force action to be taken and so their position does not justify the same scrutiny.

8.5.21 Section 184 may well have application too.

8.5.22 If a conclusion is reached that the conduct of a director, as well as being other than in the best interests of the company, was *reckless*, then that director commits an offence. Section 5.4 of the *Criminal Code Act 1995* (Cth) provides the circumstances which constitute recklessness. It involves two elements. First, an awareness of the substantial risk that exists and second that it is *unjustifiable* to take the risk. Here, the very substantial financial impact of these deductions and the existence of the legal advice that they were not, at law, entitled to be made, suggests that a finding of *recklessness* may well be open.

8.5.23 In these circumstances, failure to act, particularly after the warnings which were given to the directors of Product Co, requires the Commission to recommend that the appropriate authority investigate recklessness on the part of Mr Hanmer, Mr Lette, Mr Ludwig and Ms Watson. Mr Bentley's involvement in the matter was also sufficient to recommend investigation and recklessness by him in doing nothing to encourage resolution of the problem. His conflict is discussed further, below.

8.5.24 Senior executives of QRL, QHRL and GQL had insufficient power to act contrary to the board of Product Co. Their inaction is, therefore, explicable. In particular, Mr Godber, the CEO of QHRL, gave evidence that it was difficult to push for action when the chairman of QHRL, Mr Lette, was clearly against it.[242]

Influenced by a conflict of interest

Background

8.5.25 Mr Bentley was a director of TattsBet between 1 July 1999 and 2 July 2007.[243] He was appointed a director of Tatts Group on 12 October 2006 and remains a director of that company (although he announced that he had "stood down" after this Commission was established).[244]

242 Transcript, Michael Godber, 14 October 2013, page 78 lines 34-46, page 79 lines 1-2. Submission of Tracey Harris, 1 November 2013, page 4 paras 14.
243 ASIC 2013, *TattsBet Limited Company Report*. Available from: ASIC. [14 June 2013].
244 ASIC 2013, *Tatts Group Limited Company Report*. Available from: ASIC. [14 June 2013].

8.5.26 Mr Seymour was a director of TattsBet between 1 September 2000 and 2 July 2007.[245] He was appointed a director of Tatts Group on 12 October 2006 and remains a director of that company.[246]

8.5.27 Hence, Mr Bentley and Mr Seymour were, at all material times, directors of Tatts Group and directors of QRL and QHRL respectively.

8.5.28 Mr Bentley remained a director of Tatts Group when he became the chairman of directors of RQL from 1 July 2010.

8.5.29 At all material times, each of them held shares in Tatts Group. The details of their shareholding from October 2008 are set out in Schedule C to this Chapter. Neither of them declared their interest to the directors of their companies although their shareholding was not covert.[247]

Mr Seymour

8.5.30 Section 191 of the Corporations Act provides that a director's duty is to notify other directors of a material personal interest *when conflict arises*.

8.5.31 Mr Seymour gave evidence that he had no knowledge of the letter of advice because he had a conflict of duty and duty and/or duty and interest (as a substantial shareholder of Tatts Group). His evidence was supported by the evidence of Mr Godber[248] and Ms Harris.[249] There was no evidence to suggest that his position should be brought into question at all.

8.5.32 Mr Seymour did not engage in the affairs of QHRL concerning any dealings with Tatts Group or TattsBet.[250] As to the potential for a conflict of duty and duty and/or duty and interest, he cannot be said to have failed in his duties.

8.5.33 For Mr Seymour, the conflict did not arise as the evidence demonstrates that he genuinely avoided any participation in the matters involving the Tatts Group or TattsBet and particularly the issue being considered here; he otherwise had no knowledge of it.

Mr Bentley

8.5.34 As Mr Bentley indicated,[251] his personal interest was not sufficiently material to influence the position taken by him: to refrain from taking any action within QRL or RQL to prevent TattsBet making the deductions or to test the correctness of so doing.

8.5.35 But Mr Bentley was in a position to take action as chairman of QRL and later RQL to test the view expressed by Mr Grace. He appreciated all the relevant circumstances and yet he failed to agitate for action.[252] In so doing (or not doing) he failed to act in the best interests of QRL and RQL.

8.5.36 As he was in a position of conflict regarding his duty to those control bodies and his duty to Tatts Group, he could not be said to have acted in good faith as he failed to avoid the conflict. This is so despite his claim to have played no part in Product Co and its activities.[253] There is some doubt about this claim but even if he did play a part, he had a duty to QRL and later RQL to act in good faith in the best interests of those companies, and he did not do so by taking no action on the letter of advice.

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245 ASIC 2013, *TattsBet Limited Company Report*. Available from: ASIC. [14 June 2013].
246 ASIC 2013, *Tatts Group Limited Company Report*. Available from: ASIC. [14 June 2013].
247 There is no evidence before the Commission of Mr Bentley declaring his shareholdings in Tatts Group to QRL and RQL. Mr Bentley gave evidence that his shareholdings did not create any difficulties as chairman. Transcript, Robert Bentley, 19 September 2013, page 20 lines 37-44, page 21 lines 1-4; Transcript, Kevin Seymour, 15 October 2013, page 4 lines 25-35.
248 Transcript, Michael Godber, 14 October 2013, page 58 lines 25-27, page 59 lines 27-32.
249 Statement of Tracey Harris, 18 September 2013, page 4 para 25.
250 See above at paragraph 2.5.32; Transcript, Michael Godber, 14 October 2013, page 58 lines 25-27, page 59 lines 27-32; Statement of Tracey Harris, 18 September 2013, page 4 para 25.
251 Transcript, Robert Bentley, 19 September 2013, page 20 lines 37-44, page 21 lines 1-4.
252 Transcript, Robert Bentley, 20 September 2013, page 50 lines 36-40, page 51 lines 1-14.
253 Transcript, Robert Bentley, 20 September 2013, page 63 lines 6–10.

8.5.37 Mr Bentley swore that he did not attend meetings of Product Co.[254] He denied that he took part in Product Co decisions relating to TattsBet.[255] He denied ever meeting or discussing the issue with Mr Grace.[256]

8.5.38 The evidence suggests that these denials should be rejected. Ms Harris said that Mr Bentley required her to provide information about race fields fees, despite him representing at an earlier board meeting that he had a conflict and would not be involved in the very same matter.[257] Mr Bentley and Mr Hanmer rejected her evidence on this matter.[258]

8.5.39 But Mr Bentley did not deny that he met with Mr Grace about advice for QRL on the proper construction of the PPA in respect of the interstate race fields legislation on more than one occasion.[259] Earlier in his evidence, he denied this could or did happen, as he appreciated his conflict and managed it appropriately.[260] Mr Bentley's understanding about managing conflict was rather idiosyncratic – he said, several times, that managing conflict for him meant not making a decision or voting on a formal motion about a matter concerning TattsBet or being present when there was discussion about TattsBet's financial interests.[261]

8.5.40 Mr Tuttle accepted that attendance by Mr Bentley at these meetings with Mr Grace was at the heart of the conflict.[262] Mr Tuttle could recall Mr Bentley's presence at a meeting with Mr Grace when he raised the question of the entitlement of TattsBet to make the deduction.[263] His evidence was that Mr Bentley was certainly present at the meeting with Mr Grace when his legal advice was sought in relation to TattsBet's entitlements.[264]

8.5.41 Mr Bentley discussed his view on the issue with the chairman of Product Co, and probably influenced him whether intentionally or not.[265] Mr Bentley engaged in correspondence with representatives of TattsBet specifically relating to the position of QRL on the entitlements under the PPA.[266] He did not have the authority of the board of QRL[267] nor of Product Co to engage in these communications with TattsBet.[268] He did not have the authority of the board of QRL to engage Mr Grace,[269] although he communicated with TattsBet on 1 November 2008 as if he did have that authority. He did not disclose this communication to the other members of the board of QRL who were all on the board of Product Co.[270] He indicated to Tatts, without the authority of the board of QRL, that Mr Tuttle was authorised to handle the matter for QRL.[271]

8.5.42 Not only did Ms Harris give evidence that Mr Bentley did not seek to avoid the matters of conflict, even Mr Hanmer said that Mr Bentley had trouble understanding his conflict.[272]

254 Transcript, Robert Bentley, 19 September 2013, page 38 lines 1–27, page 98 lines 12-41.
255 Transcript, Robert Bentley, 20 September 2013, page 63 lines 6–10.
256 Transcript, Robert Bentley, 19 September 2013, page 33 lines 31–40, page 96 lines 5-25, page 97 lines 17-40, page 98 lines 12–41.
257 Statement of Tracey Harris, 18 September 2013, page 4 paras 20–25.
258 Transcript, Robert Bentley, 19 September 2013, page 60 lines 14–47, page 61 lines 1-28; Transcript, Anthony Hanmer, page 10 lines 1–24, page 11 lines 12-15.
259 Transcript, Robert Bentley, 20 September 2013, page 16 lines 35–45, page 17, lines 18–39, page 19 lines 1–15.
260 Transcript, Robert Bentley, 19 September 2013, page 30 lines 25–47, page 33 lines 31–45.
261 Transcript, Robert Bentley, 19 September 2013, page 30 lines 25–47; Statement of Robert Bentley, 26 July 2013, pages 14 and 15 para 43(c).
262 Transcript, Malcolm Tuttle, 1 October 2013, page 11 lines 32–47.
263 Transcript, Malcolm Tuttle, 1 October 2013, page 12 lines 4–15, page 13 lines 1–7.
264 Transcript, Malcolm Tuttle, 1 October 2013, page 13 lines 1–8; but note that Malcolm Tuttle denied discussions with Robert Bentley after receipt of the letter of advice: Transcript, Malcolm Tuttle, 1 October 2013, page 13 lines 24–29, page 14 lines 7–14, 23–24.
265 Transcript, Robert Bentley, 23 September 2013, page 52 lines 4-27; Transcript, Anthony Hanmer, 26 September 2013, page 5 lines 9–43, page 6 lines 15–19.
266 Transcript, Robert Bentley, 23 September 2013, page 3 lines 1–5, page 4 lines 1–11.
267 Transcript, Robert Bentley, 20 September 2013, page 28 lines 25–29.
268 Transcript, Anthony Hanmer, 26 September 2013, page 18 lines 3–35, page 19, lines 1–24, page 21 lines 21–35.
269 Transcript, Anthony Hanmer, 26 September 2013, page 14 lines 33–35.
270 Transcript, Robert Bentley, 20 September 2013, page 28 lines 25–29; Transcript, Anthony Hanmer, 26 September 2013, page 15 lines 25–32.
271 Transcript, Anthony Hanmer, 26 September 2013, page 17 lines 1-15.
272 Transcript, Anthony Hanmer, 26 September 2013, page 36 lines 43-47.

8.5.43 Mr Lambert gave evidence that Mr Bentley attended at least one Product Co meeting to discuss race fields legislation[273] despite Mr Bentley's denials of attending such meetings and despite the evidence in support of his denials given by Mr Hanmer.[274]

8.5.44 Further, Mr Hanmer and Mr Bentley did engage in discussion about the entitlement of TattsBet to deduct interstate race fields fees incurred by it.[275] There is no doubt that Mr Bentley had influence over certain members of the board of QRL (who, again, were members of the board of Product Co).[276]

8.5.45 Mr Bentley was not a credible witness about the management of his clear conflict. These are further grounds to be considered by ASIC under section 181.

Influenced by another person or by personal gain

8.5.46 There is no evidence that any person had been influenced by a relationship or by a motivation to gain personally from the relevant decision as to the Grace letter of advice.

8.6 The consequences

8.6.1 TattsBet made monthly deductions from the fee payable to Product Co, pursuant to the PPA, for race field fees paid by it to interstate control bodies.

8.6.2 The total of the charges during the relevant period of the Inquiry has been calculated by the Commission to be $90,448,277.

8.6.3 For each of the codes the charges incurred were:

- Thoroughbreds – $68,362,288
- Harness racing – $8,398,289
- Greyhound racing – $13,687,700.

8.6.4 Particulars of the monthly charges made are set out in Schedule A to this Chapter.

8.6.5 In submissions on behalf of some directors and senior executives, criticism was made of the failure by the Commission to inquire of the present board why it had taken no action to resolve the issue. The criticism misconceives this Term of Reference. The inquiry concerns the period to 30 April 2012. The Commission has performed that task.

8.6.6 The Commission understands that TattsBet and Product Co (with QACRIB) now propose to test the issue in the Supreme Court of Queensland. Any question of financial loss to racing in Queensland will thereby be resolved, irrespective of questions of breach of duty by the directors.

8.7 Conclusions and Recommendations

Introduction

8.7.1 Each issue raised by this Term of Reference will be addressed.

273 Transcript, Michael Lambert, 30 September 2013, page 23 lines 11-24, page 28 lines 21-24.
274 Transcript, Robert Bentley, 19 September 2013, page 38 lines 1-27, page 98 lines 12-41.Transcript, Anthony Hanmer, 26 September 2013, page 2 lines 13-29.
275 Transcript, Robert Bentley, 23 September 2013, page 52 lines 4-27; Transcript, Anthony Hanmer, 26 September 2013, page 5 lines 9-43, page 6 lines 15–19.
276 Transcript, Robert Bentley, 20 September 2013, page 8 lines 19-24, Transcript, Malcolm Tuttle, 1 October 2013, page 8 lines 34-41.

(i) What were the arrangements between Product Co and Tatts concerning fees paid by Tatts for Queensland wagering on interstate races?

8.7.2 The PPA was the arrangement which regulated the obligations concerning fees paid by TattsBet for Queensland wagering on interstate races. It was pursuant to the terms of this agreement that TattsBet purported to deduct sums equivalent to interstate race fields fees which it incurred during the relevant period as a *Third Party Charge* as defined in the PPA.

(ii) How did Product Co respond to the introduction of race information fees for Queensland wagering on interstate races?

8.7.3 Product Co did not resist TattsBet deducting the fees. Product Co took no action to deny TattsBet doing so for the whole of the period from October 2008 to 30 April 2012 (being the end of the relevant period for the Commission).

8.7.4 Product Co took no steps to determine whether it had a legal entitlement to resist this continuing state of affairs.

8.7.5 Product Co did resolve to seek information from the government about the commercial intent of the parties to the PPA when it commenced in 1999.

8.7.6 This investigation was legally fruitless as the intention of the parties is to be determined by interpreting the words used in the written agreement.

8.7.7 However, this inquiry of government was more likely directed to investigating whether the PPA should be varied. The diary note of Mr Grace of 5 March 2009, describing the board meeting of Product Co that day, seems the best articulation of what the inquiry was meant to achieve:

> *It was therefore necessary to address the issue and if it was not intended to take an adversarial role with [TattsBet], then to consider whether the existing agreements should be changed in order to remove any ambiguity that may exist as a result of the 2008 amendments to the Racing Act.*
>
> *It was agreed that a letter would be written with a view to seeing if the Queensland Government's view of the arrangement was intended to be the same as was thought by some of the directors, namely that commercially the amounts of these costs should be deductible by [TattsBet] from the amounts payable to Product Co under the product and program agreement.*[277]

8.7.8 Those investigations, as has been discussed, produced nothing of utility for Product Co.

8.7.9 Nonetheless Product Co took no further steps to investigate its legal rights or the legal rights of the control bodies to resist the deductions being made nor did it initiate any other productive action.

(iii) Why was any expert advice not acted upon?

8.7.10 As indicated above, no legal advice was sought by Product Co in relation to the introduction of interstate race fields fees and its impact on the PPA.

8.7.11 The reasons seem to be:

- Legal advice had been provided to QRL by Mr Grace and not to the directors of Product Co
- The majority of the directors (Mr Hanmer, Mr Lette, Mr Ludwig and, most likely, Ms Watson) reached the view that TattsBet was entitled to deduct the race fields fees it paid to interstate control bodies and that the legal advice provided to QRL by Mr Grace was unsustainable

277 Memo by David Grace, 5 March 2009.

- A view was held by some directors that so long as Queensland race fields legislation was introduced, then the impact of these deductions made by TattsBet would be more than made up by the benefits coming to the control bodies by fees they would charge pursuant to the Queensland legislation
- A view was held that if TattsBet did not seek to recoup the fees charged by the control bodies pursuant to the Queensland race fields legislation, then it was right that TattsBet be permitted to deduct the race fields fees it incurred to interstate control bodies.

(iv) Did the directors and senior executives of the relevant entities and Product Co act in good faith and consistently with their responsibilities, duties and legal obligations and the best interests of the company?

8.7.12 There are grounds to believe some directors of Product Co, namely, Mr Hanmer, Mr Lette, Mr Ludwig and Ms Watson may not have acted in accordance with their duty to the company and thereby not in accordance with their legal obligations, which included acting in the best interests of the company. The matter deserves investigation by an appropriate body, such as ASIC.

8.7.13 Mr Bentley, too, may have breached his duty to QRL and later RQL in failing to seek resolution of the uncertainty about the legal right of TattsBet to charge, among others, QRL, for the race fields fees it paid to interstate control bodies.

8.7.14 Mr Bentley (as a shareholder and director of Tatts Group) may have been influenced by his conflict of interest, to the detriment of QRL and RQL. The presence of this conflict justifies further investigation by the appropriate body.

8.7.15 Each other director and senior executive of the control bodies was essentially powerless to take action.

8.7.16 As to Mr Ryan and Mr Milner, since they did not join the boards of QRL and Product Co until December 2009, it is not clear if they ever came to appreciate Mr Grace's advice to QRL or the significance of it. There is no evidence of a breach of duty by either to justify any reference for further investigation.

(v) Was any director or senior executive influenced by personal gain?

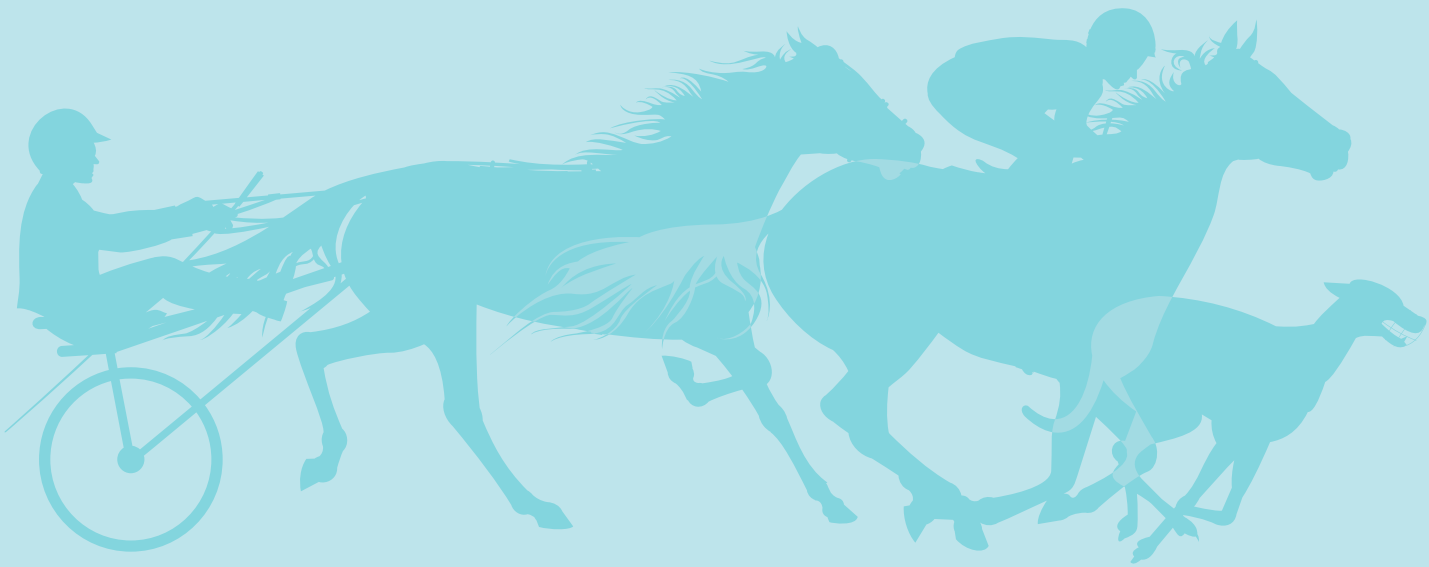
8.7.17 There is no evidence to suggest that any director or executive used his or her position to gain a personal advantage (noting, however, the observations regarding Mr Bentley's conflict of interest above).

Recommendations

8.7.18 The evidence before the Commission suggests that an appropriate authority such as ASIC should consider whether Mr Bentley acted in breach of the duties he owed to QRL and RQL and whether he acted recklessly. He appreciated all of the relevant circumstances that would have caused a director, acting reasonably, to resolve any uncertainty about the *Third Party Charge*. He was in a position of conflict and acted inappropriately when he failed to avoid that conflict.

8.7.19 The evidence before the Commission also suggests that an appropriate authority such as ASIC should consider whether Mr Hanmer, Mr Lette, Mr Ludwig and Ms Watson breached the duties they owed to Product Co and to their respective control bodies and whether they acted recklessly. Their failure to act, particularly after the warnings which were given to them, could never have been in the interests of the control bodies or of Product Co, nor could it accord with the actions of a director acting reasonably.

Schedules for Chapter 8



Schedule A – Race fields fee monthly deductions

Thoroughbreds

	2008/09	2009/10	2010/11	2011/12	
July		1,114,573	1,262,242	1,324,259	
August		1,368,570	1,263,250	1,458,663	
September	483,624	1,259,073	2,410,588	1,563,438	
October	433,000	1,928,037	3,036,154	2,258,593	
November	433,000	2,582,178	4,318,042	2,983,031	
December	607,535	1,114,007	2,319,896	1,574,110	
January	433,000	2,113,085	2,414,866	1,492,629	
February	433,000	1,971,044	2,130,667	1,279,461	
March	2,457,005	2,160,455	1,338,656	1,637,711	
April	1,349,522	1,459,402	1,556,321		
May	1,203,765	1,325,494	1,269,016		
June	928,131	1,155,508	1,157,683		
TOTAL	$8,761,582	$19,551,427	$24,477,382	$15,571,897	$68,362,288

Harness

	2008/09	2009/10	2010/11	2011/12	
July		219,274	209,608	200,321	
August		213,340	205,564	230,576	
September	69,887	144,644	152,927	178,100	
October	-	199,626	202,131	210,681	
November	-	190,079	198,518	198,269	
December	111,431	200,554	211,694	216,253	
January	176,578	343,266	184,419	195,164	
February	164,005	327,913	185,495	179,139	
March	452,894	347,705	192,976	189,325	
April	190,468	183,863	177,118		
May	213,950	189,826	180,537		
June	191,591	187,643	180,936		
TOTAL	$1,570,804	$2,747,733	$2,281,924	$1,797,828	$8,398,289

Greyhounds

	2008/09	2009/10	2010/11	2011/12	
July		327,393	324,957	344,855	
August		303,543	332,518	400,243	
September	98,978	319,218	325,080	392,531	
October	119,503	356,711	386,184	425,292	
November	105,963	283,679	382,409	413,806	
December	235,491	271,555	370,831	395,322	
January	264,059	362,756	331,165	339,998	
February	240,054	348,498	297,158	331,154	
March	446,268	387,139	344,310	355,521	
April	294,726	290,990	304,613		
May	311,478	298,794	307,800		
June	301,387	295,112	318,654		
TOTAL	$2,417,907	$3,845,390	$4,025,678	$3,398,724	$13,687,700

Schedule B – QRL/RQL Cooper Grace Ward legal fees[278]

Racing Queensland Retainer Arrangement 2010

Month	Worked Amount	Amount Billed	Amount written up/ down	Disbursements
February 2010	$22,527.00	$20,000.00	-$2,527.00	$60.37
March 2010	$40,574.00	$20,000.00	-$20,574.00	$675.43
April 2010	$42,717.00	$42,500.00	-$217.00	$16.01
May 2010	N/A	N/A	N/A	N/A
June 2010	N/A	N/A	N/A	N/A
July 2010	$23,555.00	$20,000.00	-$3,555.00	$160.18
August 2010	$11,438.50	$20,000.00	$8,561.50	$27.00
September 2010	$26,774.50	$20,000.00	-$6,774.50	$136.70
October 2010	$11,058.00	$20,000.00	$8,942.00	$148.38
November 2010	$24,695.50	$20,000.00	-$4,695.50	$0.00
December 2010	$12,979.50	$20,000.00	$7,020.50	$1,024.80
Total	**$216,319.00**	**$202,500.00**	**-$38,343.00 +$24,524.00**	**$2,248.87**

Total difference -$13,819.00

Note – May and June were billed at normal hourly rates on individual files.

278 Legal fee information supplied by Cooper Grace Ward to the Commission.

Queensland Racing (Client Number 00048222) Billings for 2006/07 as at 23/03/2010

Month		Fees	Disbursements	GST	Amount Billed
1	July	50,563.50	1,179.41	5,101.29	56,844.20
2	August	5,311.50	27.00	533.85	5,872.35
3	September	13,142.30		1,314.23	14,456.53
4	October	18,510.00	33.40	1,854.34	20,397.74
5	November	16,798.00		1,679.80	18,477.80
6	December	35,935.50		3,593.55	39,529.05
7	January	5,756.70		575.67	6,332.37
8	February	75,294.50	6,298.86	8,159.33	89,752.69
9	March	3,760.00		376.00	4,136.00
11	May	12,217.30	74.31	1,229.16	13,520.77
12	June	19,007.00	168.87	1,917.59	21,093.46
		256,296.30	**7,781.85**	**26,334.81**	**290,412.96**

Queensland Racing (Client Number 00048222) Billings for 2007/08 as at 23/03/2010

Month		Fees	Disbursements	GST	Amount Billed
1	July	613.50		61.35	674.85
2	August	17,034.50	177.29	1,721.18	18,932.97
3	September	642.50		64.25	706.75
4	October	5,463.50		546.35	6,009.85
5	November	4,855.00		485.50	5,340.50
6	December	2,104.50	16.00	212.05	2,332.55
7	January	44,420.00	8,721.17	5,314.12	58,455.29
8	February	688.00		68.80	756.80
9	March	497.50		49.75	547.25
10	April	13,106.50	21.50	1,312.80	14,440.80
11	May	19,120.00	15,000.00	3,412.00	37,532.00
12	June	18,948.50	8.28	1,895.68	20,852.46
		127,494.00	**23,944.24**	**15,143.83**	**166,582.07**

Queensland Racing (Client Number 00048222) Billings for 2008/09 as at 23/03/2010

Month		Fees	Disbursements	GST	Amount Billed
1	July	17,931.00	38,800.00	5,673.10	62,404.10
2	August	8,490.50	2,306.16	1,079.67	11,876.33
3	September	2,079.00		207.90	2,286.90
4	October	27,497.00		2,749.70	30,246.70
5	November	5,792.50	6,000.00	1,179.25	12,971.75
6	December	19,619.00	121.60	1,974.06	21,714.66
7	January	2,087.00		208.70	2,295.70
8	February	11,496.00	115.50	1,161.15	12,772.65
9	March	29,690.50		2,969.05	32,659.55
10	April	27,355.50		2,735.55	30,091.05
11	May	22,088.00	1,064.47	2,266.64	25,419.11
12	June	25,824.00	126.95	2,595.10	28,546.05
		199,950.00	**48,534.68**	**24,799.87**	**273,284.55**

Schedule C – Shareholdings

Shareholdings – Mr Robert Bentley

Shareholdings in TAB Qld, UNiTAB, Tatts Group: Bob Bentley, Bob Bentley as trustee for Bob Bentley Superannuation Fund, Bob Bentley and Mr Bentley's wife as trustees for Bob Bentley Superannuation Fund and Crossmore Cattle Co Pty Ltd.

Date	Event
29.11.1999	**Bob Bentley Superannuation fund acquires 5,535 shares in TAB Qld Ltd (unknown value)** **Total holdings: 5,535 ordinary shares** 5000 ordinary shares – Mr Bentley as trustee for Bob Bentley Superannuation Fund 535 ordinary shares – Mr Bentley and Mr Bentley's wife as trustee for Bob Bentley Superannuation Fund
27.01.2000	**Bob Bentley Superannuation fund acquires 4,470 shares in TAB Qld Ltd (unknown value)** **Total Holdings: 10,005 ordinary shares** 9,470 ordinary shares – Mr Bentley as trustee for Bob Bentley Superannuation Fund 535 ordinary shares – Mr Bentley and Mr Bentley's wife as trustee for Bob Bentley Superannuation Fund
3.03.2000	**Bob Bentley Superannuation fund acquires 6,355 shares in TAB Qld Ltd (unknown value)** **Total holdings 16,360 ordinary shares:** 16,360 ordinary shares – indirect, Mr Bentley as trustee for Bob Bentley Superannuation Fund
6.03.2000	**Crossmore Cattle Co Pty Ltd acquires 10,000 shares in TAB Qld Ltd (unknown value)** **Total holdings: 26,360 ordinary shares** 16,360 ordinary shares – indirect, Mr Bentley as trustee for Bob Bentley Superannuation Fund 10,000 ordinary shares – indirect, Crossmore Cattle Co Pty Ltd
1.08.2000	**Bob Bentley Superannuation fund acquires 3,640 shares in TAB Qld Ltd (unknown value)** **Total holdings: 30,000 ordinary shares:** 20,000 ordinary shares – indirect, Mr Bentley as trustee for Bob Bentley Superannuation Fund 10,000 ordinary shares – Crossmore Cattle Co Pty Ltd
24.08.2000	**"Crossmore Cattle Co Pty Ltd" holding no longer a declared interest** **Total holdings: 20,000 ordinary shares** 20,000 ordinary shares – indirect, Mr Bentley as trustee for Bob Bentley Superannuation Fund (unknown value)
17.09.2001	**Mr Bentley acquires 10,000 ordinary shares in TAB Qld Ltd** **Total holdings: 30,000 ordinary shares** 10,000 ordinary shares – held by Mr Bentley 20,000 ordinary shares – Mr Bentley as trustee for Bob Bentley Superannuation Fund (unknown value)
4.01.2002	**Initial directors interest notice confirming interest of 30,000 fully paid ordinary shares**

Date	Event
11.05.2005	**Mr Bentley acquires 8,000 ordinary shares in UNiTAB Limited (value $ 90,980)** 5,000 shares, direct (value $56,930) 3,000 shares, indirect (value $34,050) held by Bob Bentley Superannuation Fund **Total Holdings: 38,000 ordinary shares (assuming same share value between purchase and holding - $432,155)** 15,000 ordinary shares – Mr Bentley 23,000 ordinary shares – Mr Bentley as trustee of Bob Bentley Superannuation fund
31.08.2005	**Mr Bentley sells 13,000 ordinary shares in UNiTAB Limited (value $171,600) –** 5,000 direct shares (value $66,000) 8,000 indirect shares (value $105,600) **Total Holdings: 25,000 ordinary shares (assuming same share value between purchase and holding - $330,000):** 10,000 ordinary shares – Mr Bentley 15,000 ordinary shares – Mr Bentley as trustee of Bob Bentley Superannuation fund
12.10.2006	**Mr Bentley appointed as a Director of Tattersall's Limited** Declares shareholding of 140,000 ordinary shares
3.09.2007	**Mr Bentley acquires 20,000 ordinary shares in Tattersall's Limited (value $85,000)** **Total holdings: 160,000 ordinary shares (assuming same share value between purchase and holding - $680,000)** 70,000 ordinary shares – Mr Bentley 90,000 ordinary shares – held by Mr Bentley and Mr Bentley's wife as trustees for the Bob Bentley Superannuation Fund
28.03.2008	**Mr Bentley moves 25,000 of his direct shares to his super fund (sale value $85,000)** **Total Holdings: 160,000 ordinary shares (assuming same share value between purchase and holding - $544,000)** 45,000 ordinary shares – Mr Bentley 115,000 ordinary shares – Mr Bentley and Mr Bentley's wife as trustees for the Bob Bentley Superannuation Fund
29.06.2012	**Mr Bentley acquires 300 Tatts Bonds in Tatts Group Limited (total value $30,000 - $100/bond) through Bob Bentley Superannuation Fund (indirect)** **Total Holdings: 160,000 ordinary shares and 300 Tatts Bonds** 45,00 ordinary shares – Mr Bentley 115,00 ordinary shares – Mr Bentley and Mr Bentley's wife as trustees for the Bob Bentley Superannuation Fund 300 Tatts bonds – Mr Bentley and Mr Bentley's wife as trustees for the Bob Bentley Superannuation Trust Fund
26.02.2013	**Mr Bentley sells 45,000 direct shares in Tatts Group Limited shares (total value $151,650)** **Total holdings: 115,000 ordinary shares (assuming same share value between purchase and holding - $387, 550) and 300 Tatts Bonds** 115,000 ordinary shares – Mr Bentley and Mr Bentley's wife as trustees for the Bob Bentley Superannuation Trust Fund 300 Tatts Bonds – Mr Bentley and Mr Bentley's wife as trustees for the Bob Bentley Superannuation Trust Fund

Shareholdings – Mr Kevin Seymour

Shareholdings in TAB Qld, UNiTAB, Tatts Group: Mr Kevin Seymour, Mr Seymour's wife and Mr Seymour's daughter.

Date	Event
12.10.2006	**Initial Director's Interest Notice** Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 9,095,295 WBK Pty Ltd – 9,327,340 LVF Nominees Pty Ltd * – 530,000 SLV Investments Pty Ltd* – 212,990 **owned by Mr Seymour's daughter* **Total interest: 37,910,665 ordinary shares**
27.04.2007	**4,150,000 ordinary shares acquired by S.KW Pty Ltd (a company controlled by Mr Seymour's wife) for $20,936,004.30** **Total interest after change: 42,060,665 ordinary shares** S.KW Pty Ltd – 4,150,000 Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 9,095,295 WBK Pty Ltd – 9,327,340 LVF Nominees Pty Ltd * – 530,000 SLV Investments Pty Ltd* – 212,990 **owned by Mr Seymour's daughter*
6.09.2007	**500,000 ordinary shares acquired by S.KW Pty Ltd (a company controlled by Mr Seymour's wife) for $2,157,500** **Total interest after change: 42,560,665 ordinary shares** S.KW Pty Ltd – 4,650,000 Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 9,095,295 WBK Pty Ltd – 9,327,340 LVF Nominees Pty Ltd * – 530,000 SLV Investments Pty Ltd* – 212,990 **owned by Mr Seymour's daughter*
4-6.03.2008	**4,500,00 ordinary shares sold by S.KW Pty Ltd (a company controlled by Mr Seymour's wife) for $16,690,347.18 (three sales between 4 – 6 March 2008)** **Total interest after change: 38,060,665 ordinary shares** S.KW Pty Ltd – 150,000 Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 9,095,295 WBK Pty Ltd – 9,327,340 LVF Nominees Pty Ltd * – 530,000 SLV Investments Pty Ltd* – 212,990 **owned by Mr Seymour's daughter*

Date	Event
4.06.2008	**Further disclosure of shares – 2,295 shares issued to LVF Nominees Pty Ltd (owned by Mr Seymour's daughter) as part of the merger with UNiTAB Limited in 2006 (value 530 UNiTAB shares)** *"These shares were issued on 12 October 2006 as part of the merger between UNiTAB Limited and Tatts Group Limited. However, due to inadvertence, Mr Seymour only recently became aware of these additional shares being in the name of LVF Nominees Pty Ltd"* **Total interest after change: 38,062,960 ordinary shares** S.KW Pty Ltd – 150,000 Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 9,095,295 WBK Pty Ltd – 9,327,340 LVF Nominees Pty Ltd * – 532,295 SLV Investments Pty Ltd* – 212,990 **owned by Mr Seymour's daughter*
7-10.10.2008	**3,596,491 ordinary shares sold by S.KW Pty Ltd and Kayaal Pty Ltd (companies controlled by Mr Seymour) and LVF Nominees Pty Ltd and SLV Pty Ltd (companies owned by Mr Seymour's daughter) for $8,356,713.73** **Total interest after change: 34,466,469 ordinary shares** Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 6,394,089 WBK Pty Ltd – 9,327,340
16-17.10.2008	**5,916,469 ordinary shares sold by Kayaal Pty Ltd (company controlled by Mr Seymour) for $13,014,516.19** **Total interest after change: 28,550,000** Seymour Group Pty Ltd – 9,612,600 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 Kayaal Pty Ltd – 477,620 WBK Pty Ltd – 9,327,340
20-21.10.2008	**1,550,000 ordinary shares sold by Kayaal Pty Ltd and Seymour Group Pty Ltd (companies controlled by Mr Seymour) for $3,666,833.50** **Total interest after change: 27,000,000** Seymour Group Pty Ltd – 8,540,220 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 WBK Pty Ltd – 9,327,340
27-28.10.2008	**2,024,821 ordinary shares sold by Seymour Group Pty Ltd (company controlled by Mr Seymour) for $4,683,319.53** **Total interest after change: 24,975,179** Seymour Group Pty Ltd – 6,515,399 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 WBK Pty Ltd – 9,327,340

Date	Event
3.11.2008	**975,179 ordinary shares sold by Seymour Group Pty Ltd (company controlled by Mr Seymour) for $2,439,802.96** **Total interest after change: 24,000,000** Seymour Group Pty Ltd – 5,540,220 Seymour Administration Pty Ltd – 4,800 Solid Earth Pty Ltd – 9,127,640 WBK Pty Ltd – 9,327,340
7-8.06.2011	**10,000,000 ordinary shares sold by UBS Wealth Management Australia Nominees Pty Ltd on behalf of Seymour Group Pty Ltd and WBK Pty Ltd (companies controlled by Mr Seymour) for $22,105,849.39** **Total interest after change: 14,000,000** *"Kevin Seymour transferred all shares in which he has a relevant interest into a custodian arrangement with UBS Wealth Management Australia Nominees Pty Ltd. There was no change in the underlying beneficial ownership of the shares held."* UBS Wealth Management (Seymour Group Pty Ltd A/C) – 540,220 UBS Wealth Management (Seymour Administration Pty Ltd A/C) – 4,800 UBS Wealth Management (Solid Earth Pty Ltd A/C) – 9,127,640 UBS Wealth Management (WBK Pty Ltd A/C) – 4,327,340
7.11.2011	**Notice of late disclosure of an additional 108,306 Tatts Shares with 106,011 shares held by him directly and 2,295 shares held directly by his wife, but over which he has control. These shares were issued on 12 October 2006 as part of the merger between UNiTAB Limited and Tatts Group Limited (24,483 + 530 UNiTAB Limited shares)** **Total interest after change: 14,108,306** UBS Wealth Management (Seymour Group Pty Ltd A/C) – 540,220 UBS Wealth Management (Seymour Administration Pty Ltd A/C) – 4,800 UBS Wealth Management (Solid Earth Pty Ltd A/C) – 9,127,640 UBS Wealth Management (WBK Pty Ltd A/C) – 4,327,340 [Mr Seymour's wife] – 106,011 [Mr Seymour's wife] – 2,295

Chapter 9

Funds Transfer – Term of Reference 3(g)

"[T]he events surrounding the approved transfer of funds by the former Queensland Government to RQL's infrastructure trust account in February 2012, on what basis the transfer was made, whether any improper influence was exercised by RQL directors, and if the transfer was appropriate and justified ..."

9.1 Introduction

9.1.1 This Term of Reference is informed by a perception, ventilated in the media[1], that millions of dollars of public money were paid to Racing Queensland Limited (RQL) to support vote winning projects in certain electorates in Queensland on the eve of or after the former government entered into caretaker mode. It is, therefore, useful to say something, initially, about the constitutional conventions generally described as caretaker.

9.1.2 In summary, these conventions apply during periods when the executive is not accountable to the Parliament. This generally occurs when Parliament has been dissolved prior to an election being held and continues until there is a clear election result either returning the previous administration or until a new government is appointed by the Governor.

9.1.3 The purpose is to ensure that decisions are not taken which will bind an incoming government, it being understood that every general election may result in a change of administration. Like other constitutional conventions in the Westminster system of government, the caretaker conventions are not regarded as legally enforceable. They are effective because they are accepted by all participants as an aspect of responsible government. Of course, the ordinary business of government must continue but public servants need to be astute to avoid political partisanship during this time.

9.1.4 In Queensland, the rules relating to a caretaker period are set out in the *Cabinet Handbook* Chapter 9[2] and would be well known to all Ministers and public servants especially those in more senior positions. Breaches of these rules may lead to disciplinary proceedings against a public servant. In contrast, breaches by Ministers are accountable only to the electorate.

9.1.5 Chapter 9.1 of the *Cabinet Handbook* states:

> *The basic caretaker conventions require a government to avoid implementing major policy initiatives, making appointments of significance or entering into major contracts or undertakings during the caretaker period.*

9.1.6 Chapter 9.5 discusses this directive in more detail:

> *The broad rule is that governments should avoid implementing new policies, or entering into major contracts or undertakings during the caretaker period. This includes commitments which could bind an incoming government. Major contracts or undertakings should not be considered only in terms of monetary commitment but should also take into account other relevant factors such as the nature of the undertaking and the level of bipartisan support.*
>
> *Consistent with this requirement, major project approvals within government programs are normally deferred by Ministers.*

9.1.7 Although, strictly, a government is in caretaker mode only from the dissolution of the Parliament, the Cabinet Handbook alerts all concerned in chapter 9.2

> *... that some care should be exercised in the period between the announcement of the election and dissolution of the Legislative Assembly.*

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1 For example, on 20 April 2013 the following appeared in *The Australian* newspaper: "more than $20M in funds for the now controversial capital works program of Racing Queensland was signed off in the dying days of the Bligh government, as the Liberal National Party was riding high in the polls and promising a cleanout of the industry body", http://www.theaustralian.com.au/national-affairs/state-politics/queensland-labor-in-20m-racing-payment-rush-before-poll-loss/story-e6frgczx-1226624799307, viewed 04/11/13. An editorial in the *The Courier-Mail* for 6 May 2013, the day the Attorney-General announced that there would be a Commission of Inquiry into racing, stated "among [unanswered questions] are a $20 million transfer of taxpayers' funds to Racing Queensland Limited's infrastructure trust account in the final days before the dying Labor Government went into caretaker mode. Subsequently, RQL and the government entered into funding deeds for more than $60 million worth of works in key Labor electorates". See also http://www.abc.net.au/news/2013-04-22/government-questions-labors-multi-millions-racing-qld-contracts/4642416, viewed 04/11/13.

2 *Queensland Cabinet Handbook*, 9.0 Caretaker conventions.

9.1.8 On 25 January 2012 Premier Bligh announced that the next State election would be held on Saturday 24 March 2012 and that the caretaker period would commence on 19 February. The last sitting of the Parliament was on 16 February 2012 and on 19 February the Governor dissolved the Legislative Assembly by proclamation published in the Queensland Government Gazette.

9.1.9 Shortly after the announcement of an election, the *Cabinet Handbook* states in chapter 9.3 that

> *...the Premier will write to all Ministers, summarising the conventions which will apply from the dissolution of the Legislative Assembly and other matters which relate to the election period. The Director-General of Department of the Premier and Cabinet will write to all Chief Executive Officers advising them of the caretaker conventions and when they will commence.*

9.1.10 With these preliminary observations in mind, this Term of Reference may be considered.

9.2 Background

9.2.1 From mid-2000[3] the government transferred some nine racecourses on State land to race clubs in freehold title[4] at no cost to the recipients including Deagon racecourse to the Queensland Principal Club (QPC) and Albion Park Raceway to the harness and greyhound authorities. Doomben racecourse had been owned by the Brisbane Turf Club (BTC) since 1953 when it was purchased from the Wren estate after leasing it for many years and Eagle Farm racecourse was vested in the Queensland Turf Club (QTC) by the *Eagle Farm Racecourse Act 1998* (Qld). The Gold Coast Turf Club (GCTC) owned its land.

9.2.2 At least from the passage of the Racing Act in 2002, Mr Robert Bentley, had considered ways of utilising the tangible assets of the racing clubs to rationalise the racing industry and to make it more financially viable. It is no exaggeration to remark that many of these initiatives were not always welcomed. It is unnecessary to say much more about them except to observe that opposition to plans to dispose of the racing venues at Eagle Farm, Deagon, Ipswich and Albion Park and to build a super, multi-purpose facility on government land at Wacol funded from the proceeds of those sales was widespread and may have caused Mr Bentley to be cautious about showing his hand to industry too early with fresh ideas.

9.2.3 There are some factual matters which came to assume importance for what became known as the Industry Infrastructure Plan (now Strategy) (IIP) for which the government earmarked, eventually, $110 million, and led to the transfers of the funds, the subject of this Term of Reference.

9.2.4 In 2007 the government announced that it would resume a portion of land managed by the trustees of Parklands Gold Coast and occupied by a greyhound racetrack for the construction of the new Gold Coast University Hospital. A compensation payment of $10 million for the loss of this use was set aside for greyhounds on the condition that the money was used for the development of a new greyhound racing facility. Land at Logan owned by the State, known as Cronulla Park, was identified as suitable for the construction of a stand-alone greyhound racing venue. The transfer of the freehold title was approved by the Treasurer subject to a viable proposal being put to government. It was anticipated that the remaining land at the Parklands site would eventually be required by the new University Hospital and that harness racing (as well as the Gold Coast Show Society) would need to vacate the site by 30 June 2013.

3 Giving effect to a policy announced in 1998.
4 Described more fully in Appendix B at (j).

9.2.5 In mid-June 2007 government approved funding of $12 million to assist in the installation of synthetic racing tracks in southeast Queensland at Corbould Park (Caloundra), Clifford Park (Toowoomba) and the GCTC.

9.2.6 In the period covered by the Terms of Reference the State was occupied with managing the budget during the global financial crisis and the downgrade of the State's credit rating; the sale of government assets; several natural disasters; and, in southeast Queensland, the equine influenza epidemic in August 2007.

9.2.7 By September 2008 the establishment of a racing capital development scheme funded by the diversion of wagering tax revenue had been mentioned to some senior public servants, and likely certain Ministers, by QRL. At about this time an audit was conducted by QRL of a number of racing venues. Many were said to be below the standard required to meet workplace health and safety concerns, particularly the conditions of the tracks and grandstands, and would not qualify race meetings held at those venues for TAB status.

9.2.8 In early 2009 Mr Bentley and Mr William Ludwig met with the Treasurer to discuss, amongst other things, the poor state of the infrastructure at some country racing centres, particularly Mackay, Rockhampton and Beaudesert. The effect of the long-standing drought in southeast Queensland on the turf track at Toowoomba was also discussed. There was, Mr Bentley conveyed, a risk that Mackay would cease to be a TAB venue unless an upgrade of the track occurred and oncourse stabling built. Contour Consulting Engineers Pty Ltd (Contour) had undertaken a visual inspection of Mackay in February 2009 and had provided a report to QRL about what needed to be done.

9.2.9 In April 2009, IER Pty Ltd, a business consultancy specialising, amongst other things, in performance measurement in the entertainment industry (including sport) provided its report entitled *Size and Scope of Racing in Queensland* to QRL, Queensland Harness Racing Limited (QHRL) and Greyhound Queensland Limited (GQL). The scope of the study, relevant for this Term of Reference, was to illustrate the economic value of the three codes of racing in Queensland; to identify the level of taxation revenue generated for both State and Commonwealth governments; and for the report to be used "as a base measurement to estimate uplift in economic impact and employment for the Queensland economy through achieving the three codes' business plan objectives". That is, it sought to demonstrate the economic value to Queensland of the racing industry, broadly described.

9.3 The Issues Paper

9.3.1 In May 2009 QRL presented a document to government entitled *Queensland Racing Industry Issues Paper* (the Issues Paper). It purported to cover the three codes but very little attention was directed to harness or greyhound racing. It is a curious document moving from invective against the thoroughbred racing clubs to analysis of the requirement to upgrade the infrastructure where race meetings were conducted in order to sustain an attractive TAB program.

9.3.2 The document frankly stated that QRL, as principal thoroughbred racing authority in Queensland, wished to assume ownership of all industry assets and broadcasting rights, the better to exploit them in the overall best interests of the industry. What it made clear was that racing in Queensland could not continue in its present form reliant on its own resources[5] – principally wagering fees – to maintain and improve the infrastructure at the venues to support the racing events which would attract revenue-producing wagering.

5 How racing is funded is set out Appendix F.

9.3.3 The Issues Paper formed the basis for submissions developed within government, initially in the Office of Racing, which resulted in government agreement to divert $80 million, then $100 million (plus the $10 million for greyhounds compensation) for racing industry infrastructure.

9.3.4 The Issues Paper described a number of capital development programs which QRL had either already completed, or had commenced, to improve racing facilities from its own funds. The observation was made that government had met the capital requirements of other sports by providing modern sporting facilities for example, for the AFL and NRL, but not racing, and racing gave a superior economic return to the State.

9.3.5 The following venues were identified as in need of work and the contemplated costs:

- *Gold Coast Turf Club – $58 million*
- *Cairns and Far North Queensland Association Race Clubs – $2.8 million*
- *Mackay Turf Club – $1.2 million*
- *Deagon – $1 million*
- *Wadham Park[6] Training Facilities – $5.6 million*
- *Brisbane Racing Club (BRC) assistance during construction – $5.4 million.*

9.3.6 The total amount (including some important integrity funding) was just over $75 million.

9.3.7 The Issues Paper recommended that government commit to the redirection of 50 per cent of the wagering tax to be returned to the racing industry staged over three years. If this did not occur it was anticipated that no TAB racing would be conducted north of Rockhampton and funding for country racing would be reduced to the legislated minimum, that is, seven per cent instead of the 13.5 per cent actually allocated; there would be no upgrade for Mackay; racing would cease in Cairns; there would be no financial assistance to the BRC; Deagon would be sold to fund projects, particularly the development of the GCTC; and some integrity functions would remain with the clubs rather than being undertaken by the control bodies.

9.3.8 On 30 June 2009 a meeting was held between the Treasurer, the then Minister responsible for racing, Mr Peter Lawlor, Mr Bentley, Mr Ludwig and Treasury officials. Discussions concerned the need for a capital injection into the racing industry sourced in the redeployment of part of the wagering tax revenue. The dire consequences of not doing so were explained by Mr Bentley as including the loss of the Magic Millions at the Gold Coast, serious workplace health and safety issues in country clubs and the likelihood that QRL would withdraw the funding currently allocated to country clubs above the legislated percentage. The outcome of this meeting was a request by the Treasurer for a Cabinet Budget Review Committee (CBRC) submission to be developed.

9.4 The development of the proposal

9.4.1 Over the ensuing months draft submissions for CBRC were drawn up and further meetings held between Mr Bentley, Mr Ludwig and relevant Ministers pursuing various options for funding infrastructure upgrades.

9.4.2 At the same time, Mr Bentley was lobbying government to make necessary legislative amendments for a single control body for the three codes of racing to bring about better decision-making for the whole racing industry and to reduce operational costs. Amalgamation of the codes became a condition for the funding package eventually approved by government.

6 QRL was, at the time, interested in buying this complex near Beaudesert but after conducting due diligence withdrew.

9.4.3 A lengthy submission was developed in the Office of Racing, drawing heavily on the Issues Paper, for CBRC consideration. It was subject to quite trenchant analysis by senior public servants in the Department of Employment, Economic Development and Innovation (DEEDI), the Department of the Premier and Cabinet (DPC), and Treasury. The proposal to redirect wagering revenue was not supported by the latter two Departments. DPC noted that while the racing industry in Queensland faced significant challenges, it saw the problem, primarily, as having too many racing venues. It considered this was exacerbated by QRL's proposals to upgrade Beaudesert while retaining Deagon. Importantly, providing direct funding to the racing industry would be a major departure from existing government policy initiated with the *Racing Act 2002* (Qld) of leaving the industry substantially to run itself. It would also invite questions about government priorities.

9.4.4 Treasury regarded the claims for the positive economic and fiscal impacts for Queensland contained in the IER Report exaggerated as to racing industry expenditure, contribution to the economy, revenue implications and employment effects. Treasury analysed the three options advanced in the draft submission: all would result in a significant fiscal impact which would adversely affect the State's ability to lower debt during a period of considerable financial stress. Uncertainty around the future revenue stream from wagering made assessing the risk of this investment of public money difficult.

9.4.5 As is customary in government, the submission for CBRC consideration was revised in light of contributions from a number of senior officers from several departments of government.

9.4.6 QRL (Mr Bentley and Mr Ludwig purported to speak for the board of QRL[7]; the other two codes were covered in the Issues Paper and mentioned in subsequent discussions but their representatives were not involved) had sought, as its preferred option, some $250 million of wagering revenue over 12 years.

9.4.7 If there were to be any funding by government, Treasury preferred the third option proposed of redirecting $100 million over five years to be used on infrastructure initiatives, asset and country racing rationalisation and structural reform, including amalgamation of the control bodies. Government, in fact, decided on something rather more modest.

9.5 Establishment of the RICDS on 26 November 2009

9.5.1 On 26 November 2009 government, through CBRC, approved[8] the establishment of a Racing Industry Capital Development Scheme (RICDS) funded by a levy of 50 per cent of the net wagering tax to be paid into the Community Investment Fund (CIF) to a total of $85 million over four years to 2013-14. Mr Andrew Fraser, the former Treasurer, told the Commission when he gave oral evidence that the government wanted to offer some stimulus to the racing industry for broader economic reasons.[9]

9.5.2 This distribution was predicated upon the industry submitting business cases on priority capital works to be funded by the RICDS. Industry would be required to identify sources of additional funding if the levy payment fell short of the budgeted expenditure. Payments would be subject to approval of a capital works program on advice from Treasury and DEEDI and dependent upon an agreed schedule of milestones.

7 This is discussed in Chapter 5.

8 This initiative was announced publicly by Minister Lawlor on 20 December 2009 after the agreement of the harness and greyhound codes to amalgamation with thoroughbreds. On 9 January 2010 the Treasurer confirmed that the funds would be available for infrastructure improvement.

9 Transcript, Andrew Fraser, 4 October 2013, page 22.

9.5.3 It was anticipated, no doubt informed by QRL, that the business cases and project plans in support of high priority infrastructure projects would be completed by the end of June 2010.

9.5.4 Necessary amendments were to be made to the *Wagering Act 1998* (Qld) to authorise the mechanics of the transfers to and from the CIF from 1 July 2010.

9.5.5 The optimism for the roll-out was not to be met. Government support for the redeployment of the wagering revenue was dependent upon the amalgamation of the three racing control bodies. That was not effected until 1 July 2010 with the appointment, by legislation, of RQL as the control body for the three codes. Furthermore, there were other challenges, mentioned below, which stalled the implementation of the plan and RQL proved unequal, initially, to the task of preparing business cases which came near to satisfying government standards.

9.5.6 On 2 September 2010 Mr Bentley proposed a strategic asset plan to a meeting attended by the under treasurer, Mr Gerard Bradley and deputy under treasurer, Mr Alex Beavers (there may have been others present) with respect to racing venues for the three codes around the State.

9.5.7 A detailed powerpoint presentation was given on 10 September attended by Mr Bentley, Mr Malcolm Tuttle, Mr Mark Snowdon and Ms Renee Whitchurch from RQL and Mr Beavers and Ms Carol Perrett, concerning the projects intended to be funded from the sale of Albion Park and the discontinuance of the Logan greyhound project.

9.5.8 On 14 September the Treasurer, Minister Lawlor, Mr Bradley and Mr Beavers discussed the provision of a guarantee secured over Albion Park to a commercial lender which had been proposed on 10 September.

9.5.9 Mr Bentley presented the detailed provisions of the Strategic Asset Management Plan (SAMP) to the board of RQL on Friday 24 September 2010 with comments to be available for discussion at a board meeting the following Tuesday, 28 September. At that meeting the board authorised Mr Bentley to recommend the SAMP to government.

9.6 The Industry Infrastructure Plan December 2010

9.6.1 The IIP was announced publicly in December 2010. The document spoke of The Case for Change referring to under-utilised assets, ageing infrastructure, downturn in attendance at race meetings and clubs struggling to maintain financial viability with substandard facilities. The IIP addressed the facilities to which it was proposed to allocate funding[10] and the work to be undertaken. Much of the preliminary assessment had been done by Contour[11] assessing the functionality, condition and safety aspects of existing key racing facilities across the State in the context of their strategic ranking as *metropolitan, provincial* or *country* venues.

9.6.2 The viability of the IIP was contingent on the sale of the Albion Park Raceway land for development with the proceeds being used to assist in the implementation of the plan. RQL announced in the IIP that it had decided not to pursue the option at Cronulla Park (Logan) for greyhounds due to a negative site evaluation. It proposed to meet the requirements of the greyhound racing industry as part of proposed Deagon and Ipswich redevelopments.

10 These were Deagon, Gold Coast, Beaudesert, Ipswich, Cairns, Townsville, Mackay, Rockhampton, and Toowoomba (Clifford Park).

11 In February 2009 Contour undertook a review of the existing facilities at the Mackay racecourse including the turf track, judge's tower, grandstand, betting ring, bars, function facilities, jockeys/stewards' facilities, swab stall and the concept for the new stable facilities. In January 2010 Contour reviewed the existing facilities at the Beaudesert racecourse including the turf and sand tracks, judge's tower, grandstand, betting ring, bars, function facilities, jockeys/stewards' facilities and machinery shed as well as a concept proposed for new stable facilities.

9.6.3 Litigation was instigated by QHRL against RQL and Mr Bentley over representations alleged to have been made that Albion Park would be retained for harness racing if that code supported amalgamation. There was also litigation arising out of Ms Kerry Watson's dismissal from the board of RQL which came about as a result of her action after the abandonment of the Cronulla Park plan became known.[12] Both matters proceeded through 2011 and it was, therefore, not possible to progress the projects while a significant part of the proposed funding remained uncertain.

9.7 Revised IIP 7 July 2011

9.7.1 As a result of the personal intervention of Mr Kevin Seymour in favour of retaining Albion Park for harness (and greyhound) racing,[13] and the uncertainty about the outcome of the litigation by QHRL, government resolved that the approval of the capital works program should proceed on the basis that Albion Park would not be sold. A revised IIP (the Revised IIP) was submitted to government in May 2011 which envisaged a two year extension to the RICDS taking it to $120 million. The scale and scope of the plan was reduced to take into account the loss of the funds anticipated from the sale of Albion Park.

9.7.2 The costs for each venue project which included past expenditure by RQL on architectural, engineering and other consultant fees were:

Cairns	$1,966,832.75
Townsville	$6,348,584.00
Mackay	$7,442,986.42
Rockhampton	$1,605,000.00
Deagon	$39,968,339.53
Gold Coast	$35,477,647.22
Logan – Reimbursement of Development Application Costs	$480,536.01
Beaudesert	$7,271,511.72
Ipswich – Reimbursement of Costs to Date	$35,435.26
Country Racing WHS & Cyclone/Flood Remediation (already paid to QRL on 13 April 2011)	$2,350,000.00
Albion Park	$1,706,416.64
Project Administration Costs to be Reimbursed from Non-Allocated Project Costs	$46,293.80
Interest Costs	$6,022,007.00
Total Expenditure	**$110,721,590.35**[14]

12 These matters are discussed in Chapter 5.
13 Transcript, Andrew Fraser, 4 October 2013, pages 20-23.
14 Letter from Robert Bentley to Timothy Mulherin, 17 May 2011.

9.7.3 RQL proposed that following approval and prior to any project being commissioned it would submit a detailed budget for each project and sought tax redirection of $120 million over six years and urgent immediate funding for work at Mackay for which a business case had been developed.

9.7.4 The extension of the redirection of the wagering tax revenue was not supported by Treasury. The fiscal situation was, if anything, worse than it had been in November 2009 when the RICDS was originally approved. The business case for Mackay was said "only just" to meet the minimum standard for a business case and Treasury supported only the immediate funding of clearly demonstrated safety matters at Mackay.

9.7.5 DPC did not support extending the wagering tax arrangements, being of the view that the appropriate time to consider alternative tax arrangements would be during a comprehensive review prior to the expiration of the TattsBet Limited (TattsBet) exclusive wagering licence. Despite those reservations, the departments recommended that the maximum contribution from government be $95 million to 2014; that urgent work for Mackay be approved and the balance for that venue be subject to a revised business case.

9.7.6 On 7 July 2011 government, through CBRC, approved the Revised IIP and in particular:

- *Approved in principle RQL's proposed capital works program as outlined in the Revised IIP.*
- *Approved a one year extension of the wagering tax sharing arrangement with RQL under the RICDS until 30 June 2015 totalling approximately $100-104 million (dependent on the total wagering tax collected).*
- *Approved the business case of $7.443 million for urgent works at Ooralea Park, Mackay, with the immediate payment of $4.946 million.*
- *Approved Queensland Treasury Corporation lending to Racing Queensland up to $100 million on the basis that the loan was to be repaid in full by 30 June 2015 through the assignment back to the State of wagering tax.*
- *Resolved that the amount of the loan (indicative $100 million) could not exceed the amount calculated by reference to the actual amount of the tax revenue less any payment already made from the RICDS.*
- *Access to loan draw-downs would only be available once a business case for each project had been submitted to and accepted by Treasury.*
- *The provision of a one-off grant of $9.852 million (the balance of the original grant of $10 million after payment of development approval costs) to RQL to fulfil a previous government commitment to provide funding towards the establishment of a new greyhound racing facility as compensation for greyhounds vacating the Parklands venue.*
- *Endorsed the Treasurer's decision of 7 March 2011 to advance $2.35 million from the RICDS to RQL (to reimburse RQL for flood and cyclone remediation work costs across Queensland race venues; urgent workplace health and safety work at non-TAB clubs; and costs in undertaking the assessment of racing venues around the State).*
- *Amendments to the Wagering Act 1998 to extend the transfer to and from the Community Investment Fund from 1 July 2014 to 30 June 2015.* [15]

15 Cabinet Budget Review Committee 2011, *Racing Industry Capital Development Scheme*, Decision No 3255, 7 July. T Mulherin, "Government Approves $110 million for Queensland Racing Industry", *Ministerial Media Statements*, 20 July 2011, http://statements.qld.gov.au/Statement/2011/7/20/government-approves-110-million-for-queensland-racing-industry, viewed 11/11/13.

9.7.7 Minister Mulherin, who had assumed responsibility for racing from Minister Lawlor on 21 February 2011, sent letters dated 19 July 2011 to the various entities where their venues had approved funding for infrastructure work under the Revised IIP.

9.8 Further Revised IIP 30 January 2012

9.8.1 Towards the end of 2011 it became apparent that there was considerable local opposition to the proposed multi-code facility at Deagon and that the necessary Brisbane City Council planning approval for material change of use (which had already been lodged) was unlikely. Treasury would not accept business cases without planning approval being in place.

9.8.2 On 23 January 2012, a meeting took place between stakeholders in the greyhound industry to discuss, yet again, the development of a facility at Cronulla Park since there was now the possibility of redeploying the Deagon funding. There was general agreement that this should occur and a business case be prepared so that racing could commence in early 2013. Mr Bentley conveyed the result of the meeting to Minister Mulherin and that the IIP would need further change.

9.8.3 On 24 January RQL emailed a revised IIP to the Office of Racing. The almost $37.9 million which had been identified for the Deagon redevelopment was to be reallocated to the reinstated new greyhound facility at Logan ($24 million); for Townsville ($6 million); Ipswich Turf Club ($6 million); project variations at Beaudesert ($0.94 million); new works at Brisbane Race Club ($0.75 million); and increases in cost estimates at Cairns, Mackay and Rockhampton racecourses.

9.8.4 The amended plan was within the $110 million approved for the Revised IIP and it was proposed, at ministerial level, that these changes proceed to Cabinet not by a developed submission paper, which would be the normal course as had occurred with the IIP and the Revised IIP, but as a Matters For Cabinet To Note.

9.8.5 The *Cabinet Handbook* describes the purpose of Matters For Cabinet To Note as

> *... agenda items for Ministers to inform Cabinet of all upcoming significant decisions and public announcements that would not otherwise go before Cabinet. "Matters To Note" are for noting by Cabinet; if a matter needs to be discussed in greater detail, Cabinet may decide that a formal submission be developed and brought to Cabinet at a later date.*

9.8.6 There was some comment in the email correspondence around 25 January 2012, which was the date the Premier announced the next election, by senior officers in DPC and in Treasury prior to the further Revised IIP going to Cabinet, that "a Matter to Note" was "a very unusual way to allocate $22 million".

9.8.7 Mr Mulherin MP defended this process, which had been approved by the Premier, Treasurer and Cabinet Secretariat, because the funding was for the same amount as previously approved by government. Each project's business case still needed to be signed off by Treasury before funds would be released, and there was some imperative to get on with the work which had been anticipated since November 2009 when government had approved the establishment of the RICDS.[16]

16 Transcript, Timothy Mulherin, 14 October 2013, page 48 line 35.

9.8.8 RQL provided its further amended IIP on 27 January 2012 to Minister Mulherin. The details were included in the Matter For Cabinet To Note. The revised projects and costings were:[17]

Project	Previous Budget	Budget	Variance
Deagon	$39,968,339.53	$2,000,000.00	($37,968,339.53)
Gold Coast	$35,477,647.22	$35,477,647.22	-
Beaudesert	$7,271,511.72	$8,212,290.00	$940,778.28
Brisbane Race Club	-	$750,000.00	$750,000.00
Ipswich	$35,435.26	$6,000,000.00	$5,964,564.74
Logan	$480,536.01	$24,000,000.00	$23,519,463.99
Cairns	$1,966,832.75	$2,195,291.00	$228,458.25
Townsville Thoroughbreds	$6,348,584.00	$6,348,584.00	-
Townsville Greyhounds	-	$6,000,000.00	$6,000,000.00
Mackay	$7,442,986.42	$8,119,258.00	$676,271.58
Country	$2,350,000.00	$2,350,000.00	-
Rockhampton	$1,605,000.00	$1,803,508.00	$98,508.00[18]
Albion Park	$1,706,416.64	$1,706,416,64.64	-
Project Admin	$46,293.80	-	($46,293.80)
Interest	$6,022,007.00	$3,000,000.00	($3,022,007.00)
Totals	**$110,721,590.35**	**$108,461,570.86[19]**	**($2,758,595.49)**

9.8.9 Cabinet noted the further Revised IIP on 30 January 2012. On 1 February 2012 Minister Mulherin's media release announced the changes to the IIP including the following:

> *"The changes to the IIP have all been approved by the Government and funding for each project will be released upon submission of the business case by RQL – as demonstrated by the Mackay and Beaudesert upgrades," he said.*
>
> *"I can also announce today that construction will start on the $8.2 million upgrade to the Beaudesert Race Club before the end of the month following the submission of a business case by RQL to Government."*[20]

9.8.10 When it was suggested to Mr Mulherin that he was, by this statement, pre-empting the decision of Treasury whether it would accept the business case for Beaudesert, he responded that there had been general public criticism, particularly from the local people and racing officials of Beaudesert and the GCTC, about the slow implementation of the projects under the RICDS. Furthermore, Beaudesert needed to be completed before work could commence on the Gold Coast. Mr Mulherin understood from RQL, at the time, that contractors were ready to commence work at Beaudesert once the business case received Treasury approval.[21] Some Treasury officials regarded this media release as tantamount to an express statement that the funding must be released for the projects, or at the least, for Beaudesert.

17 Statement of Nicholas Lindsay, 2 September 2013, attachment NL-13.
18 Amount is incorrectly listed for "Rockhampton Variance" – correct figure is $198,508.00 (Note: the "Total Variance" figure in this table is correctly listed as $2,758,595.49 i.e. the total has been calculated to include Rockhampton Variance at $198,508.00).
19 Amount is incorrectly listed for "Totals Budget" – correct amount is $107,962,994.86.
20 T Mulherin, "Amendments to the Racing Industry Infrastructure Plan Approved", *Ministerial Media Statements*, 1 February 2012, http://statements.qld.gov.au/Statement/2012/2/1/amendments-to-the-racing-industry-infrastructure-plan-approved, viewed 11/11/13.
21 Transcript, Timothy Mulherin, 14 October 2013, pages 50-51.

9.9 The business cases

9.9.1 There was some uncertainty in Treasury about the appropriate approach to assessing the business cases for the RICDS projects. They were not commercial in the sense of Treasury determining whether or not an investment should be made as there would be no return to government. The general view was that it was likely, even after the injection of the funds sought, that some of the clubs would not be financially viable. As Treasury received each of the business cases that opinion was confirmed. Indeed, in some cases the projections suggested that the clubs would require even more support after the proposed works were completed.

9.9.2 Ms Natalie Barber, during the relevant period director of the Resources and Economic Branch of Treasury with oversight for the assessments, described Treasury's role as ensuring that the business cases evinced a need for and established the priority of the proposed government capital investment grant; established the financial and economic feasibility of the project; outlined the impact of the grant on the project and how the project would improve the viability of the racing venue after the investment; identified other sources of funds for the project to supplement the government grant; and addressed the risks and issues of the project.

9.9.3 Treasury was to test the assumptions of the business case, review and evaluate the cost and revenue projections and whether the project was within the parameters approved by government for the RICDS. It was not Treasury's role to validate individual revenue and expenditure estimates or projections. It would look to the Office of Racing to do a more thorough and detailed analysis of the business cases since it understood the industry and the policy objectives of government in assigning the wagering revenue for these projects.

9.9.4 In this Treasury was disappointed but it has not been demonstrated that Treasury asked the Office of Racing to do this kind of analysis. As it was, Ms Perrett, particularly, was engaged in substantial rewriting of the business cases received from RQL just to put them into a readable form. Furthermore, the compressed time for consideration for all but Beaudesert made analysis, even for the larger, experienced group assigned to this work at Treasury, quite demanding.

9.9.5 The Treasury "team" concluded that it should assess whether the particular club would be in a financially sustainable position after the project was completed; whether further support from government might be sought in the future; whether the investment proposal appeared reasonable; to the extent that Treasury was able, whether the assumptions appeared reasonable particularly around usage of the facility and financial returns to the club; and any other matter that appeared anomalous in the business case.

9.9.6 Although the funds for works at the Ooralea Park racecourse at Mackay were approved for urgent work in July 2011 and received by RQL on 19 July 2011 and thus outside the funds transfers the subject of this Term of Reference, that process is informative. Government had resolved to fund Mackay when it approved the one year extension to the wagering tax sharing arrangements on 7 July 2011.

9.9.7 As mentioned, officials in DPC had been critical of the business case prepared by RQL for funds for Mackay describing it as "superficial". Treasury considered that it only just met the minimum standard for a business case principally because it failed adequately to identify the workplace health and safety matters which were the catalyst for the urgent funding. Treasury proposed working with DEEDI (Office of Racing) to discuss the minimum information future cases should include.

9.9.8 After the release of funds for Mackay was approved, the Office of Racing, in conjunction with the legal department within DEEDI and RQL, prepared a funding deed for the $7.443 million to be paid in two instalments - $4.946 million solely on urgent redevelopment works (as set out in the approved business case) and $2.497 million on the redevelopment of public and member facilities.

9.9.9 The legal officer drafting the agreement raised some concerns with Ms Perrett:

> *I note in passing that there seems to be [a] large amount of money involved in this and other similar transactions with Racing Qld and the State does not appear to have much leverage in the event of non-performance, given that there is no performance/bank guarantee required, all the money will have been paid up front, with no further payments tied to the achievement of milestones. Court action may be prohibitively expensive, uncertain and unpalatable from a policy perspective, so it would be preferable that practical contract management processes are included up-front under the contract terms.*[22]

9.9.10 The funding deed was executed by RQL on 15 July and the State on 18 July 2011. RQL had sent its invoice on 14 July 2011 for $5,441,068.60 (the agreed amount for the first tranche plus GST). On 19 July that amount was received into RQL's account and subsequently noted by Treasury to DEEDI.

9.9.11 During the second half of 2011 RQL, the Office of Racing and Treasury officials liaised in attempting to build business cases to the necessary standard. Mr Mark Snowdon, formerly a consultant to RQL from the beginning of 2011, was employed from July that year to manage the IIP projects for RQL. He was, to a large extent, the contact with the Office of Racing about the content of the business cases although Mr Bentley made representations to ministers and officials urging the process to move more rapidly.

9.9.12 RQL was attempting to amend and develop its procurement policies at this time to align them more closely with the government's procurement polices.[23]

9.9.13 At a meeting on 11 August 2011 between Ms Perrett, Mr Snowdon and Mr Michael Buckby, a senior treasury analyst, there was discussion about the role of the Office of Racing liaising with RQL concerning the content and format of the business cases. Mr Buckby provided Ms Perrett and Mr Snowdon with a copy of a *Business Case Development* paper which he had printed from the Department of Infrastructure and Planning's website under the title *Project Assurance Framework*.

9.9.14 Towards the end of September 2011 RQL was anxious to draw down funds from the RICDS to cover the costs of developing the business cases. This recompense became something of a saga. The Treasurer approved these costs being recouped on 5 December 2011. Payment did not occur until 5 March 2012. The amount approved was $2,796,290.58 for the costs incurred by RQL in engaging outside consultants in the preparation of the business cases and $200,000 for costs of internal RQL employees doing work on the business cases during 2010–2011.

9.9.15 The Office of Racing had considerable difficulty in getting all source documents from RQL to support each claimed expense and ensuring that each was within the scope of the approved categories of expenditure, including that internal staff work charged was solely related to the development of the business cases.

9.9.16 The Office of Racing in consultation with Crown Law sought the preparation of a template for the anticipated future funding agreements (deeds) to avoid them being compiled or reviewed at the last minute.

9.9.17 The experience with Mackay suggested that RQL was not well equipped to provide the kind of business case which would reach the exacting standards required by government before funds would be allocated and an agreement concluded. In the other business cases and deeds which were to follow, RQL continued to require the considerable support of the Office of Racing. Even so, the experience there was limited and the Office provided little critical analysis of the subject

22 Email from Rebecca Edmund to Carol Perrett, 12 July 2011.
23 Discussed in Chapter 3.

matter of the project so that, unusually, Treasury officials found themselves "recruited" into assisting to make the business cases acceptable.

9.9.18 Treasury's view was that it was not able to challenge the items of infrastructure proposed or the costings or expenditure figures in the business cases because it had neither the resources nor time, but should have been able to rely on the Office of Racing. Treasury officials who worked on the assessment of the business cases who have provided statements to the Commission have observed that Treasury received no such analysis from the Office of Racing, but it is unclear if it was ever clearly expressed to the Office of Racing that this was expected.

9.10 Beaudesert business case

9.10.1 The business case for Beaudesert was anticipated to be the template for future business cases. Work was underway by Mr Snowdon at RQL at least by 29 September 2011, when Ms Perrett wrote to Mr Buckby at Treasury on that date that Mr Snowdon was "still working on the business case for Beaudesert"[24] and would send her a draft for comment.

9.10.2 Mr Bentley wrote to Mr Michael Kelly on 22 December 2011, in effect complaining about the delay in finalising the business case for Beaudesert (it was received by Treasury on 16 December from Ms Perrett). He mentioned the effect on the racing program for 2012, and the need for the facilities to be developed to TAB standard to assist with the management of training and racing activities during the upgrade of the Gold Coast Turf Club's facilities.

9.10.3 Mr Bentley had written to Mr Kelly at the Office of Racing a week earlier that the Gold Coast business case might be approved by 13 January 2012, an optimism not shared by Mr Kelly. Mr Kelly wrote to Mr Hamish Williams in Minister Mulherin's office that day that "RQL have no chance of having anything sensible to us in that timeframe".[25]

9.10.4 In his letter of 22 December Mr Bentley asked Mr Kelly to liaise with Treasury to expedite the approval for Beaudesert. It was the recollection of a number of officials, particularly Treasury and Mr Kelly, that Mr Bentley quite often urged completion of the analysis and the approval of the business cases by representations to ministers and public servants, in person, by email and by letter.

9.10.5 On 5 January 2012 Mr Gerald Foley and Mr Buckby from Treasury, Mr Kelly and Ms Perrett from the Office of Racing met with Mr Snowdon to discuss the Beaudesert business case. Weaknesses were identified. It was said, among other things, to be deficient in its methodology; that cost estimates did not reveal the basis of calculation or make comparisons with similar projects; that it contained no financial information on the proposed viability of the upgraded tracks, nor any identified benefit to the local club, community or racing in Queensland; and that projected revenue and business analysis was required to demonstrate financial sustainability.

9.10.6 Although RQL had said that additional race days would be allocated to Beaudesert – from eight non-TAB meetings per year to 18 TAB meetings annually – Treasury noted that there was no analysis to justify that expectation or the financial consequences. In response to these comments, RQL submitted a revised business case to the Office of Racing on 24 January 2012 which was submitted to Treasury.

9.10.7 Treasury continued to have concerns with the revised Beaudesert case, particularly continuing operating deficits, the non-viability of the facility after completion of the works and the forecast subsidy required from RQL.

24 Email from Carol Perrett to Michael Buckby, 29 September 2011.
25 Email from Michael Kelly to Hamish Williams cc: Carol Perrett, 16 December 2011.

9.10.8 On 1 February Mr Foley contacted Mr Kelly with some further questions of a fairly fundamental kind. For example, based on the increased frequency of race meetings and the increase in the RQL subsidy from $21,000 to $300-400,000 per annum, how did RQL propose to fund Beaudesert in the face of reduced wagering revenue from UNiTAB; had RQL considered using some Deagon capital as a "buffer" to absorb increased operating losses; since other business cases (Rockhampton and Cairns) would show increased deficits where would RQL find the funds to cover those deficits?

9.10.9 Mr Kelly sent RQL's response to Mr Foley and attached a copy of Minister Mulherin's media release of the previous day drawing attention to the announcement about the start of work at Beaudesert and mentioned that the statement had been approved in discussions between Minister Mulherin and the Treasurer. Mr Foley understood this "to be a message to hurry up and approve the business case".[26] Mr Stuart Booker, assistant under treasurer, who had been copied into the email, described the media release statement about Beaudesert as "the explicit political imperative [for] the release of funds."[27]

9.10.10 Mr Kelly in his statement to the Commission denied that he was purporting to impose pressure on Treasury. He merely wished to convey some urgency in having a decision "either way", since if Beaudesert had not been approved the Gold Coast project needed significant amendment.

9.10.11 The approval of the Beaudesert business case was overtaken by a number of other business cases submitted to Treasury.

9.11 Other business cases

9.11.1 A further five business cases were received by Treasury between 31 January and 16 February 2012. Treasury thought they had improved in quality as a result of the consultation between Treasury, the Office of Racing and RQL (Mr Snowdon) over the Beaudesert business case.

9.11.2 These business cases, which had been settled between the Office of Racing and RQL, were for Cairns, Rockhampton and Logan and demonstrated that each would be a loss-making enterprise; would expose the government to further investment; did not generate additional profit so that even after the capital investment grant, the racing venues would not become more financially sustainable over the medium or longer term; indeed some were profoundly unsustainable.

9.11.3 A briefing note was prepared for the Treasurer concerning Beaudesert, Cairns and Rockhampton dated 10 February 2012 updated on 14 February (to take account of the recently received Logan business case) setting out these concerns:

> *It is apparent that there is a generally accepted view by the industry that racing clubs are not financially viable businesses. Indeed the business cases advise that "no TAB race club in Queensland is financially viable without financial support from Racing Queensland" and that RQL has subsidised the costs of racing at every race club in Queensland.*[28]

9.11.4 The following further points were made:

- *there was a trend in the three cases towards an increasing gap between forecast revenues and operating costs*
- *Beaudesert and Rockhampton were profoundly non-profitable*
- *there was likely to be a fall in wagering revenue*

26 Statement of Gerald Foley, 2 September 2013, page 5 para 26.
27 Statement of Stuart Booker, 30 August 2013, page 5 para 29.
28 Briefing Note from Gerard Bradley to Andrew Fraser, 14 February 2012. As is discussed elsewhere, the clubs would assert that this state of affairs partly, at least, is a result of the wagering revenue generated by the race programs put on by the clubs being paid to the control body and then distributed "back" to the clubs. Of itself the control body was not revenue-producing apart from collecting licence fees.

- *without a transparent disclosure of RQL's strategy for underwriting deficits government could not be assured the capital projects were sustainable in the longer term*
- *RQL's financial statements suggested some capacity to support the clubs.*

9.11.5 Ms Barber wrote to Mr Booker about the Logan business case on 13 February observing that it was one of many business cases recently received from the Office of Racing. She added:

> *Given the Matter to Note on the RICDS recently sent to Cabinet, I'm no longer sure what Govt considers to be the approval process, but Treasury would not endorse the release of funds prior to formally briefing the Treasurer and, as per our current brief, before receiving the letter of comfort from RQL.*[29]

9.11.6 Having reviewed the business cases for Beaudesert, Cairns and Rockhampton racing clubs and the new Logan venue, Treasury concluded they were unviable without some continuing level of subsidy. Mr Fraser said in his statement to the Commission that he regarded these racing clubs as similar to capital subsidy programs for sporting or cultural facilities.

9.11.7 Treasury could not endorse the release of public funds "in the absence of an assurance from [RQL] that it is committed and has the resources to meet any ongoing operating deficits".[30] Mr Fraser thought this was similar to the approach taken by government over the construction of the AFL stadium on the Gold Coast. Treasury was also of the view that RQL should be advised to establish and maintain a reserve fund to provide ongoing subsidies as necessary to the unprofitable clubs.

9.11.8 By letter dated 14 February RQL provided an assurance to Minister Mulherin in the following terms:

> *The revenue projections contained in the business cases are extremely conservative and receipt of increased revenues will reduce the overall subsidies required from RQL. However, it should be noted that RQL has the resources to subsidise these operations even if additional revenue streams are not accessed.*
>
> *RQL has the capacity to underwrite the operation of these facilities and their maintenance into the future. No additional government funding is required, other than that approved by [C]abinet in the amended Industry Infrastructure Plan, to assist in the conduct of racing at these facilities.*
>
> *RQL has factored in the increased costs associated with operations at the enhanced facilities and has the financial resources to support them as required into the future.*[31]

9.11.9 Treasury reviewed the letter noting that it came close to the assurance sought although there was no undertaking to establish a reserve fund for the future. Following receipt of this assurance the Treasurer approved the release of funds for the capital works at Beaudesert, Cairns, Rockhampton and Logan totalling $36.2 million or 33 per cent of the $110 million RICDS funds.

9.11.10 On 15 and 16 February business cases were received by Treasury for Ipswich and the Gold Coast. There was one working day before the government entered the caretaker period. Mr Snowdon referred to concern expressed by Mr Kelly in the Office of Racing at the late lodgement of these cases and the burden they would place on Treasury, in an email to Mr Malcolm Tuttle of RQL on 14 February.[32] The proposed expenditure on capital works at the Gold Coast was $35.48 million and Ipswich $6 million – a further 38 per cent of the RICDS fund.

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29 Email from Natalie Barber to Stuart Booker cc: Gerald Foley, Michael Buckby, 13 February 2012.
30 Statement of Andrew Fraser, 5 August 2013, attachment AF-2.
31 Letter from Robert Bentley to Timothy Mulherin, 14 February 2012.
32 Mr Snowdon had lodged revised budgets for Beaudesert and Cairns at about the same time. Email from Mark Snowdon to Malcolm Tuttle, 14 February 2012.

9.11.11 In the short time available, Treasury was able to examine only key aspects of the business cases. Treasury concluded that the Gold Coast case contained limited analysis of the financial risks faced by the club once works had been completed and insufficient analysis of how those risks might be mitigated; following the reconstruction works the Gold Coast would have continuing operating deficits of around $0.4 million per annum after including $1 million subsidy from RQL; in the long term further government assistance could be sought as there was insufficient provision to replace the assets if the deficit position was sustained.

9.11.12 Treasury was not persuaded that the GCTC would remain viable in the longer term without further assistance but that the letter from RQL provided an important assurance that RQL had the capacity to provide any assistance necessary. There was some concern that RQL itself faced a reducing income source from wagering and government was at risk of being asked for financial assistance notwithstanding RQL's assurance. A buffer fund was again recommended for RQL to reduce some risk. Treasury did not endorse the business case but did not object to the release of funds to the project on the basis of the assurance given by RQL on 14 February.[33]

9.11.13 The Ipswich Turf Club business case was rejected as not being in accordance with the aims of the RICDS fund because the proposed capital expenditure would not enhance the ability of the club to conduct race meetings or provide any direct benefit to the racing industry. Treasury saw its purpose, principally, as to enable the Ipswich Turf Club to take advantage of the relocation of its facilities to enter into a commercial development.

9.11.14 The approach of Treasury to the influx of business cases in these final working days before 19 February is reflected in this email from Mr Booker to Mr Buckby on 16 February:

> *I think you and [Mr Gerald Foley] have managed the last few hectic weeks of repeated requests etc from RQL very well! In the circumstances approaching Caretaker mode, we need to maintain our usual careful handling of such funding requests, and making sure all CBRC etc requirements are met ...*[34]

9.11.15 On 16 February funding deeds were entered into between RQL and DEEDI on behalf of the State for Cannon Park, Callaghan Park, Beaudesert and Cronulla Park.[35] The funding deed for the Gold Coast was also executed that day although the business case was not attached and the letter of assurance for that project was not received until the following day, 17 February.

9.11.16 Mr Bentley on behalf of RQL assured Minister Mulherin with respect to the Gold Coast and Ipswich projects that subsidies would continue to be allocated and were "a first charge against RQL's wagering revenue". As with the earlier projects, Mr Bentley contended that the revenue projections were conservative and, ultimately, that increased revenue receipts would be delivered. He gave the following assurance:

> *The increased costs associated with the operations at these facilities has been factored into RQL's future planning and we warrant that any costs will be met by industry. No additional funding is required other than that which has been approved by Cabinet in the amended industry infrastructure plan.*[36]

9.11.17 On 17 February the Treasurer wrote to Minister Mulherin:

> *Treasury advises that the business case for the Gold Coast facility demonstrates that the long term viability of the facilities is dependent on continuing support from RQL. The letter*

33 Subsequently, on 17 February 2012, a further letter of assurance was received from RQL for the Gold Coast and Ipswich.
34 Statement of Stuart Booker, 30 August 2013, attachment SPB-16.
35 Discussed below at 9.12.
36 Letter from Robert Bentley to Timothy Mulherin, 17 February 2012.

provided by RQL on 14 February 2012 provides an important assurance that the RQL will continue to support any losses incurred by the GCTC, and on this basis I am prepared to approve the release of funds for the capital works at the Gold Coast.[37]

9.11.18 The Treasurer observed, again, that it would be prudent to seek confirmation that RQL would establish a reserve fund by setting aside a portion of wagering revenue to use as a buffer for increased operating deficits in the event that betting distributions declined in the near future. It is likely that this switch from suggesting that an amount could be set aside from the Deagon allocation occurred after Mr Bentley advised that the RICDS funds had been fully committed by government to projects.

9.11.19 Mr Fraser said in his statement to the Commission that in approving the project funding he was aware that these funds were only part payment and the oversight agencies of government would monitor performance and whether it would be appropriate to disburse further public funds. He also contended that had Treasury advised him to withhold funding altogether for any project he would have accepted that advice.

9.11.20 On the same date, 17 February, the Treasurer wrote to Minister Mulherin declining to approve the release of funds for the Ipswich Turf Club project:

Treasury advises that the major objective of this proposal is to enable the ITC to enter into a future commercial development, and the proposed project does not itself enhance the ability of the ITC to conduct race meetings, which I consider to be a primary aim of the Industry Infrastructure Plan.

9.11.21 Minister Mulherin advised the GCTC of the funding for its project. He explained to Mr Wayne Patch, the chairman of the Ipswich Turf Club, that although Stage 1 of the project, which included the construction of a tunnel under the course proper, was a first step in developing a racing precinct in Ipswich

...[u]nfortunately, consideration of the business case for the release of funding for the project could not be completed before the Government enters the election caretaker period. Accordingly, a final decision on the release of funds will be one for the in-coming government.

9.11.22 On 2 March 2012, at the request of Minister Rachel Nolan, Member for Ipswich, a meeting was held between Mr Patch and the Ipswich Turf Club general manager, Mr Brett Kitching, Mr Bentley, Mr Kelly and Ms Perrett of the Office of Racing and Mr Booker, assistant under treasurer and Ms Barber of which Ms Barber took a file note.

9.11.23 The caretaker conventions were explained at the commencement of the meeting. Mr Bentley, the Ipswich Turf Club representatives and the Office of Racing wanted to revisit the business case for Ipswich and disputed the characterisation by Treasury of the non-racing nature of the project. They outlined a draft proposal which did not link the facility sought to be funded under the RICDS with the proposed commercial development and suggested that a report associated with the business case was out of date and did not reflect the current project proposal.

9.11.24 Treasury stressed that only one day had been available to review the Ipswich business case prior to the commencement of the caretaker period. The Ipswich Turf Club representatives and Mr Bentley sought, unsuccessfully, to have Treasury reconsider and make a further recommendation to government during the caretaker period.

37 Statement of Andrew Fraser, 5 August 2013, attachment AF-6. The assurance letter relating to the Gold Coast from RQL was, it may be assumed, not received before this letter was drafted for the Treasurer.

9.11.25 The examination of the supporting documentation for the reimbursement of the consultants' and internal employees' costs for development of the business cases was finally concluded, subject to some further vetting of the work of the RQL employees, by 29 February.

9.11.26 Treasury considered the appropriateness of this payment during the caretaker period but concluded that since these payments, subject to vouching, were approved by the Treasurer in early December 2011, there was no impediment to doing so. A deed between RQL and the State was executed on 1 March and on 2 March $3,075,919.64 was paid into RQL's bank account.

9.11.27 On 28 February Mr Snowdon wrote to Mr Kelly that "the balance of the business cases for the Industry Infrastructure Plan (IIP) $110M have been completed – these being; Townsville Greyhounds, Townsville Thoroughbreds; Brisbane Race Club; Deagon masterplan; Albion Park; and IIP revised budgets for Beaudesert, Rockhampton, Cairns and Mackay."[38] Mr Snowdon indicated that copies of the business cases were available and he awaited Mr Kelly's instructions.

9.11.28 On 5 March Mr Kelly responded:

> *As you would be aware, as a general election is to be held on 24 March 2012, the government is now operating under caretaker conventions. Caretaker conventions require the government to avoid implementing major policy initiatives, making appointments of significance, or entering into major contracts or undertakings during caretaker period.*
>
> *Accordingly, while you may forward the business cases to this office, as you would appreciate, they will not be considered during the caretaker period.*[39]

9.12 Funding deeds

9.12.1 As mentioned, the State, acting through DEEDI (described as "the Department" in the deeds), entered into funding deeds with RQL with respect to each project for which funds were released under the RICDS including for the payment of past consultants' costs. Although there are differences between them, for the purpose of this Term of Reference, the broad parameters are sufficiently similar for a general overview of their terms to be understood.

9.12.2 The funding deed for Beaudesert was executed by associate director-general of DEEDI, Mr Robert Setter and Mr Bentley as chairman of RQL on 16 February 2012. It had been prepared, as were all other funding deeds after Mackay, by Crown Law after discussion about terms between the Office of Racing, RQL and Crown Law. The Recitals to the deed for Beaudesert and (similarly for the other projects) are:

> A. *The Recipient [RQL] has requested Program Funding from the Department for the purposes set out in this Deed.*
>
> B. *The Department [the State acting through DEEDI] wishes to provide Program Funding to the Recipient, subject to the terms and conditions set out in this Deed.*
>
> C. *The Department must ensure the accountability of Program Funding and accordingly, the Recipient must comply with the terms of this Deed and will be accountable for all Program Funding it receives from the Department under this Deed.*
>
> D. *The Program Funding is to be provided under the Racing Industry Capital Development Scheme.*[40]

38 Letter from Mark Snowdon to Michael Kelly, 28 February 2012.
39 Letter from Michael Kelly to Mark Snowd[o]n, 5 March 2012.
40 *Funding Deed for Beaudesert*, between State of Queensland and RQL.

9.12.3 The State, among other things, was subject to the following obligations:

3.2 Subject to the Recipient complying fully with the terms and conditions of this Deed and the Recipient meeting all Preconditions on or before the relevant Precondition Date, the Department will pay to the Recipient the Program Funds to be committed, spent or disbursed by the Recipient solely on Eligible Expenditure for the purposes of the Program, in accordance with this Deed.

3.3 The Department will pay Program Funds to the Recipient at the times and in the amounts specified in Schedule 3, subject to receipt of a correctly rendered invoice and completion of any applicable Milestones, within 30 days after receipt of a correctly rendered invoice.

3.4 Payment of any Program Funds under this Deed is conditional upon the Department first receiving the following from the Recipient in a timely manner:

(a) a copy of this Deed signed by the Recipient's authorised signatory;

(b) an electronic funds transfer form; and

(c) a correctly rendered invoice (as specified by the Department).

9.12.4 RQL was subject, amongst other things, to the following in respect of the funds:

4.1 The Recipient must comply with the following requirements and acknowledges that the Department's obligation to pay any Program Funds (or the Recipient's right to retain Program Funds) is conditional upon the Recipient:

(a) meeting each Precondition on or before the relevant Precondition Date;

(b) committing and spending Program Funds on Eligible Expenditure only;

*(c) ensuring all elements of the Program are conducted at the Site, if a Site location is specified in **Item 8, Schedule 1**;*

(d) ensuring all elements of the Program and any subcontracted work is conducted with due care and skill and in accordance with all relevant Standards and Approved Business Case;

(e) providing all reports, acquittals and other information that may be required under this Deed to the Department, or as otherwise requested by the Department from time to time, and ensure that such reports, acquittals and other information is accurate and not misleading in any respect;

(f) not being in breach of this Deed or any other funding arrangement or agreement with the State of Queensland;

(g) completing all elements of the Program within the timeframes in the Milestones and any timeframes specified in an Approved Business Case, and in any event on or before the Expiry Date;

(h) complying with all clauses of this Deed; and

(i) complying with lawful notifications or directions of the Department given under this Deed.

...

4.8 The Recipient must not commit or spend any Program Funds except on Eligible Expenditure. There is no commitment by the Department to provide funds additional to or other than the total Program Funds amount in ***Item 4, Schedule 1****.*

4.9 The Recipient will commit and spend Program Funds, and will ensure any third party performing any work on the Program under the Approved Business Case will commit and spend Program Funds allocated to them, only;

(a) in accordance with this Deed and solely for Eligible Expenditure;

(b) for actual expenses directly incurred in respect of Eligible Expenditure; and

(c) after all relevant Preconditions have been met,

and, the Recipient must not commit or spend, or allow any third party to commit or spend, any Program Funds on ineligible Expenditure.

9.12.5 RQL was required to provide timely reports as specified in the Schedule. RQL's accounting obligations, set out in clause 6, were as follows:

6.1 The Recipient's accounting system must be structured:

(a) to enable the expenditure of the Program Funding to be properly and accurately identified, sourced, traced and reported upon to the Department;

(b) to ensure appropriate internal controls are in place to identify and prevent misuse or misappropriation of Program Funding; and

(c) to record that interest earned on the Program Funding is applied for Eligible Expenditure only.

6.2 The Recipient must deposit and retain the Program Funds in a separate bank account, invested in a manner agreed in writing to be acceptable to the Department.

6.3 The Recipient must ensure that any interest earned on the Program Funds is also committed and spent solely on Eligible Expenditure.

9.12.6 The deeds contained a clause indemnifying the State against any loss associated with the project and required RQL to hold appropriate insurance. The State was entitled to suspend the program funding for breach or for other specified failure by RQL. It could also terminate the deed "for convenience, without cause, upon written notice ...".

9.12.7 Schedule 1 set out the funds available under the deed. In the case of Beaudesert the eligible expenditure was $6,502,063.23 to be paid in instalments - the first of $3,949,286.76 to be spent as outlined in the approved business case and paid in the 2011-12 financial year. The second amount of $2,552,776.47 was to be spent as outlined in the business case in the 2012-13 financial year. Each project had an expiry date and contained certain limited milestones to be reached prior to payment.

9.12.8 As has been mentioned, Mr Fraser said in his statement to the Commission that he was conscious that the funds for the projects were part payments only when he approved their release and that further funds would only be disbursed upon the satisfaction of oversighting agencies of government.

9.13 Funds transfer

9.13.1 On 17 February 2012 $6,807,359.64 was received into RQL's bank account from DEEDI for the projects at Beaudesert, Cronulla Park, Callaghan Park and Cannon Park.

9.13.2 The payment for the Gold Coast in the sum of $3,850,000 was received on 20 February; recompense for the internal/external consultants' costs was received into RQL's bank account in the sum of $3,075,919.64 on 2 March. Invoices for each had been raised by RQL at the request of the Office of Racing a day or two earlier.

9.13.3 After the change of government Mr Bentley wrote on 19 April 2012, at some length, to Mr Kelly about the IIP projects. He detailed the status of each, the funding received and what had happened to that funding. For example, in the case of the Gold Coast, Mr Bentley noted that the first instalment of $3.5 million was received by RQL and partially invested in a term deposit to maximise the interest return. Apart from the Gold Coast, projects had either been put "on hold" or requests for additional funding (revised business cases) which had been sought on or about 6 March remained to be considered. Where additional expenditure for projects the subject of funding deeds was required, the board of RQL had resolved on 16 April to fund those further costs of $2,044,016.11 together with $750,000 for the BRC from RQL reserves.

9.14 Thereafter

9.14.1 As discussed elsewhere in this Report, after the election on 24 March 2012 which brought about a change of government, over the following month new directors were appointed to RQL. After the resignation of Mr Bentley, effective from 30 April, Mr Kevin Dixon was appointed chairman. In his Chairman's Report in the Annual Report for RQL for 2012, he wrote:

> *Another important aspect in this change in strategy is its impact on the government's commitment of $110 million to fund critical industry infrastructure upgrades. As noted the previous policy tended to create decisions that the industry did not value or want and during the financial year all infrastructure projects, with the exception of the Mackay thoroughbred facility, were put on hold pending a review of their direction and value. The racing industry has just one opportunity to make the best possible use of this infrastructure funding and we intend to ensure that all spending is appropriate to the needs of the industry and provides the best possible outcome.*[41]

9.14.2 The acting chief executive officer of RQL, Mr Adam Carter, wrote in his report:

> *The fundamental basis of Industry Infrastructure Strategy (IIS) is that the investment be viewed as providing infrastructure necessary to the growth and sustainability of the industry. This includes the infrastructure needed not only to support the actual race day delivery of racing, but also the infrastructure investments needed to ensure the long-term viability of the extended industry and, in particular, provide infrastructure that will stimulate industry growth. Following a change in the State Government, the board of RQL advised that they wished to revisit the allocation of infrastructure funding and make application on a case-by-case basis, such as Gold Coast, Beaudesert and Mackay. Further reviews and allocation of funding will be undertaken in 2012-13.*

41 Racing Queensland Limited 2012, *Annual Report 2011-12*, page 2.

9.14.3 An accompanying table showed the progress of the earlier IIP projects[42]:

Project location	Funds Received from Government for the life of the project to 30/06/12	Actual project costs for the life of the project to 30/06/12	Approval per funding deed	% Complete
Mackay	7,443	6,773	7,443	82%
Gold Coast	4,024	629	35,478	2%
Beaudesert	4,719	781	7,272	11%
Cairns	857	144	1,967	7%
Rockhampton	197	130	1,605	8%
Logan	1,860	570	23,984	2%
*Townsville	91	91		
*Ipswich	35	35		
*Deagon	701	701		
TOTAL	**19,928**	**9,853**	**77,749**	**19%**

**Funds received for the Townsville, Ipswich and Deagon projects related only to the recoupment of preliminary project scoping costs.*

9.14.4 RQL ceased, by amending legislation, to be the control body for the three racing codes in Queensland on 30 April 2013 and was replaced by the Queensland All Codes Racing Industry Board (QACRIB) on 1 May 2013. The Annual Report for 2012-13 covered, therefore, only two months. Mr Dixon as chairman wrote of the industry infrastructure project:

> *We are very pleased with the progress made this year in relation to infrastructure projects, the first to be undertaken under the restructured Industry Infrastructure Strategy. This plan will ensure that the Government's commitment of $110 million to fund critical industry infrastructure is appropriate to the needs of the industry and provides th[e] best possible outcomes. Projects have been completed or are close to completion at the Gold Coast, Cairns, Beaudesert, Mackay and Toowoomba. In addition preliminary work has been undertaken so that we can make further progress in the coming year towards establishing renewed infrastructure across all three codes.*[43]

9.14.5 The chief executive officer, Mr Darren Condon, wrote:

> *The basis for the Industry Infrastructure Strategy (IIS) is to ensure that all spending is appropriate to the needs of the industry and provides that best possible outcome in terms of the growth and sustainability of the industry. Infrastructure investment is needed not only to support the actual race day delivery of racing, but also the infrastructure investments needed to ensure the long-term viability of the extended industry and, in particular, infrastructure that will stimulate industry growth.*
>
> *During the financial year the Beaudesert, Mackay and Cairns projects were completed and the Brisbane, Gold Coast and Toowoomba projects commenced. The purchase of multi-use race day infrastructure including big screen and marquees will also be finalised in the first half of the 2014 financial year. All other projects are being reviewed and applications for funding being made on a case by case basis.*

42 Racing Queensland Limited 2012, *Annual Report 2011-12*, page 9.
43 Queensland All Codes Racing Industry Board 2013, *Annual Report 2012-13*, page 2.

9.14.6 The table in the report showed that some projects initiated or approved under the previous administration (both RQL and executive government) were almost complete:[44]

Venue Location	Funds received to date from Government for approved projects for the life of the project to 30/06/13	Actual project costs for the life of the project to 30/06/13	Approval per funding deed	% Complete
Beaudesert	3,949,287	3,726,706	3,949,287	94%
Cairns	1,859,339	1,859,379	1,859,339	95%
Gold Coast	10,897,541	4,101,456	15,461,696	27%
Mackay	7,443,426	8,358,834	7,443,000	100%
Multi Use Race Day Event Infrastructure	1,462,537	-	1,462,537	0%
Toowoomba	4,328,380	252,150	6,990,200	4%
Reimbursement of consultant costs	2,796,291	2,796,291	2,796,291	100%
TOTAL	$32,736,801	$21,094,816	$39,962,350	

9.15 Discussion

9.15.1 As is clear, the decision by the then government to divert half of the wagering tax revenue to June 2015 – in effect, to *return* that money to industry – was developed by a lengthy process during 2009. The RICDS for the provision of $85 million over four years was established in November 2009. Although neither Treasury nor DPC supported this initiative (on fiscal grounds) as Mr Smith, director-general of that department at the time, observed in his statement to the Commission, it is the prerogative of the executive government to make decisions contrary to recommendations emanating from DPC or Treasury, or the recommended position put to a Minister by the Minister's own department, as part of the decision-making process. Such a process generally results in more informed decision-making through a process of contestability.

9.15.2 Cabinet is a deliberative body comprising the Premier and Ministers of State[45] and is, collectively, responsible for its decisions to Parliament.[46] It is presumed to act in the public interest.[47] As Justice Tamberlin observed, in a different context,[48] the public interest is not one homogenous undivided concept. It will often be multi-faceted and a decision-maker, in this case Cabinet, will have to consider and evaluate the relative weight of competing matters before reaching a final conclusion as to where the public interest resides. For example, Mr Fraser's evidence that "the government's broad economic strategy was to try and see this investment take place to generate a level of activity in the Queensland economy, which had been smashed"[49] was a high level economic public interest.

9.15.3 The racing venues identified as requiring support for their infrastructure requirements which was beyond the funding resources of QRL, then RQL, were discussed in the May 2009 Issues Paper. Some remained constant. Others were affected by the changing fate of Albion Park and Logan. At no time does the evidence before the Commission suggest that any decision about a particular project was informed by electoral or party political considerations. The process had, in fact, commenced just after the March 2009 State election which had returned a Labour administration.

44 Queensland All Codes Racing Industry Board 2013, *Annual Report 2012-13*, page 23.
45 *Constitution of Queensland Act 2001*, section 42(1), section 43.
46 *Constitution of Queensland Act 2001*, section 42(2).
47 *Commonwealth v John Fairfax & Sons Ltd ("Defence Papers case")* [1980] HCA 44 at [26] per Justice Mason hearing an application for an interlocutory injunction.
48 *McKinnon v Secretary Department of Treasury* [2005] FCAFC 142 at [12].
49 Transcript, Andrew Fraser, 4 October 2013, page 22 lines 14-16.

9.15.4 It may be observed that the Cairns, Rockhampton and Woodridge (Logan) electorates in which three of the projects were located were held by the ALP after the 2009 election while Surfers Paradise and Beaudesert were held by the LNP. Only Cairns changed after the 2012 election although the members in some electorates did change, as did the winning margin. Ipswich racecourse is (forming the boundary) in the Ipswich electorate for Rachel Nolan ALP (defeated) and the Ipswich funds were not approved. A summary of the Electoral Commission's final results for those electorates are in a schedule to this chapter for those who might remain unpersuaded.

9.15.5 Although the Mackay racecourse project is outside this Term of Reference, Mr Mulherin MP was at some pains to remind the Commission that Ooralea Park was not located in his electorate of Mackay but in the adjoining electorate of Mirani, held for many years by the LNP.[50]

9.15.6 An issue which was of interest not just to QRL, RQL and government was the retention of the Magic Millions Carnival at the Gold Coast. Tourist bodies were concerned that the facilities at Bundall were likely to cause the owners of that event to look elsewhere, outside the State, for a suitable venue. They, also, ventilated their fears to government.

9.15.7 It seems to be uncontentious that the wagering revenue paid directly to the racing control bodies in Queensland has been insufficient to fund major infrastructure initiatives at the racing venues.[51] Had government declined to establish the RICDS no doubt some of the dire consequences foreshadowed by Mr Bentley in his Issues Paper may well have come to pass. It was a proper role for government to choose to use its revenue in this way. Whether others would think it the best use of funds is not to the point.

9.15.8 This Term of Reference directs attention to the process of the transfer of funds into RQL's infrastructure trust account and the basis upon which those transfers were made.[52] The problems experienced by RQL in developing the several business cases to support the projects, approved in principle 18 months earlier, meant that it was a prolonged process before they were finally in a form and with content suitable for Treasury assessment. Even then, especially in the case of Beaudesert, the path was stony.

9.15.9 Had RQL (and the Office of Racing) been more skilled at preparing the Beaudesert business case it, and the other business cases, might well have been ready for final consideration before the end of 2011. The projects themselves would not have been more fiscally attractive then to the Treasury officials charged with their assessment than they were later, but those officials would have had more time to undertake their task. It is likely that the Treasurer would, at any earlier time, still have been advised to seek an assurance that government would not be called upon to contribute further capital funding to racing venues in Queensland, to maintain their viability, if the proposed projects were to be supported with RICDS funds.

9.15.10 Treasury's concerns, more generally, had been aired prior to Cabinet approving the redirection of the wagering revenue in November 2009. Only the Gold Coast was seen as an economically worthwhile enterprise for government to fund because of the Magic Millions Carnival and the potential to attract revenue-making activity to the Gold Coast area generally. The original decision required the approval of a capital works program based on Treasury and DEEDI advice with payments to be made on an agreed schedule of milestones. The decision to extend the redirection of the wagering tax by a year to $100 million in July 2011 was subject to a, perhaps, slightly more stringent test – that access to loan draw-downs would only be available once a business case for each project had been submitted and accepted by Treasury. The Matter to Note changed nothing about how the draw-down of funds would be achieved.

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50 Transcript, Timothy Mulherin, 14 October 2013, page 44 lines 27-29.

51 Although senior Treasury officials complained in late 2009 that alternative funding models had not been explored nor the rationalisation of racing venues when they were considering the Issues Paper.

52 Although confined to "February 2012" transfers, it is a sensible reading to include all the transfers one of which was in March.

9.15.11 The process whereby Treasury identified the fiscal weaknesses in the business cases, but recommended that the Treasurer could release the funds on the basis of assurances from RQL that it could provide subsidies to these clubs in the future from its own funds to keep them operational, was not inappropriate nor outside the spirit of the original decision.

9.15.12 The Term of Reference asks the Commission to enquire as to whether any inappropriate influence was exercised by RQL directors to bring about the transfer of the funds. There is no suggestion that any director other than Mr Bentley was involved in the IIP and its reviews after the initial commitment was achieved. The RQL board minutes show that the board was informed, generally by Mr Snowdon, of the progress of the business cases.

9.15.13 Mr Bentley certainly approached Ministers, some Treasury officials and the Office of Racing often about the urgent need for a decision. There was some apparent exasperation, if not irritation, in Treasury that he, inappropriately, did not make his contact with government through the Office of Racing but this did not amount to influence and certainly not inappropriate influence. Mr Kelly was often contacted by Mr Bentley but he was at pains to explain that it was Treasury's decision to make a recommendation to the Treasurer, not his.

9.15.14 The real pressure was the perceived need by Treasury officials to give effect to the decision of government to fund these projects in an extremely narrow timeframe, both from Minister Mulherin's premature announcement with respect to Beaudesert and after the Beaudesert business case had been completed.

9.15.15 Mr Mulherin, in his evidence to the Commission, resisted the suggestion that the haste to complete the assessment process was directed by the impending caretaker period. He preferred to attribute the hurry as responsive to industry and local restlessness at the long delay in delivering the promised project. That might be accepted in part. But it is hard to accept that the shut down in activity which the caretaker period would bring was not a direct cause of the last minute flurry of activity with all but Beaudesert.

9.15.16 RQL was cognisant of the approaching caretaker period as was the Office of Racing and certainly that was so in Treasury. The Treasury officials responded professionally and plainly worked in difficult circumstances to do their best at undertaking these rushed assessments. Treasury's refusal to recommend to the Treasurer that he release funds for the Ipswich project and his acceptance of that recommendation assists in the conclusion that no impropriety was involved.

9.15.17 Each project for which funds were to be released was underpinned by a formal funding deed prepared by Crown Law and the funds were required to be, and were, transferred by RQL into a project-specific account. The funds were thus quarantined from RQL's general monies.

9.15.18 Finally, the Term of Reference asks if the transfer of funds was appropriate and justified. The projects had been flagged for a considerable time. However, if government policy changed the funding agreements could be terminated "for convenience".

9.15.19 Whether those projects at those venues were the best use of the available funds is beyond the Commission's expertise and the Term of Reference. It may be observed, however, that the new directors of RQL and then the new control body have carried on with many of the same projects after taking time to review them. The prudent requirement of an assurance from RQL to support those venues into the future at the least provided a level of risk management for government.

9.16 Conclusion

9.16.1 The events surrounding the approved transfer of funds by the former Queensland government to RQL's infrastructure trust account in February (and March) 2012 have been examined fully by the Commission. Those transfers were the culmination of a lengthy administrative process considered by Cabinet over several years from November 2009. Without an understanding of the background to the allocation of $110 million of government funds to support the racing industry in Queensland and the delay in redeploying those funds, the perception that something "improper" might have occurred is not surprising.

9.16.2 The rush to have a number of business cases approved before the caretaker period commenced was likely informed by a concern by RQL that the incoming administration might not support some of those projects. It may also have apprehended that several months might pass before the projects, even if endorsed by a new administration, would be able to be started if the funds were not released prior to the caretaker period.

9.16.3 The Commission has had access to the considerable email and other documentary material both within and between government departments including Ministers and their advisors and officials in those departments and RQL. No improper influence was exerted by a director of RQL. No impropriety has been revealed. Since the process established by Cabinet in November 2009 was adhered to, the transfer of the funds was appropriate and justified.

Schedule – 2009 and 2012 State Election Results

District	2009 election[53]	2012 election[54]
Beaudesert	LNP	LNP
Cairns	ALP	LNP
Rockhampton	ALP	ALP
Surfers Paradise	LNP	LNP
Woodridge	ALP	ALP

53 http://www.ecq.qld.gov.au/elections/state/state2009/results/summary.html, viewed 20/11/13.
54 http://www.ecq.qld.gov.au/elections/state/State2012/results/summary.html, viewed 20/11/13.

Chapter 10

Future Governance and Other Matters – Terms of Reference 3(h) and 5

"[A]ny other relevant matter relating to the relevant period or otherwise that the Commissioner considers necessary."

"In making recommendations the Commissioner should consider any recommended legislative and/or organisational changes to promote good corporate governance, integrity and a transparent and accountable culture for the new control body for racing in Queensland – the Queensland All Codes Racing Industry Board established under the Racing Act 2002 (trading as Racing Queensland)."

10.1 Introduction

10.1.1 The Commission has considered these Terms of Reference together as they have some commonality.

10.2 Queensland All Codes Racing Industry Board and other initiatives

10.2.1 In 2012 extensive amendments to the *Racing Act 2002* (Qld), which came into effect on 1 May 2013, established the Queensland All Codes Racing Industry Board (QACRIB) as the control body for thoroughbred, harness and greyhound racing. Separate control boards for each of the three codes of racing were created with responsibility for the management of the respective codes of racing under QACRIB. QACRIB is a statutory body under the *Financial Accountability Act 2009* (Qld), the *Statutory Bodies Financial Arrangement Act 1982* (Qld) and a unit of public administration under the *Crime and Misconduct Act 2001* (Qld). It is, thus, subject to stringent oversight and the ambiguity noted in Chapters 5 and 6, about the responsibility for "internal" corporate governance of a *Corporations Act 2001* (Cth) control body, has ceased to be a concern.

10.2.2 The new Chapter 3A of the Racing Act has established the position of independent Racing Integrity Commissioner, whose function is to conduct audits of and investigate the integrity processes of a control body either of the commissioner's own initiative, or when requested by the Minister.[1] The commissioner is empowered to investigate complaints about an integrity process of a control body. The integrity process of a control body is

> *...a policy, process, system, action, decision or other matter affecting the integrity of the public's confidence in the control body's code of racing.*[2]

10.2.3 Apart from its primary function as the control body for the three codes, some of QACRIB's other functions address important challenges for the racing industry, including:[3]

- identifying, assessing and developing responses to strategic issues relevant to the codes of racing
- developing and implementing responses to strategic challenges faced by racing
- leading and facilitating negotiations between two or more control boards about strategic issues and agreements that affect them individually or as a whole
- leading and undertaking negotiations with other entities about strategic issues and agreements that affect racing
- identifying priorities for major capital expenditure for racing
- managing the redevelopment of existing, and the construction of new, infrastructure required by the codes of racing individually or as a whole
- marketing.

10.2.4 QACRIB comprises five members – the chairpersons of the Thoroughbred Racing Board, the Queensland Harness Racing Board and the Greyhound Racing Board and two members appointed by the Governor in Council.[4] Each must have skills and experience in one or more of enumerated areas, including a *code of racing*[5].

10.2.5 The chairperson and the deputy chairperson are appointed by the Governor in Council from the members of QACRIB.

1 *Racing Act 2002*, section 113AN.
2 *Racing Act 2002*, section 113AN(3)
3 *Racing Act 2002*, section 9AD(1).
4 *Racing Act 2002*, section 9AI(1).
5 *Racing Act 2002*, section 9AJ(1)

10.2.6 The amendments to the Racing Act establish control boards for thoroughbred, harness and greyhound racing. Each is the control board for its code of racing. The control boards' functions are to assist QACRIB to manage their respective codes of racing and to respond to any requests from QACRIB. Each board is responsible for recommendations to QACRIB about the allocation of race meeting dates and prize money, and the code's rules of racing; each is authorised to consult with industry stakeholders and has a role in advancing the interests of its code.[6]

10.2.7 The amendments provide, in detail, how conflicts of interest should be managed.[7]

10.2.8 As the several Chapters in this Report demonstrate, it is necessary but insufficient to have policies, guidelines, checks and balances in place to ensure that an organisation is conducted with integrity, as understood in the broadest sense, and in conformity with those policies guidelines and checks and balances. To perform successfully the functions for which the organisation was created, those policies, and so on, must be carried into practical effect. QACRIB must be conscious of these matters as it undertakes the important duties imposed upon it by the amending legislation.

10.2.9 A potential weakness in a five person board, three of whom are chairpersons of a code control board, is the appointment of one of those code chairpersons as chairperson of QACRIB. An independent chairperson would remove any perception that any one code or club is favoured or that a code's concern or proposal has not been heard or heard adequately. The Racing Act requires QACRIB to make decisions for the benefit of racing as a whole. As mentioned in Chapter 6, such a generalised *motherhood* statement is as difficult to enforce as it is to give it meaning.

10.2.10 There is value in an independent chairperson of an organisation which is *representative* for three of its five members. The ASX Corporate Governance Council in its *Corporate Governance Principles and Recommendations* observes:

> *The chair is responsible for leadership of the board and for the efficient organisation and conduct of the board's functioning.*
>
> *The chair should facilitate the effective contribution of all directors and promote constructive and respectful relations between directors and between board and management.*
>
> *Where the chair is not an independent director, it may be beneficial to consider the appointment of a lead independent director.*
>
> *The role of chair is demanding, requiring a significant time commitment. The chair's other positions should not be such that they are likely to hinder effective performance in the role.*

10.2.11 An example of a successful independent chairperson, where independence might have been seen as necessary but unlikely to be achieved, occurred in Queensland with the appointment of Mr (later Sir) Albert Sakzewski as the founding chairperson of the TAB.[8] He had not been involved in the politics of racing administration.

10.2.12 The dominance of the thoroughbred code, both financially and numerically, and the historical cycle of suspicion and division within racing in Queensland suggest that an independent chairperson of QACRIB might create a beneficial perception that the best interests of the three codes of racing as a whole will be respected. Although there will be opposition to this course from some quarters, it seems to the Commission that it is a sensible attempt to break the destructive cycles of the past.

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6 *Racing Act 2002*, section 9BQ(2).
7 *Racing Act 2002*, section 9BJ and 9BK.
8 Cohen, K 1992, *Character and Circumstance: Thirty Years of the Totalisator Administration Board in Queensland: 1962-1992*, Boolarong Press, page 6.

10.2.13 The identity of *the owners* of the racing industry can not be easily defined. They are a widespread and diverse group, many of modest financial means. For all in the industry, an effective, functioning and forward-looking control body is essential. There is merit in the requirement for a nominee to QACRIB to have the support of at least two representative racing bodies (with a minimum membership), perhaps even drawn from two codes of racing, before being eligible for consideration for appointment. The Commission does not make a recommendation about this but offers it as a suggestion for consideration.

10.2.14 Some annual process for gauging the views of the industry at large might be devised. The lack of formal and genuine consultation with industry stakeholders, prior to important change to the control body as discussed in Chapter 6, was the origin of much unrest. As recommended at 6.13.9, at some appropriate time, the government should undertake a wide ranging consultation about the future needs of the racing industry in Queensland. The Commission is aware that racing and wagering have been discussed nationally over some years at ministerial level.

10.2.15 There is much to be said for a unified approach as to how international and national corporate wagering businesses should be regulated. This would avoid jurisdiction shopping and the uneven distribution of wagering revenue not reflective of the source of the gambling product. This may involve the Commonwealth assuming responsibility for wagering regulation.

10.2.16 The competition for the wagering dollar has never been greater and racing will need to be creative, active and smart to capture a reasonable share of the market.

10.2.17 There are other models which might be considered but, for the present, that selected by the legislature has regard to the weaknesses revealed in the former model and has sought to manage them. This statutory authority model departs from the conclusion reached in 2001, that there should be less government involvement in the commercial side of the racing industry. The reality is that racing in Queensland under present conditions is unlikely to be self-sustaining. If significant public funds are to be deployed for its maintenance then government ought to be more closely involved than the corporate model allows.

10.3 Racing Science Centre

10.3.1 Little is said in this Report about the Racing Science Centre (RSC) – it was not expressly within the Terms of Reference and the Commission found no criticism of the way in which it carried out its tasks under the Racing Act. Nor did the Commission seek statements from those who operate the RSC about whether its functions could be carried out appropriately in some other way. Mindful of these limitations, the Commission offers some preliminary observations.

10.3.2 The RSC is a very important part of the oversight of the integrity of racing – a principal purpose of the Act. However, the Racing Act provides no legislative requirement for government to be the provider of analytical and scientific services to the racing industry.

10.3.3 In February 2013, the Commission of Audit report was presented to government. It focussed on public sector renewal, with a view to repositioning Queensland to meet future economic and fiscal challenges. Two key elements of the report were:

> *[f]or the Government to ensure services are delivered, not necessarily to be the agency that actually does the delivery. It needs to be the 'enabler', not necessarily the 'doer'.*[9]
>
> *Government should not perform commercial functions which other parties are better placed to deliver at equal or lower cost. It should focus on those activities which others cannot or will not undertake.*[10]

9 Queensland Commission of Audit 2013, *Final Report – February 2013, Volume 1 – Executive Summary and Recommendations*, Queensland Government, page i.

10 Queensland Commission of Audit 2013, *Final Report – February 2013, Volume 1 – Executive Summary and Recommendations*, Queensland Government, pages 1-10.

10.3.4 Since the racing industry fully funds the RSC, it may be that the necessary services could be obtained less expensively by locating the RSC within a university where the latest research and equipment would be available or by obtaining the services from a commercial laboratory undertaking general pathology tests.

10.3.5 It is respectfully recommended that government investigate the financial and scientific advantages of such a move.

Appendices

Appendix A

Terms of Reference

Commissions of Inquiry Order (No. 1) 2013

Short title

1. This Order in Council may be cited as the *Commissions of Inquiry Order (No. 1) 2013*.

Commencement

2. This Order in Council commences on 1 July 2013.

Appointment of Commission

3. UNDER the provisions of the *Commissions of Inquiry Act 1950* the Governor in Council hereby appoints the Honourable Justice Margaret White AO, from 1 July 2013, to make full and careful inquiry in an open and independent manner in relation to the operations of the former racing control bodies in Queensland (the relevant entities) being Racing Queensland Limited ACN 142 786 874 (RQL) and its predecessor bodies which amalgamated in July 2010 (Queensland Racing Limited ACN 116 735 374, Greyhounds Queensland Limited ACN 128 067 247 and Queensland Harness Racing Limited ACN 128 036 000), and their controlled entities, including Queensland Race Product Co Limited ACN 081 743 722, over the period 1 January 2007 to 30 April 2012 (the relevant period) with respect to:

   (a) (i) the adequacy and integrity of, and adherence to, the procurement, contract management and financial accountability policies, processes and guidelines for the relevant entities including measures to ensure contracts awarded delivered value for money; and

   (ii) the events surrounding the contractual arrangements between the relevant entity or entities and Contour Consulting Engineers Pty Ltd to manage contracts on behalf of those entities; and

   (iii) whether the resulting contracts were underpinned by sound procurement practices and whether appropriate payment policies and processes were implemented and were adhered to;

   (b) the adequacy and integrity of, and adherence to, management policies, processes and guidelines and the workplace culture and practices of the relevant entities, in particular RQL, and the appropriateness of the involvement of the Boards of those relevant entities in the exercise of functions by the executive management team and other key management personnel, including the officer holding the position of company secretary and those involved in integrity matters;

   (c) the adequacy and appropriateness of RQL's corporate governance arrangements, in particular:

   (i) whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, acted with integrity and in accordance with RQL's constitution, in the best interests of the company and the racing industry;

   (ii) whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, operated consistently with relevant applicable State and Commonwealth policies and legislation, including the *Racing Act 2002* and the *Corporations Act 2001* (Cth);

(iii) the policies, rules and procedures to identify and manage potential and actual conflicts of interests and to minimise the risks of directors and executives improperly using their position and information obtained for personal or financial gain;

(iv) the adequacy of employment contracts in restraining former directors and executives from seeking employment with RQL's preferred contractors and suppliers;

(d) whether there was sufficient and appropriate oversight by the responsible Minister, executive government and chief executive, including under the provisions of the *Racing Act 2002*, for the operations of the relevant entities;

(e) the events surrounding the renegotiation of employment contracts of four RQL senior executives, Chief Executive Officer Malcolm Tuttle, Director of Integrity Operations Jamie Orchard, Director of Product Development Paul Brennan and Senior Corporate Counsel and Company Secretary Shara Reid (nee Murray) in 2011 and resulting payouts on their voluntary termination in March 2012 under those contracts, and whether the directors and senior executives acted consistently with their responsibilities, duties and legal obligations, with reference to the key findings of the Auditor-General in his Report to Parliament, *Racing Queensland Limited: Audit by arrangement*, tabled in July 2012;

(f) the arrangements between Queensland Race Product Co Limited and the Tatts Group (comprising Tatts Group Limited ACN 108 686 040 and each of its subsidiaries, including TattsBet Limited ACN 085 691 738), and formerly UNiTAB, concerning fees paid by the Tatts Group for Queensland wagering on interstate races through TattsBet, in particular;

(i) how Queensland Race Product Co Limited responded to the introduction of race information fees;

(ii) whether the Boards of the relevant entities and/or Queensland Race Product Co Limited sought expert legal advice or other advice regarding the effect on fees payable by the Tatts Group to Queensland Race Product Co Limited as a consequence of race information fees being introduced and if not, why this advice was not sought;

(iii) the reasons why any expert advice sought at any time following the introduction of race information fees was or was not acted upon; and

(iv) whether the directors and senior executives of both the relevant entities and Queensland Race Product Co acted in good faith and consistently with their responsibilities, duties and legal obligations and the best interests of the company at the material time race information fees were introduced, or at any other time and whether their actions may have been influenced by any conflict of interest in being both a director of the relevant entities and/or Queensland Race Product Co Limited and/or the Tatts Group or by a relationship with any other person, or whether they used their position/s to gain a personal advantage;

(g) the events surrounding the approved transfer of funds by the former Queensland Government to RQL's infrastructure trust account in February 2012, on what basis the transfer was made, whether any improper influence was exercised by RQL directors, and if the transfer was appropriate and justified; and

(h) any other relevant matter relating to the relevant period or otherwise that the Commissioner considers necessary.

Commission to report

4. AND directs that the Commissioner make full and faithful report and recommendations on the aforesaid subject matter of inquiry, and transmit the same to the Honourable the Premier by 30 September 2013.

Commission to make recommendations

5. IN making recommendations the Commissioner should consider any recommended legislative and/or organisational changes to promote good corporate governance, integrity and a transparent and accountable culture for the new control body for racing in Queensland – the Queensland All Codes Racing Industry Board established under the *Racing Act 2002* (trading as Racing Queensland).

Application of Act

6. THE provisions of the *Commissions of Inquiry Act 1950* shall be applicable for the purposes of this inquiry except for section 19C – Authority to use listening devices.

Conduct of Inquiry

7. THE Commissioner may hold public and private hearings in such a manner and in such locations as may be necessary and convenient.

ENDNOTES

1. *Made by the Governor in Council on 23 May 2013.*
2. *Notified in the Gazette on 24 May 2013.*
3. *Not required to be laid before the Legislative Assembly.*
4. *The administering agency is the Department of Justice and Attorney-General.*

Commissions of Inquiry Amendment Order (No. 4) 2013

The make of the Commissions of Inquiry Amendment Order (No.4) 2013, which amends the reporting date of the Queensland Racing Commission of Inquiry, established by the Commissions of Inquiry Order (No.1) 2013, from 30 September 2013 to 7 February 2014.

Appendix B

A Brief History[1] of Racing in Queensland

1 The *History of Australian Thoroughbred Racing* (1987) Volume One; (1990) Volume Two; (2007) Volume Three, by Harold Freedman (Original Illustrations) and Andrew Lemon (Text) published by Classic Reproductions, Melbourne, is a comprehensive history of thoroughbred racing in Australia. It had its genesis in a proposal to record the history of Australian thoroughbred racing in a vast mural at Flemington Racecourse with an accompanying text. The project was endorsed by the Australian Bicentennial Authority and had the support of libraries and racing clubs around Australia and overseas. That work, the six Queensland Royal Commissions/Commissions of Inquiry which are described fully in Appendix C into aspects of the racing industry together with all relevant Queensland legislation constitute the major source materials consulted for this Appendix to the Commission's Report. Queensland Racing Limited, a former control body for thoroughbred horse racing in Queensland commissioned a documentary DVD of the sport's history in Queensland which is both entertaining and informative. It also published a companion book edited by Mark Oberhardt, *Racing Through the Years: A Guide to Queensland Thoroughbred Racing* (2010). It commences with a short history and is, essentially, an almanac of horses, races and identities. A report prepared for the Victorian Casino and Gambling Authority in October 1999 by the Australian Institute for Gambling Research University of Western Sydney Macarthur: *Australian Gambling Comparative History and Analysis* although focused on gambling in its many forms contains an excellent summary of animal racing in Australia in Chapter 3. It will be referred to as "the *Gambling Report*". An affectionate history of trotting in Queensland by Raymond Lowndes *From Kedron to Albion Park* in two volumes, self-published in 2003, contains numerous biographical sketches of personalities and details of races and horses from 1880 to 1968 and the author's own perception of the influence of the thoroughbred clubs on government which, in part, limited the success of the sport in Queensland. This work will be referred to as "*Lowndes*". More generally on harness racing is Max Agnew's *Silks and Sulkies – The Complete Book of Australian and New Zealand Harness Racing*, Doubleday (Sydney) 1986, and his earlier work, *Australia's Trotting Heritage* (1977). The former will be referred to as "*Agnew*". The Commission is grateful to Mr Peter Rose, a former greyhound breeder, who, at the Commission's request, compiled a brief history of greyhound racing in Queensland. It will be referred to as "*Rose*". John O'Hara's *A Mug's Game: A History of Gaming and Betting in Australia* (1988) New South Wales University Press includes useful references to trotting and greyhound racing at pages 184-188. The comprehensive history of the TAB in Queensland, *Character and Circumstance: Thirty Years of the Totalisator Administration Board in Queensland: 1962-1992* (1992) Boolarong Press, by Kay Cohen, hereafter referred to as "*The History of the TAB*", includes much about the business of racing in Queensland and the strong personalities which shaped the course of the TAB. *Queensland Turf Club: A Place in History* by the late Helen Coughlan and Noel Pascoe (photographer) (2009) Boolarong Press, was commissioned by the outgoing board of directors of the Club to commemorate its 146 year history. A new race club – the Brisbane Racing Club was formed as the result of the merger of the Queensland Turf Club and the Brisbane Turf Club, the operators of Eagle Farm and Doomben race courses respectively in 2009.

Beginnings

Organised animal racing has been a part of human communal activity long before written history. Archaeological remains show equestrian events in the Ancient Greek Olympics by the seventh century BC. Flat races and chariot races were an important entertainment throughout the Roman Empire. Sport involving horses and dogs is depicted in early Asian art and artefacts.[2]

It is likely that from its earliest emergence gambling has been associated with racing animals and continues to be closely connected. This, no doubt, has contributed to horse racing's survival long after horses ceased to be necessary in battle and, later, in domestic and commercial life. Gambling now provides much of the economic base for the horse and dog racing industry.[3]

Racing, more or less as known today, was developed in the early to mid-eighteenth century in England with multiple horses competing for pooled prize money. The need for some central organisation led to the formation of The Jockey Club of England at Newmarket in 1750. It created and then controlled the Rules of Racing, approved racecourses to conduct meetings under those rules and arbitrated racing disputes. It continued to do so until 2007 when the British Horseracing Authority in the United Kingdom assumed the regulatory functions while The Jockey Club continued to control the races.

The regulation of gaming, generally, commenced in England in the sixteenth century with The *Unlawful Games Act of 1541*.[4] At common law contracts of gaming and wagering were enforceable and all games were lawful save those excluded, by implication, in the 1541 statute. The *Gaming Act of 1845*[5] made all gaming and wagering contracts void. Earlier gaming legislation in 1664[6] and 1710[7] made unenforceable contracts of wager in respect of some games including cards, tennis, bowls, horse racing, dog matches and cricket.[8]

Halsbury tells us that the "emancipation of horse racing was brought about" by "a tortuous course of legislation ...".[9] The statute of 1664[10] prohibited the loss of more than £100 on credit by playing (gambling) among other things (on) horse racing. The *Gaming Act of 1710*[11] imposed a penalty on persons who won more than £10 at a time by playing at games including horse racing. As a result, numbers of races took place for small stakes which tended to "impoverish the breed of horses".[12] Ostensibly to remedy this state of affairs, the *Gaming Act of 1744*[13] authorised races with stakes over £50.

Record keeping became a necessary part of the regulatory function of The Jockey Club and by the end of the eighteenth century the *Calendars and Stud Books* were established.[14] Richard Tattersall, a successful English horse-dealer provided headquarters for The Jockey Club in London and established a club for the betting fraternity which, in due course, became the ruling body on matters concerning betting.[15] His name was used in Australia for hotels which catered for those connected to racing and was adopted by betting clubs.

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2 Lemon, A 1987, *The History of Australian Thoroughbred Racing*, Volume One, Chapter One, Classic Reproductions, Melbourne. This work will be referred to as "the *History*, Vol One".

3 As the *Gambling Report* notes, while the original associations with sport, recreation and social gambling have remained, racing is now regarded as an industry because of its important contribution to the national economy and state revenue, at page 52 [of the *Gambling Report*]. Because it is the dominant industry, the reference to "racing" unless otherwise specified is a reference to thoroughbred horse racing. The possibility of lawfully racing other animals in a similar manner to horses and dogs was established as a consequence of the National Competition Policy Review in Queensland and found its expression in amendments to the *Racing Act 2002*.

4 33 Hen 8 c 9.

5 8 & 9 Vict c 109.

6 16 Car 2 c 7.

7 9 Ann c 19.

8 *Jeffreys v Walter* (1848) 1 Wils 220.

9 *Halsbury's laws of Australia*, volume 15 (1st edition), p286 note (d).

10 16 Car 2 c 7.

11 9 Ann c 19.

12 *Halsbury's*, volume 15 (1st edition), p286 note (d).

13 18 Geo 2 c 34.

14 Lemon, *The History*, Vol One, page 44.

15 Lemon, *The History*, Vol One, page 45.

Imported horses in the seventeenth and eighteenth centuries swamped the bloodlines of horses already in Britain.[16] The most famous import was the horse that became known as the *Darley Arabian* foaled in Syria in 1700 and purchased in Aleppo in 1704 by Thomas Darley and put to stud in Yorkshire. He sired many famous winners and it is his sire line which dominates in the pedigree of the modern thoroughbred as well as the standardbred horse. The two other "foundation" imported sires were the *Byerley Turk* (captured in Buda in battle and brought to England in 1688) and the *Godolphin Arabian* (foaled in Syria in 1724 and imported into England in 1730 via Tunis and Paris).[17]

First Races in New South Wales

Seven non-thoroughbred horses acquired in the Cape of Good Hope in South Africa arrived in Sydney with the First Fleet in 1788. Greyhounds, bred for hundreds of years in England for hunting, came in the First Fleet and were used for hunting animals for food. The first thoroughbred horse to be brought to the colony is thought to be *Rockingham* "probably in the late 1790s",[18] and likely from the Cape. Horses were generally imported from South Africa or India to avoid the arduous sea voyage from England. They fetched high prices. Gradually better horses were imported, particularly by the regimental officers who prized strength, speed and looks. Direct imports from England were a rarity until about 1830.

Organised horse racing in the Australian colonies was modelled on the English system and based upon racing clubs. The names of famous English centres were imitated throughout the Australian colonies. Annual race meetings of several days' duration were held.

The first official race meeting in the colony was held at what is now Hyde Park, Sydney, under the patronage of Governor Macquarie in October 1810. The program included a contest between the trotters.[19] Complaints about the effect of horse racing on the morals of convict labourers and others came early:

> *I reside in the neighbourhood. I found my convict labourers dissatisfied and idle on the race-day. The village was in an uproar; and drunkenness and fighting prevailed at night; horrible oaths and language ingenious for its damnable impiety, were the order of the day. Evil examples and evil habits were inculcated on the native youth of both sexes; and despair and poverty pervaded the minds and hearts of those next morning, who found their substance had been dissipated in drunkenness the night before. A woman, with a sucking child, was found stretched on the ground all night, incapable of moving from the effects of drunkenness.*[20]

As the author of the *History* observed: "So the bounds were set for a debate on the morality of horse racing which would be a sidelight of intellectual discussion in Australia for generations to come."[21]

The early fortunes of racing in New South Wales waxed and waned depending often on gubernatorial patronage and the disputes between racing factions. Close on developments in New South Wales, race events took place in Van Diemen's Land/Tasmania, Victoria, Western Australia and South Australia.

In January 1842 the Australian Jockey Club was formed in Sydney.

16 Lemon, *The History*, Vol One, page 39.
17 Lemon, *The History*, Vol One, page 37.
18 Lemon, *The History*, Vol One, page 49.
19 Agnew, *Silks and Sulkies*, page 13.
20 The *Sydney Gazette*, September 1822, quoted in Lemon, *The History*, Vol One, pages 59-60.
21 Lemon, *The History*, Vol One, page 60. A detailed history of gambling in the early years, particularly in New South Wales, has been researched by John O'Hara, *A Mug's Game: A History of Gaming and Betting in Australia* Chapter 2: The Establishment of Colonial Gambling Practices 1820-50.

Trotting, or harness racing as it was known in the United States, was introduced into Victoria by Americans who settled there following the discovery of gold in that colony. The first identified trotting meeting was in 1860 at Flemington organised by John Peck, an American, "for those horses that favoured the trotting or pacing gait".[22] It was described as "The American Trotting Races". The first trotting track devoted to harness racing opened at Elsternwick Park in Melbourne in 1882 and thereafter regular race meetings were held.[23] "Standardbred" was the description given to horses bred for harness racing. Initially, trotting and pacing horses were ridden as well as driven from sulkies; however, with the introduction of the pneumatic tyre, racing horses under saddle was phased out and by the end of the 1920s light sulkies prevailed.[24]

Greyhounds were raced for sport from the early years of the colony as well as for hunting. Formal coursing associations were established towards the end of the nineteenth century in several of the colonies. The sport, using live wallabies and then imported hares as bait had, as the *Gambling Report* noted, "limited appeal",[25] and did not pick up wider popularity until the tin hare was introduced in the mid-1920s. The first mechanical lure meeting was held in Sydney at Epping Racecourse (Harold Park) on 28 May 1927.[26]

Racing in Queensland

(a) Early years 1843-1909

The convict colony of Moreton Bay began in Brisbane in 1826 and was closed to free settlement until 1842.[27] A year later, the first recorded race meeting was held at Coopers Plains in 1843 when a track was cleared in the scrub.[28]

It is highly likely that earlier races had been held elsewhere around the Settlement. The Coopers Plains venue was abandoned by 1845 and in 1846 races were held for the first time at New Farm. The *Moreton Bay Courier* of 20 June 1846 wrote of "... the bright costumes of the gentlemen-jockeys ..." The author of the *History* observes that the term "gentlemen-jockeys" gave a hint of some conflict and the following year the prizes could be contested only by members of "the club" of which there were 64 each subscribing £3 3s. This was said to be due to some unpleasantness between "the sporting gentlemen and some of the inhabitants of Brisbane" at the previous meeting. The organisers were the squatters who were in Brisbane infrequently from the Darling Downs. They imported the breeding stock and often rode their own horses in the races.

As a consequence of these "incidents", the squatters organised races on the Downs with prizes not dissimilar to those being offered in Brisbane. The advent of racing on the Darling Downs led to the virtual extinction of racing in Brisbane for many years.[29] There were only five annual meetings between 1848 and 1861. According to the *History*:

> *The biggest obstacle to the successful establishment of horse racing in Moreton Bay and the Darling Downs was the constant squabbling between the few people who owned and bred horses.*[30]

As something of a compromise between the disputants, the chief racing centre of the colony became Ipswich. It was the preferred port over Brisbane for the squatters and became very prosperous. At this time there was no rail connection between the Darling Downs and Brisbane. In 1852 the North Australian Jockey Club was established to conduct the Ipswich races, the members comprising "the most

22 Australian Institute of Gambling Research (AIGR) 1999, *Australian Gambling Comparative History and Analysis*, Victorian Casino and Gaming Authority, Melbourne, p. 55. This work will be referred to as "*The Gambling Report*".
23 Agnew, *Silks and Sulkies*, page 24.
24 AIGR, *The Gambling Report*, page 55; Agnew, Silks and Sulkies, page 36.
25 AIGR, *The Gambling Report*, page 82.
26 *Rose*.
27 The separate colony of Queensland was established in 1859.
28 The *History* notes "Appropriate to the politics of the day, a horse named **Whig** beat **Conservative** in the first race, the Brisbane Town Plate" Vol One page 204.
29 Lemon, *The History*, Vol One, page 210.
30 Lemon, *The History*, Vol One, page 209.

influential men in the district".[31] They adopted the Rules of the Australian Jockey Club. It was the first permanent racing club in the colony and was to provide leadership for racing for the next 15 years.[32]

Few race meetings were organised in Brisbane although the Queensland Turf Club (hereafter the QTC) had been formed in 1863. Race meetings were held in Maryborough, Rockhampton and other northern settlements in the 1850s and 60s.

Private Acts of the Queensland colonial parliament vested Crown land in trustees for racing purposes. Sir George Bowen, the first Governor of Queensland, vested land at Toombul in three individuals as trustees for racing purposes in 1863. These lands were granted under the provisions of the *Alienation of Crown Lands Act of 1860*. Other grants of land for the same purpose followed for other locations in the colony.

The first race meeting on the Eagle Farm racecourse was held in 1865 and the first Brisbane Cup in 1866.[33] By the early 1870s, Ipswich and Brisbane settled into a period of mutual co-existence synchronising their racing programs. However once Brisbane was connected to the railway system which extended west from Ipswich to Grandchester, Toowoomba and Dalby, Ipswich lost its geographical advantage. This, together with an economic recession in the late 1870s and early 1880s, saw the demise of the North Australian Jockey Club which held its last meeting in 1881.[34]

By then the QTC had become organised on a more professional basis. According to O'Hara, although the QTC came to exert dominance over the Darling Downs and was the leader of Queensland racing "it was never able to exercise the same level of control over racing throughout Queensland as its counterparts achieved elsewhere".[35] In New South Wales the Australian Jockey Club was undisputed as the Principal Club and similarly with the Victorian Racing Club. In Tasmania control of racing was shared between a Hobart club and a Launceston club in the north of the island.

When the QTC attempted to impose its rules of racing on all clubs throughout Queensland, and thereby to assume the right to hear appeals from racing stewards anywhere in the colony, its edicts were ignored by the other clubs. In retaliation, initially, the QTC refused to accept nominations from horses which had raced at meetings conducted by nonconforming clubs. Those clubs themselves retaliated. They had a powerful weapon in that they were able to offer more stake money than the QTC. Eventually three divisions emerged to control racing across the colony – the Central Queensland Racing Association in 1884, and the North Queensland Racing Association in 1888, together with the QTC. Lemon and O'Hara suggest that when the advocates of decentralised racing control coincided with the demands of the separatists in the north for the division of North Queensland into a number of colonies, the different history of racing control in Queensland compared with other colonies is understandable.[36]

The strength of feeling against the QTC's attempted assertion of dominance over racing can be seen in the following:

> *I should like to see a uniform code of rules adopted throughout the colony [wrote the secretary of the Towers Jockey Club], but I strongly object to the overbearing way in which one club at the extreme end of the colony attempts to foist on us a code of rules which this club will never submit to, even if the consequences are that we have to abandon racing.*[37]

An important factor in the development of racing in Queensland was the introduction of the totalisator onto Queensland racecourses in 1879. The totalisator – a device for calculating betting dividends to be distributed from the pool of bets (pari-mutuel betting) – had been invented in the early 1870s. The

31 Lemon, *The History*, Vol One, page 213.
32 O'Hara, J 1996, *Horseracing and Betting in Queensland in Gamblers' Paradise*, Royal Historical Society of Queensland publication, pages 28-29.
33 Lemon, A 1990, *The History of Australian Thoroughbred Racing*, Volume Two, Classic Reproductions, Melbourne, pages 334. This work will be referred to as "the *History*, Vol Two".
34 O'Hara, *Horseracing and Betting in Queensland*, pages 28-29.
35 O'Hara, *Horseracing and Betting in Queensland*, pages 29.
36 Lemon, *The History*, Vol Two, page 341; O'Hara, *Horseracing and Betting in Queensland*, page 30.
37 Quoted in Lemon, *The History*, Vol Two, page 341, extracted from the *Queenslander* of 4 April 1885.

QTC was experiencing financial stringency in the late 1870s after investing heavily in infrastructure at Eagle Farm. The club saw the totalisator, which had been ignored by other racing clubs except in Adelaide, as a means of generating revenue.[38]

The first machine used at a race meeting was at Eagle Farm in May 1879.[39] It returned a profit to the QTC and its use became widespread beyond the racecourse and into shops such as barbers and tobacconists. The QTC took a 7.5 per cent commission from the totalisator installed at Eagle Farm which assisted its finances.[40] To reduce the incidence of betting, amongst other aims, *The Totalisator Restriction Act of 1889* restricted the use of the "tote" to racecourses operated by a racing club which held a government permit. In 1892 a tax of 2.5 per cent was imposed[41] on the turnover of the conductor of an authorised totalisator.[42]

Thus began the long relationship between government and the punter in which the inclination towards gambling was harnessed for the financial benefit of the state. Somewhat surprisingly, this occurred at a time when the evils of gambling were much articulated and anti-gambling legislation had become widespread.

Tattersalls Club was formed in 1883 not just for bookmakers but as a local sporting club.[43] It arranged its own race meetings by agreement with the QTC at Eagle Farm. By 1888 there were, annually, 12 days of racing at Eagle Farm compared with just four or five a few years earlier.

On New Year's Day 1882 the Brisbane Driving Park Club ran a meeting at Eagle Farm and introduced trotting and light harness racing to Brisbane.[44] Coursing – racing between greyhounds – was also popular.[45]

Racecourses proliferated including one at Sandgate, then a seaside resort (later Deagon). Land at Breakfast Creek, initially known as the Breakfast Creek Sports Ground, later the Smithsfield Racecourse and finally renamed Albion Park, was developed into an extensive sporting complex complete with a lake, racecourse and viewing stands. It opened on 7 September 1889.[46]

The boom of the late 1880s gave way to the economic depression of the 1890s. In 1893 southern Queensland experienced extensive cyclonic and flood damage. Minor racing clubs collapsed financially and even the QTC was "in the red". In 1894 George Adams moved his sweepstake headquarters to Brisbane having been driven out of New South Wales by anti-gambling legislation.[47] This assisted the Queensland clubs financially. However, a racing scandal caused the totalisator to be restricted to racecourses in an attempt to suppress gambling.[48] According to the *History*, "Brisbane had been awash with sweepstake consultations[49], many of doubtful honesty".[50] George Adams, against whom there was no hint of scandal, unsuccessfully lobbied to have his sweepstakes excluded from the legislation. He removed his business to Tasmania in 1895.

Gradually the QTC's financial fortunes improved and in 1901 it had built a new totalisator created by Henry Hodsdon, the pioneer of the automatic starting barrier in Brisbane. The author of the *History* observed:

38 Lemon, *The History*, Vol Two, pages 338-9.
39 Coughlan H, & Pascoe, N 2009, *Queensland Turf Club: A Place in History*, Boolarong Press, page 12.
40 O'Hara, *Horseracing and Betting in Queensland*, page 31.
41 *Totalisator Tax Act 1892*.
42 Increased to 5 per cent by the *Totalisator Tax Amendment Act 1902*.
43 Lemon, *The History*, Vol Two, page 341.
44 Lemon, *The History*, Vol Two, p. 342; Agnew, Silks and Sulkies, page 146.
45 *Lowndes*, R 2003, *From Kedron to Albion Park*, Book One, page 32.
46 The *Queenslander* of 7 September 1889 quoted at length in Lemon, *The History*, Vol Two, page 347.
47 Lemon, *The History*, Vol Two, p 346; O'Hara, *Horseracing and Betting in Queensland*, p 100.
48 *Totalisator Restriction Act 1889*.
49 A name given to sweeps and referred to in the *Suppression of Gambling Act 1895*, section 8.
50 Lemon, *The History*, Vol Two, page 348.

Queensland in the nineteenth century was a house divided, a misalliance of competing regions, a battleground for factions. United, it could have been a much greater power in the Australian racing scene. But none of the disputes and disagreements could extinguish the love of racing. Charters Towers was remote from Brisbane, but was positively handy compared with Charleville, Longreach or Birdsville. Yet there was hardly a centre of population, however small, that did not once a year at least resound with the echo of galloping hooves in the dust.[51]

(b) 1910-1930: the Wren factor

In 1912 the Australian Rules of Racing were framed and adopted by the leading racing bodies across Australia to provide a uniform set of rules suitable for Australian conditions. The designated principal club (or control body) for a geographical area was responsible for registering other racing clubs in its area and administering the Rules. In southern Queensland the QTC was the principal club. Clubs or other bodies registered with a principal club were known as registered clubs and were bound by the Australian Rules of Racing. Amongst other matters, the Rules concerned the registration of horses and jockeys, the appointment of stewards, dealing with disputes and the allocation of race days to those clubs registered with it.

The unregistered clubs or proprietaries not registered with a principal club carried on unregistered racing. They were not bound by the Australian Rules of Racing. Registered racing put any profits back into the sport. Unregistered racing was seen more as a money-making enterprise for the organisers. From 1915 it was a policy of the QTC not to grant registration to proprietary interests.[52]

Melbourne businessman John Wren's foray into Brisbane from 1910 had a major impact on racing in Brisbane. As recounted in the *Report of the Royal Commission into Horse-Racing and Racecourses 1930*, the Royal Bank of Queensland became the owner of the land comprising the Albion Park Racecourse on the liquidation of the then registered proprietor in 1894. In 1909 the Bank agreed to sell most of the land to one Wesley Castles who, later that year, assigned the benefit of the contract to John Wren and his partner, Ben Nathan.[53] They became the registered proprietors in 1916.

When Wren first arrived in Brisbane and saw the poor attendances at Albion Park – both punters and horses – he announced the "Brisbane 2000" – a race with prize money of £2,000 to be run in June. It was richer than any of the great Sydney or Melbourne races.[54] In April 1910 Wren and Nathan purchased Deagon racecourse at Sandgate with rich prizes promised. They built improved facilities. Next, Wren leased Bundamba, again with generous prize monies for the race meetings.

A record-breaking crowd watched the largest field of horses ever seen in Queensland – 27 – compete for the Brisbane Cup in June 1910. Other successful race meetings followed at other Wren courses. Wren's annual profit from Albion Park was said to be £19,000 by 1914.[55]

There were also numerous small unregistered racecourses in and around Brisbane which Wren gradually acquired, but covertly, in the names of others.[56] By 1922 Wren owned, directly or indirectly, every racecourse in and around Brisbane registered and unregistered except for Eagle Farm.[57] It was claimed that Wren took £60,000 profit annually from his Queensland racing interests.[58]

A few years earlier Wren had purchased, confidentially, and had consolidated, land at Doomben next to Eagle Farm intending to build a new racecourse. He set about creating a bona fide racing club –

51 Lemon, *The History*, Vol Two, page 348.
52 *Parliamentary Papers* Queensland No.2 1930, *Royal Commission appointed to Inquire into and Report the Control and Management of Horse-Racing and Racecourses in and Around Brisbane and Ipswich*, Second Session, 25th Parliament, page 34, hereafter referred to as "*Royal Commission into Horse-Racing and Racecourses 1930*".
53 *Royal Commission into Horse-Racing and Racecourses 1930*, page 20.
54 Lemon, *The History*, Vol Two, page 417; Agnew, page 66.
55 Lemon, *The History*, Vol Two, page 418.
56 *Royal Commission into Horse-Racing and Racecourses 1930*, Part III "Unregistered Racing", page 25.
57 *Royal Commission into Horse-Racing and Racecourses 1930*, Parts II and III; Lemon, *The History*, Vol Two, page 419.
58 Lemon, *The History*, Vol Two, page 419.

the Brisbane Amateur Turf Club (hereafter the BATC then BTC) – and enlisted a number of respected residents as members. By its rules its members were forbidden from taking any profits. The club "[w]ith remarkable dexterity ... without assets"[59] negotiated to buy Albion Park and Deagon racecourses and to lease the land at Doomben. Doomben was readied for use as a racecourse and, although identified by the 1930 Royal Commission as ideal for non-proprietary racing, it did not open until 1933 when the first Doomben Cup was run.

In April 1923 the QTC registered the BATC. It took over the management of Albion Park. The financial structure of the purchase was such that it was highly unlikely that the club could meet its repayments and, in that eventuality, the lands would revert to Wren and Nash.[60] According to the *History*, the advent of the BATC and the reconstitution of unregistered racing after 1923 did little to stop the dissatisfaction with Brisbane racing, expressed by owners, trainers and the press. This was particularly so by the end of the 1920s as the economic climate had again deteriorated.

The economic slump caused attendances at race meetings and returns from the totalisator to decline. This was generally attributed to radio broadcasts of racing which had begun in Queensland on the government-owned station, 4QG, in 1926. The advent of the telephone added to the ease with which information about race meetings could be communicated throughout the State. Gamblers could thus bet without paying the entrance fee to the racecourse.

At the end of 1927 the South Coast Press Agency established its business in Brisbane, the sole purpose of which was to sell racing and betting information to off-course bookmakers. It paid considerable fees.[61] The general dissatisfaction at the way racing was being conducted together with the assertion that the BATC was "no more than a façade for proprietary ownership of Albion Park ..."[62] meant that when government changed in 1929 a Royal Commission into racing and racecourses was established.

Wren appeared[63] before the 1930 Royal Commission and admitted that he had intended to obtain a monopoly over metropolitan racing in Brisbane outside Eagle Farm. As reported by the Royal Commission[64] there was resentment at "vast" profits going "south" and, accordingly, there was parliamentary agitation against proprietary racing.

While expressing some doubt about the original intention of those who purchased Albion Park from Wren and Nathan, the Commissioners concluded that the BATC had, by 1930, become a bona fide club and owed no allegiance to the vendors.[65] Wren retained a financial interest in Albion Park as the sale was not due for completion until 1940, and also in Doomben which was not finally sold to the BATC until after Wren's death in 1953. There was no suggestion that he was involved in the management of the club.

Wren was a controversial figure, hero to many, villain to just as many[66] but he made important contributions to racing in Queensland, both galloping and trotting, including holding open stewards' inquiries, improved racecourse infrastructure and greatly increased prize money.

Tattersalls Club, the Commissioners noted, had purchased Deagon Racecourse where it conducted meetings but the enterprise had not been financially viable. In 1911 it was ultimately sold by the mortgagees to Wren and Nathan. Thereafter it held its race meetings at Eagle Farm under an arrangement with the QTC. The Commissioners concluded that Tattersalls was a bona fide club, as was the Brisbane Trotting Club which had been formed in 1927.

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59 Lemon, *The History*, Vol Two, page 420.
60 The contracts are closely analysed in the *Royal Commission into Horse-Racing and Racecourses 1930*, pages 25-29.
61 Lemon, *The History*, Vol Two, page 423.
62 Lemon, *The History*, Vol Two, page 423.
63 Agnew, *Silks and Sulkies* reproduces a newspaper report of Wren's evidence to the Royal Commission at page 67. His presence as a witness was said by the reporter to add "flavour to the inquiry."
64 *Royal Commission into Horse-Racing and Racecourses 1930*, page 25.
65 *Royal Commission into Horse-Racing and Racecourses 1930*, page 28.
66 Griffin, J 1990, *Wren, John* (1871-1953), Australian Dictionary of Biography, volume 12, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/wren-john-9198/text16247, viewed September 2013; Agnew, *Silks and Sulkies*, chapter 11.

Trotting had long been popular at agricultural shows in Queensland although betting on those races was illegal. Kedron Park was a busy race track for thoroughbreds (eventually owned by Wren) from the early 1900s and trotting events were gradually included in the calendar. The Brisbane Trotting Club raced under its own rules which were similar to the Kedron Park rules. It raced at the Coorparoo race track but since the proprietors permitted it to race only on the days on which the QTC was holding a race meeting, it struggled to attract sufficient patrons.[67] Before the Royal Commission the club sought 18 racing days per annum and contended that some Saturdays would enable it to be financially viable. The Commissioners did "not consider that the interests of the metropolitan racing public would be promoted" by reserving any Saturdays for the trotting club and recommended only six days per annum during the week, although this was extended subsequently.[68]

While natural coursing had been carried on for many years in Queensland,[69] the advent of the tin hare in the 1920s had a significant impact on the development of the sport. The governing body was the Queensland Coursing Association composed of representatives of the various metropolitan and country clubs. The first fully organised race meeting in Brisbane occurred in 1908 under the auspices of the Queensland Coursing Association at Ascot. The Rocklea Coursing Club conducted its first meeting in 1913 and was to be a home to greyhound racing for 45 years.[70] The first mechanical hare coursing under lights occurred on 29 October 1927 at the Brisbane Cricket Ground at Woolloongabba.[71] Initially there was some doubt about the legality of betting at greyhound race meetings since they were not held at race courses (although betting was carried on). The 1936 Royal Commission recommended that betting at coursing meetings be legalised.

As the *History* notes, the 1930 Royal Commission is opinionated and strongly inclined towards the interests of registered racing on which it placed a higher moral value. The Commissioners recommended, amongst other things, the prohibition of proprietary registered racing; that no racecourse be used for race meetings (other than trotting) except by a bona fide club; a limit on the number of days on which race meetings could be held to 104 and trotting meetings to six; the establishment of an independent control board for unregistered racing (other than trotting); and the prohibition of broadcasting race information until after the close of the last race. They were resolutely against night trotting.

The government declined to introduce a control board but banned all proprietary and unregistered racing from the end of 1931.[72]

(c) Gaming and betting legislation in Queensland to 1936

It is useful to say something about Queensland gaming and betting legislation at the end of the 1920s. The early Imperial Acts concerning gaming mentioned earlier[73] became part of the law of New South Wales (and, in due course, in the colony of Queensland) on settlement and by virtue of the *Australian Courts Act 1828*. Gaming, betting and participation in lotteries were further regulated by the criminal law in Queensland legislation which reflected closely the then English statutory provisions. Provisions could be found in, for example, the *Gaming Act 1850,* the *Totalisator Restriction Act 1889*[74], the *Suppression of Gambling Act 1895,* the *Criminal Code 1899,* the *Liquor Act 1912,* the *Art Union Regulation Acts 1920* and the *Vagrants Gaming and Other Offences Act 1931*.

67 *Royal Commission into Horse-Racing and Racecourses 1930*, page 58.
68 *Royal Commission into Horse-Racing and Racecourses 1930*, page 59.
69 *Royal Commission 1936,* page 17.
70 *Rose*.
71 *Rose*.
72 *The Racing Act 2000*, in response to the National Competition Policy Review of the *Racing and Betting Act 1980*, restored non-proprietary clubs (as well as removing an impediment to clubs racing animals other than thoroughbred horses and dogs such as quarter horses and camels).
73 At page 405.
74 Only totalisators approved for use at horse-racing meetings conducted by a racing club were permitted in the colony.

O'Hara has observed that "the amount of restrictive (gambling) legislation in Queensland in [the three decades before World War One] is tiny in comparison with the more populous states ..." and that "the need for moral reform was neither felt as strongly nor acted upon as vigorously in Queensland as it was elsewhere".[75]

Queensland introduced the Golden Casket Art Union in 1920. It was "the first lottery to be administered by a government after the anti-gambling backlash of the previous century."[76] It had begun in 1916 as an art union to raise money for repatriated soldiers. After the government took over its operations and ownership it became very popular and prosperous, with its profits providing two per cent of the Queensland Government's total budget within a year. It was sustained in an era against gambling because the profits were kept separate from consolidated revenue, and placed in the newly created Motherhood, Child Welfare and Hospital Fund controlled by the Home Secretary's Department, and not Treasury.[77] Ultimately it funded the State's free public hospital system before declining in popularity in the 1980s.

The legislative regime for gambling permitted betting only in respect of licensed activity in licensed places – relevantly, a licensed racecourse conducting a lawful race meeting for prize money at which licensed bookmakers took bets. A tax was levied on each betting transaction. From 1923 bookmakers were required to pay an annual government licence fee as well as a registration fee to the race clubs as the "price" of their legitimisation.

After the implementation of reforms to racing following the Royal Commission recommendations in 1930, according to the *History*,[78] Brisbane racing did not show any benefit immediately. The effect of the depression was severe, attendances at race meetings were down and thus totalisator revenue to clubs and government reduced. Illegal off-the-course betting was seen as responsible and, in 1935, a Royal Commission was appointed to "[i]nquire into Certain Matters Relating to Racing and Gaming".[79] The Commissioners were the Commissioners of Police and Stamp Duties and a member of the Industrial Court as chairman. They reported in 1936. The tone for what followed in their report can be appreciated from their introductory paragraph:

> *For some time past there has been an insistent demand for improvement in the condition of racing in Queensland. The sport is languishing and for this state of affairs the prevalence of illegal betting has been blamed. Not only the impoverishment of the racing clubs, however, but also the presence of certain moral, social and economic disorders in the national life has been attributed to the same cause.*[80]

The tax levied on betting at racecourses, paid by the bookmakers and passed on to the punter, was said to have directly contributed to the serious falling-off in racecourse attendances and those erstwhile patrons had recourse to off-the-course betting facilities.[81]

Witnesses spoke of the "evils attendant upon the dissemination of racing information by means of wireless transmission, publication in the press, telegram and telephone".[82] This kind of information, according to the Commissioners, acted as a powerful stimulus to off-the-course betting but no action could be taken unless the Commonwealth thought fit to intervene. The Commissioners were also opposed to newspaper tips because this information "took gambling information right into the home".[83]

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75 O'Hara, *Horseracing and Betting in Queensland*, pages 33-34.
76 Selby, W 1996, 'What Makes a Lottery Successful? A case study of Queensland's Golden Casket Art Union', in *Gambler's Paradise*, Royal Historical Society of Queensland, page 38.
77 Selby, W 1996, 'What Makes a Lottery Successful? A case study of Queensland's Golden Casket Art Union', in *Gambler's Paradise*, Royal Historical Society of Queensland, page 43.
78 Lemon, *The History*, Vol Two, page 425.
79 *Royal Commission Appointed to Inquire Into Certain Matters Relating to Racing and Gaming 1936*, hereafter referred to as "Royal Commission 1936".
80 *Royal Commission 1936*, page 8.
81 *Royal Commission 1936*, page 16.
82 *Royal Commission 1936*, page 33.
83 *Royal Commission 1936*, page 35.

The QTC had withdrawn permission to broadcast races conducted at Eagle Farm and the BATC and Tattersalls took similar action over their race meetings. The Queensland government radio licence expired in 1930. The newly-created Australian Broadcasting Company Limited took over that station and it became a link in the national chain. It wished to provide information by wireless for racing enthusiasts. After discussions, the QTC consented to broadcasting provided it was confined to a running description only and that all information about betting and dividends was withheld until the finish of the last race. The clubs received a small fee from the broadcaster.

The Commissioners directed their main concern to the South Coast Press Agency which was providing clients in any part of Queensland with as much information as if they were personally present on the course.[84] The problem seemed to be that the Agency paid the Postmaster-General's Department a very considerable sum for telephone services. It was a strongly held view that its operations fostered the "betting-shop evil" and led to a falling-off in racecourse attendances. It was described as "a parasitical growth on horse racing".[85] The fact was, as conceded by the Commissioners, the Commonwealth was not interested in reducing its revenue from telephone usage.

The Commissioners concluded that broadcasts during race meetings

> *...have seriously interfered with racecourse attendances and racing standards, that they have acted as a stimulus to illegal betting, and that they constitute a most potent factor in the growth of betting shops ....*[86]

They recommended that the federal authorities prohibit racecourse broadcasts until after the last race had been run at any meeting. This was a singularly unsuccessful recommendation.

The Commissioners recommended that a limited number of meetings for coursing be permitted – one per week for natural coursing and one for greyhound racing; that betting be permitted by licensed bookmakers and a tax be levied on every ticket issued.

The Commissioners noted when discussing trotting that it could lawfully be conducted on any ground used for a show by agricultural and pastoral associations, even at night, but no betting or wagering was permitted. Notwithstanding that all witnesses agreed that if trotting as a sport and recreation were to flourish in Queensland, night trotting with betting was the only solution, and, despite the fact that the Commissioners had attended and noted the popular, "excellently conducted" and financially lucrative night trotting in Adelaide

> *... the opportunities for indulging the gambling habit here should not be further increased. We add that in Queensland generally, persons who engage in racecourse betting prefer the meetings conducted by the racing clubs as opposed to trotting meetings.*
>
> *We think that the exercise of the betting proclivities of the people should be limited strictly to the day-time, and that the community should be encouraged to spend its leisure evening hours in other recognised forms of recreation where the evils of betting do not intrude.*
>
> *On the whole we are convinced that the evils attendant upon betting more than outweigh the advantages claimed for night trotting, and therefore recommend that night trotting with betting be not allowed in Queensland.*
>
> *This is also the view we would express in regard to foot-running and sports meetings generally, concerning which very little evidence was placed before us.*
>
> *We recommend that night betting should not in any circumstances be permitted.*

84 *Royal Commission 1936*, page 39.
85 *Royal Commission 1936*, page 40.
86 *Royal Commission 1936*, page 38.

In view of the fact that these forms of recreation are enjoyed to a great extent by country people who have not the same opportunity of attending race meetings as city dwellers, we think that betting at such gatherings should be allowed in the day time.[87]

In a reflection of the ever-present question of who should control racing in Queensland the Commissioners wrote:

We found evidence of some dissatisfaction with the present system of control ... The remedy most often proposed was the substitution of boards of control for the Queensland Turf Club and other principal clubs ... their personnel to be appointed by the Government ...[88]

Organisations which had been in favour of a control body before the previous racing commission in 1929 were now opposed. The Commissioners concluded that no case had been made out for an alteration in the existing manner of control nor any justification for interference with the then current procedure which was universal throughout Australia. They concluded that there was no obligation on the State to set up any control board and it was preferable that the administration of racing should be left with the principal clubs.[89] They observed:

The committees of the principal clubs are composed of men of standing, well versed in racing matters, and having the leisure to devote to the administration of racing affairs without remuneration.[90]

The Rockhampton Jockey Club sought (successfully) to be appointed a principal club independent of the Central Queensland Racing Association dominated by the much smaller western Queensland clubs, whose combined prize money did not even equal that of Rockhampton.

Police estimated to the Commission that there were about 750 illegal bookmakers in Queensland and that about one-quarter of the adult population were habitual betters. The Commissioners visited well-patronised illegal betting shops. South Australia had licensed off-the-course betting hoping thereby to regularise and reduce gambling. The Commissioners noted that it had not been contained and concluded, with the Commissioner of Police dissenting, that there was no need to legitimise a morally corrupting activity. In the country they found that agreements were made with off-the-course bookmakers to close their betting shops on the afternoons of local race meetings. Attendances were, accordingly, increased, the finances of the local clubs improved and they could offer greater prize money.

The Commissioners concluded that the fiscal aspect, which would augment Queensland's revenue and improve off-the-course betting facilities, should not be permitted to predominate over or outweigh the harmful social consequences which would ensue if the State recognised off-the-course betting.[91] They did not recommend the licensing and registration of betting shops but rather that the existing prohibition be made more effective by better policing and increased penalties.

Many of those recommendations were implemented in the *Racecourses Act and Other Acts Amendment Act of 1936*, including prohibiting proprietors of betting shops from advertising and touting for business; prohibiting tipsters' advertisements; prohibiting illegal press agencies and conveying any information from a racecourse calculated to facilitate off-the-course betting. Penalties for breach were severe fines or imprisonment or both. By the *Racing and Coursing Regulation Acts 1930 to 1936* bets could lawfully be recovered by and against licensed bookmakers operating at licensed events, thus exempting them from the provisions of the *Gaming Act of 1850* which made void all contracts of gaming or wagering with certain limited exceptions.

87 *Royal Commission 1936*, pages 21-22.
88 *Royal Commission 1936*, page 23.
89 *Royal Commission 1936*, page 24.
90 *Royal Commission 1936*, page 23.
91 *Royal Commission 1936*, page 62.

The authorities, apparently, regarded these measures as successful since attendance at race meetings increased significantly and the quality of the horses improved.[92]

(d) After the Second World War to 1962

The Second World War largely brought about the cessation of race meetings in Queensland although Albion Park continued with big attendances.[93] Eagle Farm and Doomben were taken over for military purposes. In 1946 their return to the clubs signalled the resurgence of racing. The Doomben Ten Thousand (£10,000) "...a racing fortune, never offered before for a sprint"[94] indicated the buoyant atmosphere. The great *Bernborough* returned home and won both the Doomben £10,000 and the Doomben Cup in the first race meeting after the war.

The QTC and BATC spent significantly on improvements including the installation of new totalisators equipped with the latest technology which permitted punters to purchase win and place tickets at the one window. As a consequence, the takings increased dramatically. In 1950 the QTC lifted its prize money to £12,000 for the Brisbane Cup when the Melbourne Cup stake had just been raised to £12,800. This level of prize money attracted many first class interstate and New Zealand horses to Brisbane.[95] As the *History* noted "[a]ll this attention on Queensland did wonders for the local thoroughbred breeding industry".[96]

Notwithstanding the overwhelming evidence of the prevalence of off-the-course betting throughout Queensland in the 1930s and the resistance by government to license that activity, the stronger penalties, apparently initially successful, failed after a few years to curb its revival after the war. The *History* suggests that the Queensland government "was embarrassed by the farce of its anti-gambling legislation".[97] The Starting Price (SP) bookies wanted their activities made legitimate. The Gair government appointed a Royal Commission to inquire into the desirability of legalising off-the-course betting.[98] It was constituted by five commissioners including a grazier and committee member of the QTC, John Meynink; George Pont, District Secretary of the AWU; an accountant; the Commissioner of Stamp Duties; and a member of the Industrial Court. Two of the Commissioners, Mr Griffin, the accountant, and Mr Pont disagreed with aspects of the majority report – Mr Pont comprehensively.

The evidence demonstrated that there were thousands of bookmakers operating illegally and openly off-the-course throughout Queensland. In the north of the State, particularly, there appeared to be absolutely no moral obliquity associated with betting in that way.

The Commissioners observed that they were in a dilemma being required to make recommendations in respect of illegal off-the-course betting which some regarded as a social evil and others a form of entertainment and recreation.[99]

The Commissioners concluded that more remote country Queenslanders should be able to bet off-the-course legally because of the lack of access to race meetings but not punters in the principal centres. Their recommendation, plainly unworkable, was to permit betting and wagering off-the-course for horse racing only by means of licensed bookmakers (not totalisators) and not within a radius of 100 miles of the Brisbane GPO or 25 miles of the Rockhampton GPO (except for Mount Morgan but including Yeppoon!).

92 Lemon, *The History*, Vol Two, page 427.
93 Coughlan & Pascoe, *Queensland Turf Club: A Place in History*, pages 199-200.
94 Lemon, A 2007, *The History of Australian Thoroughbred Racing*, Volume Three, Classic Reproductions, Melbourne, page 90. This work will be referred to as "*The History*, Vol Three".
95 Lemon, *The History*, Vol Three, page 94.
96 Lemon, *The History*, Vol Three, page 95.
97 Lemon, *The History*, Vol Three, page 96.
98 *Royal Commission Appointed to Inquire into Whether it is Desirable to Make Legal the Method of Betting and Wagering Commonly Known as Off-The-Course Betting* 1952, hereafter referred to as "*Royal Commission 1952*".
99 *Royal Commission 1952*, page 54.

A resolution of the problem was not reached until the passage of the *Racing and Betting Act in 1954* which repealed a number of old Acts including the *Gaming Act of 1850*.

The 1954 Act established the Off The Course Betting Control Board comprised of three members to be appointed by the Governor-in-Council to license off-the-course betting once electors had approved such activity by referendum held in their electoral area. It restricted all racing – galloping, harness and coursing – to non-proprietary registered clubs which were required to enforce the provisions of the Act and the relevant Rules of Racing. Four existing racing clubs in different geographical areas were designated principal clubs – the QTC, the Central Queensland Racing Association, the North Queensland Racing Association and the Rockhampton Jockey Club. Other principal clubs could be appointed by the Governor-in-Council including for trotting and coursing. This was the beginning of what has been continuous legislative intervention into the operation of racing clubs in Queensland. Much stricter penalties were imposed for engaging in SP bookmaking.

Clubs (of all codes) were required to be non-proprietary. It was unlawful for a person other than a non-proprietary club to conduct a race meeting of whatever kind. The minister allotted racing days for galloping horses amongst the registered clubs; it was unlawful for a registered club to conduct a race meeting for galloping horses on a day not allotted to it. Night race meetings were prohibited. Only approved clubs could hold meetings for or partly for trotting horses or for coursing. Provision was made for the allotment of racing days for trotting or coursing. Sundry offences were included in relation to unlawful racing.

The 1954 Act repealed the *Totalisator Restriction Act of 1889* and established a comprehensive regime for licensing totalisators on the application of a racing club which lawfully conducted race meetings for "galloping and trotting horses".[100] Provision was made for betting odds and for taxes to be paid on all transactions.

On-the-course bookmakers (for galloping and trotting horses) could not operate at a racecourse without permission of the relevant club and were required to pay a permit tax. Every betting ticket attracted stamp duty. The Act continued the prohibition against keeping a common gaming house.

The *History* notes that these provisions did not commence until 1955 and, although some petitions circulated for licensed betting shops, none were issued and "any prospect of this died with the collapse of Gair's government in 1957".[101] To give these legal facts some colour, in 1961 a record crowd at Eagle Farm saw the great horse *Tulloch* win the QTC Brisbane Cup.

(e) The advent of the TAB in Queensland in 1962

Across Australia, the States and Territories came to recognise that off-the-course gambling could not easily be controlled by increased penalties where it was illegal, or through licensed bookmakers and betting shops. Victoria led the way in 1962 with the government-owned Totalisator Agency Board with numerous agencies throughout the State. It was an immediate financial success. Other States and Territories followed. In Queensland pressure was exerted by legitimate racing interests and community groups for legalised off-the-course betting, either by licensing betting shops/bookmakers or a totalisator. The Nicklin government eventually chose the totalisator and established the Totalisator Administration Board (TAB) as an independent statutory authority with representatives of the racing clubs as directors chaired by prominent businessman, Albert (later Sir Albert) Sakzewski.[102] The appointment was regarded favourably – the new chair was not involved in the politics of racing administration and "... was able to insist that Board members, whatever their role in the racing industry, put the TAB's interests first".[103] The government was to receive five per cent of TAB turnover. Its purpose

100 *Racing and Betting Act 1954*, section 57(7).
101 Lemon, *The History*, Vol Three, page 98.
102 Cohen, K 1992, *Thirty Years of the Totalisator Administration Board in Queensland: 1962-1992*, Boolarong Press, page 1. This work will be referred to as "*The History of the TAB*".
103 Cohen, *The History of the TAB*, page 6.

was to assist the racing industry by diverting a proportion of the money invested in gambling for the use of race clubs which were then struggling financially to maintain their facilities.

The first agencies opened in August 1962 and were immediately financially successful. The punters were described as "investors".

There can be no doubt that the advent of the modern, legal, off-the-course totalisator changed racing in Australia. Large amounts of money returned to the racing industry supported increased prize money, breeders, trainers, owners and jockeys. The author of the *History* observed:

> *In subtle ways, beyond money, the TAB changed the balance of power in racing. Pre-TAB, control of the sport had been concentrated in the hands of the principal clubs, tempered only by State government regulations restricting gambling and stipulating the days on which horse racing could be conducted. The TAB itself became a new vested interest that claimed the right to help shape the policies of principal clubs. Racing clubs had spawned a creature that, over the course of the next few decades, would come to be their master, or at the very least their indispensible companion.*[104]

The advent of the TAB saw the return of mid-week racing outside Brisbane and the formulation of the Gold Coast Racing Club in 1964 (renamed Gold Coast Turf Club in 1971). By the end of that year the future of the TAB was assured. Turnover figures and profits had exceeded expectations and the TAB was well-established in every area of the State.[105] Between 1965 and 1970 the growth of profits was such that one member of Parliament described the TAB as providing the government and the racing clubs with "a golden harvest".[106]

Amendments to the *Racing and Betting Act* in 1970 established the Greyhound Racing Control Board similar to the Trotting Board. When the TAB commenced coverage of night greyhound racing in 1972 the inaugural chairman of the greyhounds board was represented on the board of the TAB.

In 1971 the Deputy Premier, the Hon Gordon Chalk, successfully proposed an amendment to the *Racing and Betting Act* to establish a Racecourse Development and Assistance Fund under the control of Treasury but funded out of a 0.75 per cent deduction on certain types of betting. TAB officials processed all applications for low interest loans from the clubs to upgrade facilities or for new construction for which Treasury gave final approval.[107]

In 1974 Treasury approved the retention of TAB funds by the TAB out of profits to create a Reserve in the Totalisator Investment Deduction Fund. In 1976 the organisation moved to a large new building in Albion built under its supervision. Subsequently, the TAB ran into significant financial difficulties over aspects of its computer contract with its supplier. As a consequence of associated losses the government provided over $6 million in supplementary funds in the three years to 1978.[108]

The BATC built a trotting track inside the racing circuit at Albion Park which was used by the Queensland Trotting Board (which had replaced the Queensland Trotting Control League) for night trotting from September 1968.[109] Nonetheless, attendances were declining – blamed in part by the clubs on night racing but more likely it was the TAB because it was no longer necessary to frequent the SP bookmakers to bet off the racecourse. Brisbane was seen to be "slipping" in relation to the other States in its prize money offerings and, consequently, more generally.[110]

104 Lemon, *The History*, Vol Three, page 154.
105 Cohen, *The History of the TAB*, page 33.
106 Cohen, *The History of the TAB*, page 46.
107 Cohen, *The History of the TAB*, page 70.
108 Cohen, *The History of the TAB*, page 91.
109 Lemon, *The History*, Vol Three, page 162; *Lowndes*, R 2003, *From Kedron to Albion Park*, Book Two, page 455.
110 Lemon, *The History*, Vol Three, page 162.

By 1978 the 1954 Act which had been amended many times to address TAB functions and trotting and greyhound activities, was thought to have "served its purpose".[111] The then Minister for Racing, Treasurer and Deputy Premier, the Hon L R Edwards, sought submissions about new legislation. He circulated a White Paper with detailed proposals to modernise the racing industry in Queensland and to make minor changes to the TAB.

(f) Racing and Betting Act 1980

With only minor quibbles from one or two members of the Opposition, the Racing and Betting Bill was supported by the whole Parliament as advancing the interests of the racing industry. Two members who were to play important roles in the future of racing in Queensland, Mr Russell Hinze and Mr Bob Gibbs, made only modest contributions to the debate. Aspects of the second reading speech by the Minister introducing the Bill are worth recording for the sentiments expressed might be thought to be apt today:

> *What has amazed me since I became the Minister for Racing is that whilst people will agree in respect to an overall view of the industry (for example, that there are too many clubs racing too often for what is available to support their activities) the attitude changes diametrically when their own club or their own sectional interest is involved, yet it is of absolute importance to the future of racing that all elements take the overall view and develop the highest possible degree of conciliatory liaison.*[112]

The Minister observed that every effort should be made by all involved, government and industry, "to ensure that the greatest value is obtained for every dollar spent in the future on or in support of racing". He noted that, contrary to calls made by clubs and through the media, "band-aid financial assistance is not and never has been the solution to problems".

The 1980 Act established five principal clubs for thoroughbred racing where previously there had been four – adding the Downs and South-Western Queensland Racing Association which had previously been a de facto principal club under the umbrella of the QTC – as the control bodies for racing. Although the Act maintained the overall control of thoroughbred racing by the clubs it did allow for a broader base into the deliberations of the QTC and the Rockhampton Jockey Club requiring their control committees to include membership of other clubs within their jurisdiction.[113] Executive government assumed control of the principal clubs to be exercised when "necessary or expedient".[114] The functions, powers and duties of the clubs were set out in detail.[115] Each principal club was required to provide the minister with a comprehensive report of its activities annually.[116] Proprietary and unregistered racing continued to be unlawful[117] and a principal club was precluded from registering a newly formed race club without prior ministerial approval.[118]

The powers of the thoroughbred control bodies and the corresponding trotting and greyhound control boards were expanded. When introducing the Bill, the minister noted that control bodies of all codes would be better able to supervise the dissolution of affiliated clubs and be given the responsibility more directly of being concerned with the performance of clubs and taking action where such performance was not satisfactory. This would give the control bodies "a more significant force in racing administration".[119] More flexibility about the allocation of racing days was given.

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111 *Racing and Betting Bill 1980*, second reading speech by Hon L R Edwards, Queensland Parliament 1980, *Hansard*, 15 April, page 3251.
112 Queensland Parliament 1980, *Hansard*, 15 April, page 3251.
113 *Racing and Betting Act 1980*, section 11(2)(g).
114 *Racing and Betting Act 1980*, section 11(2).
115 *Racing and Betting Act 1980*, section 12.
116 *Racing and Betting Act 1980*, section 12(6).
117 *Racing and Betting Act 1980*, section 16.
118 *Racing and Betting Act 1980*, section 17.
119 Queensland Parliament 1980, Hansard, 15 April, page 3252.

The majority of the members of the trotting and greyhound control bodies were to be nominated by the minister "because those codes were still growing and dependent on outside assistance".

The 1980 Act established the Racing Development Fund to be administered by Treasury instead of the existing Racecourse Development and Assistance Fund administered by the TAB. The Fund was financed by 1.5 per cent of all investments on totalisators operated by the clubs or by the TAB, the net amount of the unpaid fractions, dividends and refunds derived from totalisators together with any grants to the Fund, monies directed into the Fund on the dissolution of a club, receipts from the Treasurer as interest on the Fund's credit balance, appropriations by Parliament and all other monies payable to the Fund.[120] On application to Treasury advances could be paid out, primarily to a club, control body or the TAB for, broadly, racing purposes.[121] This was seen as freeing the TAB to "pursue its statutory role, which is the running of an off-course betting system".[122]

Heralding a change in focus for the TAB the Minister said when introducing the Bill

> *... the Government believes that the future role of the TAB is not simply as an extension of the racing industry but rather the efficient and responsible operation of an off-course betting business with heavy regard for the requirements of the public at large as well as for the racing codes which it supports ...*[123]

The 1980 Act largely continued the existing regulation of bookmakers at racing venues by the clubs; other controls including indemnity insurance against default, betting tickets and sheets and various betting taxes; prohibitions against unlawful bookmaking, keeping a common gaming or betting house and resort thereto and permitting betting at premises operating a liquor licence. Sundry other integrity offences were continued such as the use of drugs on horses or greyhounds.[124] Gaming or wagering contracts continued to be void and unenforceable except for lawful betting which was deemed a valid contract.[125]

(g) The TAB 1980 to 1999 and privatisation

Live television broadcast of races added to what the TAB could deliver to punters. The clubs, particularly the metropolitan clubs, were unhappy at the prospect of state-wide telecasting and the introduction of trifecta and quinella betting was making inroads into their domain.[126]

The 1980 Act contained provision for the retirement of the TAB directors after serving three years – the initial appointment had been for an indefinite term. The story of the power struggle between the government coalition parties for control of racing is compellingly recounted in Kay Cohen's *History of the TAB*[127] and is a reminder that the industry has a long, modern history of strongly held views about how racing can best be managed.

In December 1989, after 27 years in opposition, the ALP won government in Queensland. Cohen observes:

> *Members of the incoming government had many years to develop their ideas on the management of Queensland's racing industry and its betting component and, in the lead up to the December 1989 election, Bob Gibbs had been a relentless critic of racing industry administration. He was determined the TAB would shed its image of a board of racing interests and adopt the business mantle such an enterprise warranted.*[128]

120 *Racing and Betting Act 1980*, section 116.
121 *Racing and Betting Act 1980*, sections 117 and 118.
122 Queensland Parliament 1980, *Hansard*, 15 April, page 3253.
123 Queensland Parliament 1980, *Hansard*, 15 April, page 3254.
124 *Racing and Betting Act 1980*, section 228.
125 *Racing and Betting Act 1980*, section 249.
126 Cohen, *The History of the TAB*, page 96.
127 Cohen, *The History of the TAB*, chapter 7.
128 Cohen, *The History of the TAB*, page 149.

Virtually the whole board of the TAB was replaced although the new chair was a member of both the QTC and BTC. The board introduced PubTAB and agencies were located in hotels. TAB's betting coverage was extended to other sports. It set up its own radio station. By 1991:

> *After 30 years in operation, the TAB had become a very powerful force in the racing industry, but for those who had known the early hopes for a successful partnership between the clubs and the TAB to benefit the racing industry, the continuing differences between them was a source of major disappointment. The organisation itself had changed.*[129]

TAB turnover had grown from $28 million in 1962 to over $1 billion in 1991.

In August 1998 the Queensland Principal Club, the control body for thoroughbred racing, released a strategic plan, recommending amongst other things the privatisation of the TAB. In November 1999 TAB shares were listed on the Australian Stock Exchange, following privatisation of the Victorian and New South Wales TABs. In what was ultimately to have far-reaching consequences, the Northern Territory government had legislated to permit internet gambling through Centrebet in 1996. TABQ Limited changed its name to UNiTAB in 2002. It had acquired SA TAB and NT TAB. Four years later, in November 2006, the company was delisted after Tattersall's Limited acquired all of its shares. Its name was changed to Tatts Group Limited. UNiTAB was named TattsBet and is a wholly owned subsidiary of the Tatts Group of Companies.

(h) Racing in Queensland in the 1980s

The author of the *History* suggests that racing in Australia "became overheated" in the 1980s due to uncontrolled competition between racing clubs to offer large prize money; the arrival of racing entrepreneurs, some of whom were "ethical and constructive; some were certainly not";[130] and gambling. Of the latter, the author observed

> *... governments around Australia abandoned every last semblance of controlling and minimising betting and, for the sake of revenue and for fear of being left behind, embraced every new opportunity to separate the gambler from his or her money – and to find new gamblers if possible. The racing industry in general was prepared to go along with this as long as its share of the bounty was protected.*[131]

Notwithstanding that prosperity, "the almost universal Australian passion for horse racing was waning at the same time as spending on gambling was rising sharply".[132]

In 1981 Russ Hinze became Minister for Racing (amongst many other portfolios) and set about distributing major funds to Queensland racecourses through the Racing Development Fund.[133] He was himself a breeder and raced horses. In 1982 he was reported as "intent on making Queensland a premier racing state".[134] In 1981 Albion Park was given over entirely to harness racing.[135] With the strong backing of the Minister, the Magic Millions, a glamorous commercial horse sale event, began at the Gold Coast in 1982. In 1987 the first race meeting associated with the Magic Millions was held.

The contraction in racing was felt strongly in country Queensland. The *History* notes "... over years of rationalisation and long periods of drought beginning in the 1990s, Queensland suffered the most significant drop in racing activity in Australia".[136] During the 1980s there was a number of racing scandals in Queensland, the most notorious of which was the *Fine Cotton* ring-in affair which, according to the *History*,[137] squandered much of the status of Queensland racing.

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129 Cohen, *The History of the TAB*, page 150.
130 Lemon, *The History*, Vol Three, page 206.
131 Lemon, *The History*, Vol Three, page 206.
132 Lemon, *The History*, Vol Three, page 206.
133 Lemon, *The History*, Vol Three, page 209.
134 Lemon, *The History*, Vol Three, page 209.
135 "Harness" is the American terminology which was adopted in the 1980s instead of "trotting".
136 Lemon, *The History*, Vol Three, page 258.
137 Lemon, *The History*, Vol Three, page 228.

(i) Government control: Queensland Principal Club 1991

In 1991 the new Racing Minister, the Hon RJ (Bob) Gibbs, changed dramatically the way racing was controlled in Queensland. He was reported in *The Australian* newspaper[138] as saying:

> *Primarily, I believe there is a requirement for economic overhaul of the industry and changes necessary to ensure the industry is properly democratised ... Nobody can claim it's democratic at the moment.*

In response to fears of a monolith, especially held by country racing, he said:

> *I can assure you there will not be one public servant on the QRIA and there never has been the intention of a Brisbane-based institution running the show. I want state-wide (QRIA) representation.*[139]

The *Racing and Betting Amendment Bill (No. 2) 1991* replaced the five principal clubs for thoroughbred racing with a single Queensland Principal Club, an independent statutory authority, with a committee broadly representative of the clubs. The Minister's second reading speech cited cross party support for the "abolition of the five principal clubs system in favour of one broadly based club". The Minister noted that such an approach would bring Queensland into line with other mainland States.[140] The Queensland Principal Club (QPC) was tasked with the control, supervision, regulation and promotion of racing as well as the initiation, development and implementation of policies it considered conducive to the development and welfare of the racing industry and the protection of the public interest.[141]

The Greyhound and Harness (Trotting) Racing Authorities were continued as boards.

The ensuing, tumultuous, years have been summarised by the *History*:[142]

> *But the replacement principal club in its first few years created a battleground in its own board room: there were sackings and law suits. The QTC and several other clubs resisted attempts by the new body to remove their traditional responsibility to set handicap weights. The worst arguments arose from the old dilemma of how income from TAB funds should be distributed to clubs. The QTC felt itself unjustly treated under this new regime, receiving less than its proportional share of betting revenue. When Labor Premier Wayne Goss unexpectedly lost the State election in 1996, a new Minister for Racing from the other side of politics, Russell Cooper, in his term made sweeping changes at the QPC and replaced the entire TAB board. Two years later, when Peter Beattie brought Labor back to power, Gibbs returned to the racing portfolio and rearranged the deck chairs once more.*

The QPC strategic plan released in 1998 recommended a change in its composition to make it more independent of the racing clubs and proposed that its members be paid fees for their services. Until then, one of the hallmarks of racing had been the voluntary work done by participants in the sport/industry in and around race meetings and the clubs. There was pressure on the QTC to merge with the BTC.

As mentioned, the government floated the public company TABQ Limited in 1999 to replace the TAB. It brought $35 million to the racing industry (including harness and dog racing) over the first four years. Thereafter it paid 39 per cent of total betting revenue and 4.9 per cent of on-course betting turnover in fees.[143]

138 *The Weekend Australian*, January 5-6 1991, page 28.
139 *The Weekend Australian*, January 5-6 1991, page 28.
140 *Racing and Betting Amendment Bill (No. 2) 1991* (Qld), Second Reading Speech by Hon R J Gibbs, Queensland Parliament 1991, *Hansard*, 26 November, pages 3186 – 3187.
141 *Racing and Betting Amendment Act (No. 2) 1991*, section 11A.
142 Lemon, *The History*, Vol Three, page 258.
143 Lemon, *The History*, Vol Three, page 260.

(j) Transfer of land to race clubs from 2000

In May 1998 the Hon Russell Cooper announced that the government proposed granting freehold ownership to a number of racing clubs throughout Queensland. At the same time funding of $5 million was made available for the purchase of Deagon and Corbould Park race courses. Gradually the government transferred at nil cost racecourses held under Deeds of Grant in Trust (DOGITS) to race clubs subject to a statutory covenant which required that the land "must be used for racing, sport and recreation purposes only". Seven racecourse property assets were transferred to tenant race clubs as a result: Clifford Park (Toowoomba 2000); Bunya Park (Dalby 2001); Ooralea Park (Mackay 2002); Bundamba (2003); Gatton (2004); Cluden Park (Townsville 2005) and Callaghan Park (Rockhampton 2007).

In December 1998 the government acquired the Deagon racecourse from the BTC and in July 2000 transferred it at nil cost to the QPC. As a consequence of transitional provisions it became an asset of Racing Queensland Limited (RQL) in 2010.

In June 2002 (effective from July 2003) the government transferred the ownership of Albion Park Raceway to the Greyhounds Racing Authority and the Queensland Harness Racing Board as tenants in common in equal shares at nil cost. As a consequence of amendments to the Racing Act it, too, became an asset of RQL when it became the sole control body for the three codes of racing.

The BTC, at the time of those transfers, held the freehold title to its racecourse at Doomben, as did the Gold Coast Turf Club to its racing venue. The Eagle Farm racecourse was vested in the Queensland Turf Club Limited subject to certain restrictions by the *Eagle Farm Racecourse Act 1998*.

Since 2007 Corbould Park, Caloundra, has been owned by a unit trust comprised of Queensland Racing and the Sunshine Coast Turf Club which purchased the site from the Caloundra City Council at a cost of $4.5 million.

(k) Reducing government control: the move to a business model

By 2000, there were numerous allegations of conflicts of interest associated with the QPC because its members were drawn from the racing clubs. In response, the then Minister for Racing (and Tourism and Fair Trading), the Hon Merri Rose, conducted a ministerial review of the governance structure of thoroughbred racing in 2001. This review involved consultation with a wide range of industry stakeholders. The outcome was the recommendation that an independent company limited by guarantee, incorporated under the *Corporations Act 2001 (Cth)*, was the most appropriate form of governance for racing. A similar approach had been adopted in Victoria with the transfer of thoroughbred racing from the Victorian Racing Club to Racing Victoria Limited. Given the acknowledged infighting in the industry, it was considered that establishing such a company immediately would encounter difficulties.[144] A process of racing boards, to manage the transition to an independent company, was adopted.

The Interim Thoroughbred Racing Board was established in December 2001 pending the appointment of the Queensland Thoroughbred Racing Board. The Interim Board was chaired by an executive director of the Department of Tourism and Racing and five persons representing the areas of the former principal clubs. Public applications were sought to fill non-executive positions on the permanent board managed by an external recruitment firm. A shortlist was provided to a selection panel, appointed by the Minister, comprising the Minister's representatives, a representative of TAB clubs and a representative of non-TAB clubs. It was required unanimously to appoint a five member board, including the chair and to identify three reserve members.

144 *Racing and Betting Amendment Bill (No.2)*, second reading speech by the Hon M. Rose, Queensland Parliament 2001, *Hansard*, 9 November, page 3718.

The initial persons selected were Ms Nerolie Withnall as chair, Mr Stephen Lonie as deputy chair and Mr George Pippos, Mr Anthony Hanmer and Mr Michael Lambert. Ms Withnall was unable to take up the position due to a perceived conflict of interest and Mr Robert Bentley was appointed chairman by a differently constituted selection panel as her replacement. On 5 April 2002 the Queensland Thoroughbred Racing Board replaced the Interim Board.

In September 2002 Mr Pippos died and was replaced by Mr Walter Tutt who was on the reserve list. He was appointed by a selection panel comprising Mr Bentley, Mr Les Geeves, a representative of TAB clubs, and Mr Rex Smith, a representative of non-TAB clubs.

In September 2004 an independent recruitment firm was engaged to manage the filling of two vacancies following the resignations of Mr Lonie and Mr Tutt. A short list of applicants was provided to a selection panel comprising Mr Bentley, Dr John O'Duffy as representative of TAB clubs and Mr Cyril Vaine as representative of non-TAB clubs. That panel selected Mr William Ludwig and Mr William Andrews to fill those vacancies.

The new *Racing Act 2002*[145] came into force on 1 July 2003 and repealed the *Racing and Betting Act 1980*. A substantial part of the Act was directed to managing the appointment and oversight of a control body for each of the codes of racing independent from government. The Act also provided for the existing Thoroughbred Racing Board, the Harness Racing Board and the Greyhound Authority to continue as the control bodies for their respective codes. Approvals were given for a period of three years (subsequently extended to five years for harness and greyhound racing by amendments to the Act in 2006).

The membership and chairs of each former control body continued in the new control bodies. The Country Racing Associations were continued and the Country Racing Committee consisted of their chairs. Schedule 1 of the Act contained relevant provisions "relocated" from the Racing and Betting Act to facilitate this continuation.

The *Racing Amendment Act 2006* (2006 Amendment Act) which came into effect on 1 July 2006 made provision for Queensland Racing Limited (QRL) to replace the Thoroughbred Racing Board as the control body for thoroughbred racing. QRL was an independent company limited by guarantee. This model had been identified as the preferred governance entity by the ministerial review conducted in 2001. On 13 January 2006 it was approved by notice in the Government Gazette as the control body for the thoroughbred code. The 2006 Amendment Act contained transitional provisions which, in general terms, provided for the transfer of legal rights and obligations of the former board to QRL without disruption. The Class A members of QRL were various industry groups representing race clubs, owners, breeders, trainers, jockeys and bookmakers. The directors were the Class B members.

The national rules of racing which applied to greyhound and harness racing did not prevent direct government appointments to industry control bodies. The greyhound and harness racing control bodies initially were statutory bodies established under the Racing Act with boards appointed by Governor-in-Council until 30 June 2008. Companies limited by guarantee, Greyhounds Queensland Limited and Queensland Harness Racing Limited, were appointed as the greyhound and harness control bodies respectively from 1 July 2008. Their constitutions were modelled on that of QRL. The board of Greyhounds Queensland Limited initially comprised Ms Kerry Watson, Mr Chris Williams, Mr David Stitt and Mr Paul Douglas Felgate (from 12 November 2008). The board of Queensland Harness Racing Limited comprised Mr Robert Lette, Mr Kevin Seymour, Mr Dave Knudsen and Ms Janice Dawson.

145 Most provisions commenced on 1 July 2003.

As mentioned, in 2006 Tattersalls Limited, which had listed on the Australian stock exchange the previous year, merged with UNiTAB Ltd and became, in Queensland, TattsBet.

The *Revenue and Other Legislation Amendment Act (No.2) 2008* introduced into the Racing Act new sections relating to the charging of race information fees. The explanatory notes to the Bill detailed that these amendments were introduced in response to a decision by NSW and Victoria to institute a fee for the use of their race information by all wagering operators, including TABs, from 1 September 2008. That legislation is discussed in the body of the Report.[146]

(l) Three inquiries

(i) The Shanahan Inquiry 2004

Section 37 of the Racing Act 2002 requires a control body for a code to have information systems that separate its commercial operations from its regulatory operations. In May 2004 Premier Beattie and the Minister responsible for racing, the Hon RJ Schwarten, announced an inquiry into the integrity management structures of the three codes.

The three Commissioners – former Chief Judge of the District Court, Mr Pat Shanahan AO, former MHR, MLA and economist, Dr David Watson and former general manager of Network Ten, Mr William Lenehan – were directed to consider the appropriateness of the existing integrity systems, recommend the type, structure and composition of the entity to manage and deliver integrity services; identify potential conflicts between regulatory and commercial functions; and the role of government in ensuring the integrity of those services. In the course of their deliberations the Commissioners considered the national nature of racing and discussed integrity issues with many interstate racing CEOs and stewards.

The Commissioners delivered their report to government on 30 August 2004. They explained that it was essential that the racing industry integrity system should ensure that decisions made by those responsible for monitoring the integrity of races were free from any improper influence including commercial interests. They observed:

> *The separation of integrity/regulatory functions from commercial functions is a structural dichotomy which is widespread in government and widely supported. For example, this separation is the rationale behind the corporatisation of government business interests with regulatory authority residing in the Queensland Competition Authority. In the Queensland Gaming Industry, commercial interests lie in the arena of machine manufacturers, clubs, hotels, casinos and operators of the regulatory integrity function resides with Queensland Office of Gaming Regulation.*[147]

The Commissioners encapsulated their approach as follows:

> *Confidence in the integrity of the racing industry is fundamental to the perception of persons placing bets on the outcome of a race. In placing bets, they expect they are participating in a "fair game". Consequently, the Commission aimed to design an integrity system which ensured the system was perceived to be impartial.*[148]

The Commissioners noted that while opposition to full integration across the three codes of racing was mixed with some strongly expressed negative views, there was a greater acceptance of integration for integrity purposes. The Commissioners concluded that it was in the public interest to separate the integrity/regulatory aspect of racing from the commercial aspects "to ensure the integrity of the industry".[149]

146 At Chapter 8.
147 Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report*, 30 August, page 3.
148 Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report*, 30 August, page 4.
149 Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report*, 30 August, page 9.

The Commissioners recommended a separation for the racing industry similar to that in the gaming industry with the products sourced from different vendors in different locations being subject to integrity checks by the Queensland Office of Gaming Regulation. They recommended that the most effective and efficient structure for dealing with integrity services was a single organisational unit.

The Commission "was quite struck by the animosity evident both within racing codes and among the three codes of racing"[150] and recognised that this level of hostility would make the integration of the commercial aspects of racing "extremely difficult".

The principal recommendation was that the three control bodies be dissolved and replaced by one control body to regulate the integrity aspects of all three codes of racing, and that a separate body be established to coordinate the commercial functions of the racing industry. Recommendations were made about how those boards should be selected noting that many of the representations made to the Commission concerned the need for appointments to be seen to be independent and open. The Commission also made recommendations about the method and criteria for the appointment of senior staff and for the professional development of stewards. The conflict inherent in Albion Park Raceway remaining to be administered by the respective harness and greyhound board/authority was inconsistent with the separation of integrity and commercial functions. Neither body supported the facility being put into the hands of the two clubs operating the raceway. The recommendation was either to divest Albion Park Raceway to those two clubs or to a joint code specific commercial entity on terms and conditions to be specified by the government.

As directed by their terms of reference, the Commissioners considered the role that government should play in ensuring the integrity of each code of racing. They concluded that government, having satisfied itself that the single board proposed was functioning as intended, "particularly at the time of reappointing members or when a new board was selected",[151] would then have a limited and decreasing role in the integrity aspects of racing.

In view of what was characterised as "the intense rivalry"[152] between and within the racing codes, the Commissioners offered an alternative commercial structure which, although more expensive, would complement the proposed integrity structure. They proposed that three boards be established, one for each racing code, to undertake all the commercial aspects of the industry with one separate integrity board for the three codes.

These recommendations remained largely unimplemented and the warnings about the difficulties of amalgamation as well as some concerns about the terms of the Product and Program Agreement 1999[153] seemed to have been ignored when fresh initiatives for code amalgamation were proposed from 2009.

(ii) The Daubney/Rafter Inquiry 2004-05

In October 2004 many newspaper articles asserted that Brisbane-based bookmakers were engaged in an orchestrated "sting" of interstate bookmakers in which artificially inflated odds for a particular horse were allegedly transmitted on the Australian Prices Network, with a view to using intermediaries to place bets with interstate bookmakers at these inflated prices.[154]

In November 2004 a Commission of Inquiry was appointed to investigate these and other integrity allegations. The Commissioners – Mr Martin Daubney SC and Mr Anthony Rafter SC (members of the Queensland Bar but now, respectively, members of the Supreme Court of Queensland and District Court of Queensland) – were also directed to investigate a particular matter relating to integrity, and the conduct of the QTRB and its staff in connection with the appointment and termination of staff, including stewards. The Commissioners reported to government on 3 June 2005.

150 Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report*, 30 August, page 10.
151 Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report,* 30 August, page 19.
152 Shanahan, P, Watson, D & Lenehan, B 2004, *Racing Industry Integrity Review Report,* 30 August, page 20.
153 Discussed in Chapter 8 of the Report.
154 Daubney SC, AM & Rafter SC, AJ 2005, *Report of the Queensland Thoroughbred Racing Inquiry*, 30 June 2005, page 07-1.

The Commission undertook a detailed analysis of certain races and horses in the context of the information and complaints which it had received. It concluded that the allegation of the existence of a long-standing, orchestrated and systematic rorting of betting prices was without foundation. It regarded the unregulated use of commission agents as intermediaries in the wagering process as a matter for serious concern to the integrity of the bookmaking and thoroughbred racing industries.

The Commission investigated staffing restructures that had occurred at the QTRB in 2002 and 2003 and the manner in which staff were dealt with. Mr Bentley, the chairman, came under close scrutiny for his management style. Some 13 staff appointments and departures were considered. Of interest, given some of the matters which have arisen in the present inquiry, Mr Bentley's involvement in the selection process for a senior position in the organisation was questioned.

(iii) The Equine Influenza Inquiry 2007

The third inquiry concerned the equine influenza epidemic in 2007. An inquiry was established by the Commonwealth under the *Quarantine Act 1908 (Cth)* to examine the circumstances which contributed to the outbreak of equine influenza in Australia in August 2007. The occurrence and controls put in place to curb its spread seriously affected horse racing in southeast Queensland.

The Commissioner, the Honourable Ian Callinan AC, found that a number of horses imported into Australia from Japan were taken into the Eastern Creek and Spotswood Quarantine Stations in New South Wales and Victoria and were shown, by subsequent blood analysis, to have symptoms corresponding with equine influenza infection. Towards the end of August 2007 cases of equine influenza were reported in a number of places in New South Wales and on the outskirts of Brisbane. Four infected horses, as found by the Commissioner, had attended a one-day event near Maitland, New South Wales. A rapid outbreak in New South Wales and Queensland followed. By 10 October there were about 4500 infected premises in an area of 278,000 square kilometres. The Commissioner concluded that the most likely explanation was that the virus escaped from Eastern Creek Quarantine Station on the person, clothing or equipment of a groom, veterinarian, farrier or other person who had contact with an infected horse and who then left the Quarantine Station without cleaning or disinfecting adequately or at all. The timing of the Maitland event and the emergence of clinical science in Eastern Creek strongly suggested to the Commissioner that this was likely to have occurred in the period after 10 August 2007.

The report concerns the circumstances and likely source of the outbreak of influenza in Australia, inadequacies in the Australian Quarantine and Inspection Services and recommendations for remediation.

The epidemic had a very serious effect on racing in southeast Queensland with meetings, both thoroughbred and harness, cancelled[155] and, accordingly, revenue compromised.[156] Extra product for wagering was delivered by greyhounds or sourced from overseas races. Some extra TAB race days were given to north Queensland racing clubs.

The vaccination of hundreds of horses in southeast Queensland was carried out with cooperation between the Office of Racing and the horse control bodies. Even the latter's harshest critics praised the response to this epidemic by QRL.

155 The number of meetings conducted in Queensland during the 2007-08 financial year was reduced by 23.5 per cent with the loss of 72 TAB meetings and 105 non-TAB meetings: Queensland Racing Limited 2008, *Annual Report 2007-08*, page 10.

156 Wagering was down $3.3 million on budget, and additional costs were incurred by QRL in managing Queensland's response to the epidemic.

(m) Reducing industry involvement: one control body for three codes

The *Racing and Other Legislation Amendment Act 2010* provided that the three racing codes would, henceforth, be controlled by one control body. Transitional provisions, as had occurred in the past when control bodies changed, provided for the transfer of legal rights, obligations and assets from the former entities into the new control body without disruption. RQL, a company limited by guarantee, was appointed the control body for thoroughbred, harness and greyhound racing in Queensland without going through the approval process envisaged for a new control body. Its only members were the directors. A consideration of how this came about is discussed in the body of the Report.[157]

Mr Bentley was appointed chairman. The other directors, initially, were Mr Hanmer (deputy chair), Mr Ludwig, Mr Andrews, Mr Lambert, Mr Lette and Ms Watson. That is, the former thoroughbred control body provided five directors and the other former control bodies one each. This was argued by the chairman to reflect the financial contribution to the industry which flowed from those codes. Subsequently, Messrs Milner and Ryan replaced Messrs Andrews and Lambert in circumstances discussed in the Report. Ms Watson left the board of RQL in controversial circumstances in December 2010, again, discussed in the Report.[158]

(n) Government control again: 2012 -

After a change of government on 26 March 2012, the incoming LNP implemented its long held racing policy and returned to three control boards under an overarching control body, the Queensland All Codes Racing Industry Board (QACRIB), maintaining RQL as the control body until that change could be legislatively implemented but with new directors. RQL's approval as the control body for the three codes of racing was cancelled when QACRIB was established.[159] QACRIB is a statutory body under the *Financial Accountability Act 2009 (Qld)*, the *Statutory Bodies Financial Arrangements Act 1982 (Qld)* and a unit of public administration under the *Crime and Misconduct Act 2001 (Qld)*.[160] QACRIB, known as Racing Queensland, and the three code boards were established from 1 May 2013.

The QACRIB consists of five members, being the chairs of each of the Queensland Thoroughbred Racing Board, the Queensland Harness Racing Board and the Queensland Greyhound Racing Board, and two other members appointed by the Governor-in-Council.[161] The Act provides that the Governor-in-Council must appoint the chair and deputy chair of QACRIB from the board members thus maintaining some control over the board. The current board members' appointments were effective from 1 May 2013.

All assets of RQL became vested in the new QACRIB.[162] Interests taken by RQL in the assets of the racing clubs as a result of infrastructure grants were returned to the clubs.

157 At Chapter 6.
158 At Chapter 5.
159 *Racing Act 2002*, section 446. RQL ceased to be the control body for the three codes on 30 April 2013.
160 *Racing Act 2002*, section 9AC.
161 *Racing Act 2002*, section 9AI.
162 *Racing Act 2002*, section 447.

Appendix C

Royal Commissions/Commissions of Inquiry Concerning Racing in Queensland

1. Royal Commission appointed to Inquire into and Report upon the Safety of the Kedron Park Racecourse at Brisbane for Racing and Trotting Purposes, and matters incidental thereto:

    - Appointed 16 December 1920
    - Commissioner: William Harris, Esquire, Police Magistrate, Brisbane
    - Report presented to both Houses of Parliament (incomplete in Parliamentary Papers, pages 4 and 5 omitted)
    - Reference: Parliamentary Papers Queensland, No. 9, *Royal Commission appointed to Inquire into and Report upon the Safety of the Kedron Park Racecourse at Brisbane for Racing and Trotting Purposes, and matters incidental thereto*, Second Session, 22nd Parliament 9 August 1921.

2. Royal Commission appointed to Inquire into and Report upon the Control and Management of Horse-Racing and Racecourses in and Around Brisbane and Ipswich:

    - Appointed 28 August 1929 - extended 23 October 1929
    - Commissioners: The Honourable Mr Justice HH Henchman, Mr J Cadell Garrick, Mr FJ McCarthy
    - Report presented to Parliament 10 April 1930
    - Reference: Parliamentary Papers Queensland, No.2, *Royal Commission appointed to Inquire into and Report upon the Control and Management of Horse-Racing and Racecourses in and Around Brisbane and Ipswich*, Second Session, 25th Parliament, 1930.

3. Royal Commission appointed to *Inquire into Certain Matters Relating to Racing and Gaming*:

    - Appointed 22 August 1935
    - Commissioners: Mr Thomas Arthur Ferry, Mr Cecil James Carroll MVO, Mr Frederick James McCarthy
    - Report presented to Parliament 8 July 1936
    - Reference: Parliamentary Papers Queensland, No. 2, *Royal Commission appointed to Inquire into Certain Matters Relating to Racing and Gaming*, Second Session, 27th Parliament, 1936.

4. Royal Commission appointed to Inquire into Whether it is Desirable to Make Legal the Method of Betting and Wagering Commonly Known as Off-The-Course Betting

    - Appointed 17 November 1951
    - Commisisoners: Mr William James Riordan, Mr Edward Patrick Griffin, Mr William Malcom Kay, Mr John Fitzsimmons Meynink and Mr George William Pont
    - Report presented to Parliament 8 July 1952
    - Reference: Parliamentary Papers Queensland *Report of Royal Commission on Off-the-Course Betting* No. 82, Third Session, 32nd Parliament; Queensland Evidence taken by Royal Commission on Off-the-Course Betting (4 Vols) No. 82a.

5. Commission of Inquiry to Investigate the Appropriateness of the Current Systems of Separating Regulatory and Commercial Functions Established by the Thoroughbred, Harness and Racing Control Bodies:

   - Appointed 6 May 2004 - extended 22 July 2004
   - Commissioners: Mr John Patrick Shanahan AO, Dr David John Hopetoun Watson and Mr William Robert Lenehan
   - Report presented to Parliament 30 August 2004, tabled 1 September 2004
   - Reference: Parliamentary Papers: Queensland 1290 *Racing Industry Integrity Review Report*, 51st Parliament.

6. Commission of Inquiry into Certain Integrity Matters Concerning Thoroughbred Racing in Queensland:

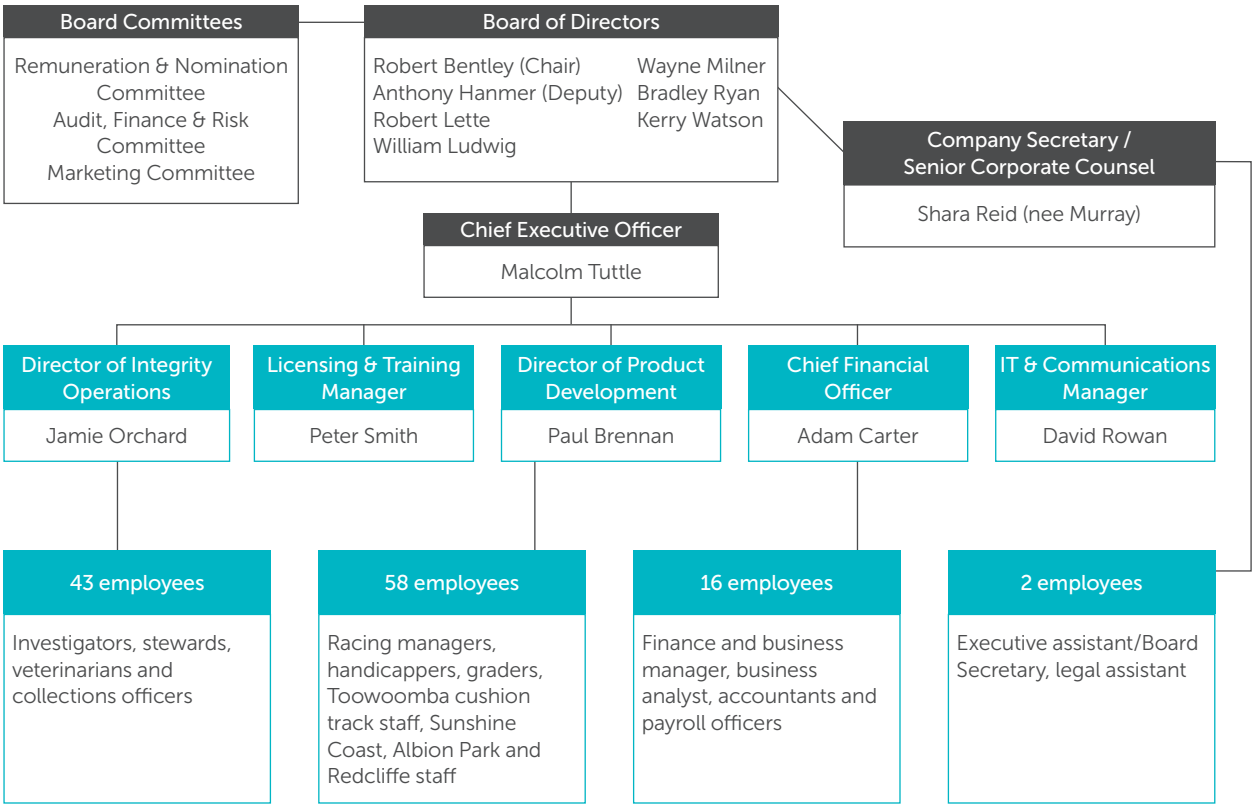
   - Appointed 4 November 2004 – extended 16 December 2004 and 24 February 2005
   - Commissioners: Alfred Martin Daubney SC and Anthony John Rafter SC
   - Report presented to Parliament 3 June 2005, tabled 7 June 2005
   - Reference: Parliamentary Papers: Queensland 3634 *Report of the Queensland Thoroughbred Racing Inquiry*, 51st Parliament.

7. Commission of Inquiry into the August 2007 Outbreak of Equine Influenza in Australia:

   - Appointed 25 September 2007 by the Honourable Peter McGauran MP Minister for Agriculture, Fisheries and Forestry under section 66AY of the *Quarantine Act 1908* (Cth)
   - Commissioner: The Honourable Ian Callinan AC
   - Report presented to the Minister 23 April 2008.

Appendix D

Summary of RQL Organisational Structure[1]



1 Summarised from "Proposed Three Code Organisational Structure (Names)", adopted by the RQL Board (RQL, Meeting Minutes, 1 July 2010, page 8). Note this does not include information for the IT & Communications (8 employees) or Licensing and Training (15 employees) departments. Approximately 150 RQL employees total, at 1 July 2010.

Appendix E

Contour Projects during the Relevant Period

1. Introduction

1.1 During the relevant period, Contour Consulting Engineers Pty Ltd (Contour) was engaged by Queensland Racing Limited (QRL)/Racing Queensland Limited (RQL) to provide project management and engineering design services for 63 projects across 14 different racecourses in Queensland.[1] Contour first performed work for QRL in June 2007 when it was awarded the tender to provide engineering design services for the synthetic track at Caloundra after a competitive process conducted by Arben Management Pty Ltd (Arben), the company then contracted to provide project management services to QRL.

1.2 This Appendix is intended to summarise the major infrastructure projects in which Contour performed a management role during the relevant period, and the procurement by Contour of significant contractors (or sub-contractors) for the purposes of those projects.

2. Contour Consulting Engineers Pty Ltd and associated entities

2.1 Contour was registered as a proprietary company limited by shares on 9 November 2005, with Mr Brett Thomson, Mr Chris Fulcher and Mr Anthony Shelley appointed as directors. Mr Shelley ceased as a director on 21 March 2011. Mr Thomson and Mr Fulcher remain directors of Contour. Mr Chris Fulcher and Powerful Owl Australia Pty Ltd hold equal shares in Contour.

2.2 Powerful Owl Australia Pty Ltd, trading as Duke Environmental, was registered as a proprietary company limited by shares on 14 October 2004. Mr Thomson was a director and employee of Duke Environmental from 2004 to 2006. He ceased as a director on 1 July 2006. At this time, Ms Paula Duke, the spouse of Mr Thomson, was appointed as the sole director of Powerful Owl Australia Pty Ltd. Ms Duke and Mr Thomson hold equal shares in Powerful Owl Australia Pty Ltd.

2.3 Contour utilised the human resources and environmental management consultancy services of Duke Environmental during the relevant period pursuant to a contractor agreement.[2] Through Contour, Duke Environmental was engaged to perform environmental consultancy services on QRL and RQL infrastructure projects without participating in any competitive procurement processes.

3. Corbould Park, Caloundra: Synthetic track (June 2007 – April 2008)

3.1 The procurement of the synthetic track material and funding arrangements preceding the design and construction of the synthetic track at Corbould Park, Caloundra are the subject of separate consideration in the body of the Report in Chapter 3 at 3.11.

3.2 Arben was engaged in about May 2007 by Sunshine Coast Racing Pty Ltd (Sunshine Coast Racing) as trustee for the Sunshine Coast Racing Unit Trust following a competitive process, involving two other contractors, to project manage the design and construction of the synthetic track at Corbould Park.[3] Arben proposed a project management fee of 1.6 per cent and noted that this fee could vary depending on the size of the project.[4] Following the engagement of Arben, the QRL board resolved on 25 May 2007 that Arben and QRL were to commence negotiations with a civil contractor for the synthetic track.[5]

1 Statement of Brett Thomson, 5 August 2013, page 2 para 8.
2 Statement of Brett Thomson, 27 August 2013, page 10 paras 62-71.
3 Sunshine Coast Racing Pty Ltd, Board Meeting Minutes, 7 March 2007.
4 Arben fee proposal letter to Sunshine Coast Turf Club Inc, 9 March 2007.
5 QRL, Board Meeting Minutes, 25 May 2007.

3.3 Mr Thomson stated that Contour first became aware of the project through Blacklaw Civil Contractors Pty Ltd (Blacklaw) around May 2007.[6] At this time Contour did not have any experience in managing or designing racecourse infrastructure,[7] but believed it had a chance at winning the tender due to its background in road, drainage and sporting field design.[8] Contour subsequently submitted a fee proposal to QRL on 15 June 2007 proposing a fixed fee of $69,670 for engineering design services.[9] Arben recommended the engagement of Contour on the basis that Contour had submitted the most economical price and had demonstrated a full understanding of the required scope of work. QRL accepted the recommendation of Arben and engaged Contour on 21 June 2007 in accordance with their fee proposal.[10]

3.4 On 3 August 2007, the chairman advised the QRL board that the design of the synthetic track was complete and construction was due to commence in August 2007 for completion in December 2007.[11] QRL and Blacklaw entered into a contract on 9 October 2007 in the amount of $2,292,378.33 (excl GST) for the construction of the synthetic track in accordance with the design specifications prepared by Contour.[12] Like Contour, Blacklaw did not then have any experience in constructing racecourse infrastructure, but was an experienced civil contractor with a history of involvement in large projects.[13] There is no evidence of a competitive process undertaken for the engagement of Blacklaw.[14]

3.5 Contour was further engaged to provide onsite auditing for the removal and replacement of a defective drainage layer pursuant to a fee proposal dated 17 December 2007.[15]

3.6 Contour was subsequently appointed as the superintendent's representative on 26 March 2008,[16] for the purpose of issuing a certificate of practical completion to Blacklaw after the services of Arben were terminated on 7 March 2008.[17] A flying minute of the Sunshine Coast Racing board stated that the "project services [of Arben] were not being fulfilled in order to deliver the project."[18] The minute also recommended the engagement of Contour to provide project management services for proposed stabling and associated works at Corbould Park and that, as a part of the associated works, Contour would provide project management and contract administration to finalise the synthetic track. The resolution passed and the services of Arben were terminated.

3.7 On 4 April 2008 the QRL board noted that the total costs incurred for the synthetic track at Corbould Park were $6.1 million, leaving the project approximately $151,000 under budget. The QRL board was advised that the track was complete and had attracted positive endorsement from key stakeholders. The official opening of the synthetic track at Corbould Park was held on 6 April 2008.[19]

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6 Statement of Brett Thomson, 27 August 2013, page 2 para 16; This is supported by an email from Brett Thomson to Colin Gursanscky, 4 May 2007, 4.12pm, which attached a fee proposal directed to Blacklaw for the engineering design of the synthetic track.
7 Statement of Chris Fulcher, 21 August 2013, page 1 para 7; Statement of Brett Thomson, 27 August 2013, page 2 para 21.
8 Statement of Chris Fulcher, 21 August 2013, page 1 para 4; Statement of Brett Thomson, 27 August 2013, page 2 paras 21-22.
9 Contour fee proposal to QRL, 15 June 2007.
10 Engagement of Civil Designer for Synthetic Track Surface recommending Contour, executed by Malcolm Tuttle, 21 June 2007.
11 QRL, Board Meeting Minutes, 3 August 2007.
12 Contract between Blacklaw Civil Contractors and QRL, executed 9 October 2007.
13 Letter from Colin Gursanscky to the Commission, 9 September 2013, page 3 para 6c.
14 No documents have been produced to the Commission evidencing a competitive process for the construction works. This is supported by email from Arben to Contour, 27 July 2007, requesting Contour recommend other contractors for the construction work in the event agreement with Blacklaw was unable to be reached; see further, letter from Colin Gursanscky to the Commission, 9 September 2013, page 2 para 4, page 3; para 6a.
15 Contour fee proposal to QRL, 17 December 2007; see also Statement of Brett Thomson, 27 August 2013, page 2 paras 18-20, page 3 para 28.
16 Letter from Reid Sanders to Brett Thomson, 26 March 2008.
17 See letter from Martin Waters, Arben Management, to the Commission, 29 July 2013; QRL, Board Meeting Minutes, 1 February 2008; Statement of Brett Thomson, 27 August 2013, page 3 para 28; Sunshine Coast Racing Pty Ltd, Flying Minute.
18 Sunshine Coast Racing Pty Ltd, Flying Minute, 14 March 2008.
19 Contour, Media release "Contour Consulting Engineers – First Synthetic Horse Racing Track of its type in Australia at Corbould Park Caloundra", undated.

3.8 It appears that the total fees charged by Contour for this project were approximately $120,000 (incl GST).[20]

3.9 None of the appointments of major contractors on the Corbould Park synthetic track project conformed to the requirements of the QRL Purchasing Policy. Although Arben and initially Contour were appointed through competitive processes, these processes were not in accordance with the Purchasing Policy, which required a public tender for engagements over $100,000 unless waived by the QRL board. In relation to the civil contractor, Blacklaw, it does not appear that there was any competitive process leading to its appointment.

4. Beaudesert: Sand Track Flood Rectification Works (January – April 2008)

4.1 In January 2008 RQL commissioned Contour to provide engineering and project management services for the replacement of the sand track at Beaudesert after extensive flood damage. At the QRL board meeting on 1 February 2008, expenditure of up to $200,000 was approved for the repair of the Beaudesert track.[21] Contour's appointment was not subject to a competitive process. Internal Contour correspondence indicates that Contour considered that the company's performance on this project may affect other opportunities to work with QRL, and the project appears to have been efficiently executed with appropriate documentation generally on file.[22]

4.2 Contour conducted a closed tender process for the earthworks contract, approaching eight contractors and receiving tender submissions from three local contractors.[23] Calam Plant Contracting Pty Ltd was engaged and an amended tender price of $64,945 was negotiated. The procurement process undertaken was not compliant with the QRL Purchasing Policy which required quotes from three contractors selected by QRL as *preferred suppliers* where the value of the contract was between $10,000 and $100,000.

4.3 While significantly more expensive than other tenderers,[24] Calam Plant Contracting was engaged on Contour's recommendation that it was best positioned to provide the necessary expertise.[25] The initial budget for the project was $163,149.72.[26] At the completion of the project, Contour's fees for engineering services and project management amounted to $20,207 (incl GST). Due to substantial variations, the total payment to contractor Calam Plant Contracting was $94,935.83 (incl GST). The overall project appears to have been completed under budget; however at least one invoice from Q Haul Pty Ltd is missing from the Contour file provided to the Commission, preventing the calculation of total expenditure on the project.[27]

5. Corbould Park, Caloundra: Course Proper and Synthetic Track Lighting (April 2008 – February 2009)

5.1 Part of the works at Corbould Park included the renovation of lighting infrastructure for both the course proper and synthetic track. The project was funded by QRL on behalf of Sunshine Coast Racing, and in return QRL received additional units in the Sunshine Coast Racing Unit Trust.[28]

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20 Calculated from a review of invoices for Project 270 produced by Contour to the Commission, excluding amounts included for the preparation of the Strategic Asset Management Plans and Business Cases.
21 QRL, Board Meeting Minutes, 1 February 2008, pages 5-6; QRL, Board Meeting Minutes, 9 May 2008, pages 5-6 (amendment to Item 3.2 of the February 2008 Board Minute).
22 Email from Brett Thomson to Andrew Davis, cc: Chris Fulcher and Ingrid Lambert, 8 February 2008.
23 Email from Andrew Davis to Paul Brennan, 15 February 2008.
24 Jimboomba Earthmoving submitted a quotation of $39,070 and Bardool Holdings submitted a quotation of $23,800.
25 Email from Paul Brennan to Andrew Davis cc: Reid Sanders, Brett Thomson, Lisa Banks, 28 February 2008.
26 Email from Andrew Davis to Paul Brennan cc: Brett Thomson, 27 March 2008.
27 The two invoices from Q Haul Pty Ltd on file amount to $13,333.14 incl GST. Therefore, the total value of the project invoices on file is $128,475.97 incl GST.
28 QRL, Board Meeting Minutes, 6 June 2008, pages 13-14.

5.2 On 28 April 2008 Contour submitted a fee proposal for the provision of project management services at a fixed fee of 1.25 per cent of the construction cost.[29] At a QRL board meeting on 9 May 2008 the board approved the engagement of Contour at a maximum rate of two per cent.[30] Contour's fee proposal for 1.25 per cent was subsequently signed for QRL by Mr Bentley on 14 May 2008.[31] The board noted that this project was "urgent" due to the impending transfer of the Toowoomba evening race program to Corbould Park. It was estimated that the cost of the lighting would be between $2.6 to 3.6 million.[32]

5.3 At a QRL board meeting on 6 June 2008, the board approved (on Mr Paul Brennan's recommendation) the appointment of Neil T Fallon Services Pty Ltd at a cost of $4.3 million after a very limited closed tender process for the lighting design and construction.[33] Before the expenditure and appointment of Neil T Fallon Services were approved, the minutes did not record any board consideration of a tender process or results, or the reasons for not conducting an open tender process in accordance with the QRL Purchasing Policy. There is no evidence in the minutes of a waiver by the board of that requirement.

5.4 On 4 July Mr Brennan advised the QRL board that the project costs had risen from $4.3 million to $6-7 million. No explanation for the increase was recorded in the minutes. Mr Brennan advised that he had requested Neil T Fallon Services to separate the quote into three options: synthetic track, course proper, or both.[34]

5.5 At the next board meeting on 8 August Mr Brennan advised the costs of three options: synthetic track only, $4.7 million; course proper only, $5.9 million; and both tracks, $7.2 million. The board approved the option of both tracks at a cost of $7.2 million.[35] A paper presented to the board by Mr Brennan noted that Contour and QRL had been working with two companies and after reviewing their quotes proposed to engage Neil T Fallon Services.[36]

5.6 On 29 August, Contour provided QRL with a project budget for $7.2 million (excl GST) listing Neil T Fallon Services for the design and construct ($6.5 million), Blacklaw as the nominated subcontractor ($56,000) and Contour as project manager ($87,000 or 1.25 per cent of construction costs).[37] The budget also included miscellaneous services including town planning and geotechnical ($111,000). The next day, on 30 August, Contour provided a formal tender analysis to Mr Brennan recommending Neil T Fallon Services as the preferred contractor.[38]

5.7 On 5 September, Contour sent a letter of intent on behalf of QRL to Neil T Fallon Services to enter into a design and construct contract for $6.5 million with practical completion set at 30 January 2009.[39] A contract giving effect to the letter of intent was executed by QRL and Neil T Fallon Services on 31 October 2008.[40]

5.8 Additional services on the project were provided by Duke Environmental (for environmental works) and Ken Hicks & Associates (for survey works).[41] The services rendered by these contractors ranged from less than $10,000 (for which the Purchasing Policy did permit a

29 Contour fee proposal to Sunshine Coast Racing Pty Ltd, 28 April 2008, signed for QRL by Robert Bentley on 14 May 2008.
30 QRL, Board Meeting Minutes, 9 May 2008, page 11.
31 Contour fee proposal to Sunshine Coast Racing Pty Ltd, 28 April 2008, signed for QRL by Robert Bentley on 14 May 2008.
32 QRL, Board Meeting Minutes, 9 May 2008, page 11.
33 QRL, Board Meeting Minutes, 6 June 2008, page 13.
34 QRL, Board Meeting Minutes, 4 July 2008, page 16.
35 QRL, Board Meeting Minutes, 8 August 2008, page 10.
36 Board Paper presented by Paul Brennan, 6 August 2008.
37 Email from Brett Thomson to Paul Brennan, 29 August 2008.
38 Email from Brett Thomson to Paul Brennan cc: Shara Reid, 30 August 2008.
39 Letter from Contour to QRL, 'Letter of Intent with Neil Fallon Services', 5 September 2008.
40 Contract between Neil T Fallon Services Pty Ltd and Queensland Racing Ltd, 31 October 2008.
41 For example, Ken Hicks & Associates, 'Operational Works and Building Approval', 17 July 2008, fee estimate $6,000 excl GST; 'Detail Survey Race Tower, Rail, Grandstand and Light Towers', 29 August 2008, invoice for $1,900 excl GST; 'Light tower, track grid, all services fixtures location survey', 22 December 2008, invoice for $12,900 excl GST. Duke Environmental, 'Lighting Project Environmental Management Plan', 16 October 2010, invoice for $2,750 excl GST; 'Lighting and Noise Impact Assessment', 27 October 2008, invoice for $8,850 excl GST; 'Track Lighting Audit', 15 January 2009, fee proposal for $14,520 excl GST.

purchasing officer to simply select a company that had provided good service in the past and suited operational requirements), to more than $10,000 (for which competitive quoting from at least three preferred suppliers should have occurred under the QRL Purchasing Policy).

5.9 The project reached practical completion in time on 30 January 2009.[42] The total project construction cost was $6.795 million. This was $295,000 above the original contract price of $6.5 million, but within the project budget contingency allowance and in accordance with approved variations.[43]

5.10 Contour ultimately charged 1.25 per cent ($88,657) of the project construction cost in project management fees. This was in line with the fee proposal and project budget provided to QRL.[44] Overall, Contour's total fees charged were $168,596 which consisted of project management as well as preliminary planning and design work, and "additional services". The lighting facilities at Corbould Park were officially opened on 21 February 2009.[45]

6. Corbould Park, Caloundra: Stables (February 2008 – October 2010)

6.1 The Corbould Park stables project consisted of the construction of 256 new horse stables and associated facilities. Contour was involved from the initial planning stages of the project, commencing October 2007.[46] QRL managed and financed the project through a $12 million loan from the National Australia Bank (NAB).[47] As a condition of the loan facility, QRL was required to engage a certified quantity surveyor approved by NAB to oversee the administration of the project and the payment of progress claims. Contour submitted all invoices to the quantity surveyor for approval prior to payment.

6.2 Contour submitted an initial fee proposal for engineering design works to QRL through Arben on 28 February 2008.[48] The fee proposal set out fixed fee structures for all categories within the scope of services, amounting to a projected total cost of $234,080. On 11 March 2008, after the termination of Arben's services, Contour provided a further fee proposal to provide project management services on the Corbould Park stables project. The fee proposal set a rate of 1.25 per cent of the construction cost for the civil engineering phase and 1.75 per cent of the construction cost for the structural engineering phase, but did not provide a projected budget. For project administration and contract administration relating to the synthetic track and tasks associated with the development application phase for the stables, Contour referred QRL to a schedule of hourly rates and, again, no fixed budget was set.

6.3 Within the fee proposal, Contour highlighted the value for money offered by these rates in comparison with current market rates of between 2 per cent and 3 per cent, but noted that if its involvement in multiple components of the project was reduced, "we reserve the right to review the above fee structure to account for loss of economies of scale with respect to our involvement."[49] In terms of any specific industry expertise held by Contour at this time, the fee proposal stated, "We do not profess to understand the detailed requirements of horses or the horse racing/training industries."[50] The appointment of Contour was approved by a flying minute circulated by Shara Reid to the Sunshine Coast Racing board on 14 March 2008,[51] and Contour was formally engaged by Sunshine Coast Racing on 26 March 2008.[52]

42 Letter from Brett Thomson to Neil T Fallon Services, 15 October 2009.
43 Contour, 'Progress Certificate No.10 – Final', 27 September 2010.
44 Contour summary of invoices for Project CIV00436.
45 Media Article, *Sunshine Coast Daily,* 'Starry Night: Twilight races are just the beginning', 21 February 2009.
46 Contour fee proposal to QRL, 29 October 2007.
47 QRL, Board Meeting Minutes, 6 February 2009.
48 Contour fee proposal to QRL, 28 February 2008.
49 Contour fee proposal to Sunshine Coast Racing Pty Ltd, 11 March 2008, page 3.
50 Contour fee proposal to Sunshine Coast Racing Pty Ltd, 11 March 2008, page 3.
51 Sunshine Coast Racing Pty Ltd, Flying Minute, 14 March 2008.
52 Letter from Sunshine Coast Racing Pty Ltd (Shara Reid) to Contour, 26 March 2008.

6.4 On 22 January 2009, Contour submitted another fee proposal to QRL for civil engineering design services based on similar categories to those in the fee proposal dated 28 February 2008.[53] The proposal notes that work had already commenced on certain items pursuant to "verbal instructions" from QRL.[54]

6.5 Contour distributed tender documents for the civil works contracts for Phase A and Phase B of construction on 22 December 2008. Blacklaw was awarded the Phase A Stables Complex Civil Works Contract.[55] The scope of works included site preparation, construction of underground services, construction of an access road and construction of drainage and erosion and sediment control devices. The contract was executed by QRL and Blacklaw on 7 August 2009, with a final negotiated contract sum of $3,528,542.45 (excl GST).

6.6 Integral Constructions was awarded the Phase B Building Works Design and Construct Contract, for which the scope of works included the stable building, hose-down bays, staff amenities building and design.[56] A closed tender process was conducted by Contour with tenders submitted by Shadforths, Carruthers, Hall and Integral.[57] RCQ Pty Ltd also submitted a tender for both stages of the project but was not included within the tender analysis.[58] The final contract sum was $6,236,855 (excl GST).[59] Although the contract provided to the Commission is signed by both Integral and QRL, it is undated.

6.7 Other significant subcontractors on the Corbould Park stables project included Archimedes Engineering (Bulk Waste Storage and Disposal Contract – $306,400 excl GST)[60] and Magnum Industries (Horse Walkers – $458,176 excl GST).[61] Neither engagement was in accordance with the QRL Purchasing Policy requirements for contracts over $100,000.

6.8 In relation to the horse walkers, Contour sought quotes from four suppliers, one of which was Magnum;[62] however, under the QRL Purchasing Policy this capital purchase of over $100,000 in value required an open tender process. Although the horse walkers were originally included within the civil construction contract, QRL removed the item from the contract, advising that it would itself arrange the procurement of the supply and installation of the walkers directly from Magnum.[63] A contract was signed between QRL and Magnum on 26 October 2009.

6.9 At the time when Magnum Industries, a New Zealand company, was negotiating for the Corbould Park contract, Mr Wayne Milner was its Australian agent.[64] Although nominated by the selection committee as a new QRL director on 14 September 2009, Mr Milner was yet to be appointed.[65] Once Mr Milner was formally appointed as a director of QRL in December 2009, his son, Bradley Milner, who operated a corporate event management company, assumed the position of Magnum's Australian agent and assisted with the Corbould Park project.[66]

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53 Contour fee proposal to QRL, 22 January 2009.
54 Contour fee proposal to QRL, 22 January 2009, page 3.
55 Civil Works Construction Contract No. 0318 – Stables Complex Civil Works Phase A, Stage 1 between QRL and Blacklaw Civil Contractors, executed 7 August 2009.
56 Letter from Paul Brennan to Brett Thomson, 4 June 2009.
57 Letter from Brett Thomson to Paul Brennan, 5 June 2009.
58 Tender submission from RCQ Pty Ltd to Contour, 3 March 2009; Email from Timothy Freeman (Contour) to scole@rcq.net.au cc: Brett Thomson, 26 June 2009.
59 Building Works Design and Construct Construction Contract No. 0318 – Stables Complex Civil Works Phase B, Stage 1, between QRL and Integral Constructions Pty Ltd, signed but undated.
60 Design and Construct Contract No. 318 – Bulk Waste Storage and Disposal, between QRL and Wulguru Steel Pty Ltd trading as Archimedes Engineering, executed 11 October 2010.
61 Letter from Ingrid Lambert to Richard Wheeler (Magnum Industries Ltd) cc: Paul Brennan, attaching signed Magnum Contract Acceptance Form, 29 October 2009.
62 Letter from Tony Shelley (Contour) to Paul Brennan, 16 September 2009.
63 Letter from Tony Shelley (Contour) to Justin Costanzo (Integral Constructions), 6 October 2009.
64 Email from Paul Brennan to Timothy Freeman cc: Ingrid Lambert and Brett Thomson, 6 August 2009.
65 See *Andrews v Qld Racing Ltd* [2009] QSC 338.
66 Statement of Paul Brennan, 11 October 2013, page 13.

6.10 Work on the Corbould Park stables project was completed on 24 October 2010, with the final cost of work amounting to $11,357,243.[67] This figure was within the initial project budget.

7. Corbould Park, Caloundra: Miscellaneous Projects

7.1 At Corbould Park, Contour also performed work on additional projects that did not require special expertise in racing infrastructure. None of these engagements were the product of a competitive process. In mid-2009, Contour provided engineering services associated with the construction of a storage bin for synthetic track material at Corbould Park and issued QRL with invoices totalling $10,806.88 (incl GST).[68]

7.2 Then, in November 2009, Contour submitted a fee proposal for miscellaneous civil works at Corbould Park to QRL.[69] This proposal detailed work to be done across 12 *Queensland Racing Zones* and six *Sunshine Coast Turf Club Zones*. In short, the work was to constitute an extension and resurfacing of the existing jockey and officials' car park, the reconstruction of existing access roads with new pavement material, the replacement of existing rubberised pavers, the installation of a new access road on the western side of the complex, the expansion of the car park at the rear of the members' area, sealing the existing dirt roads, the reconstruction of the existing bitumen road between the main entrance and the administration building, the resurfacing of the existing members' and visitors' car parks, the installation of a new hardstand area for vendors, the connection of all existing subsoil drainage pipes under the cushion track to a new perimeter collection pipe, and the construction of a new barrier shed near the 1600m start. On 3 February 2010, Contour provided a cost estimate that projected that its fees for these works would total $279,820 (excl GST), however noted that the figure was "indicative only for QR budgetary purposes" and that "[f]inal CCE fees will be calculated on the accepted construction tender or quote, for each respective item".[70] Ultimately, the fees paid to Contour for work associated with these projects from February 2010 to 30 April 2012 amounted to $352,864.63 (incl GST).[71]

7.3 For the civil works, Contour invited tenders from Carruthers, Shadforths and Blacklaw on 6 April 2010.[72] The project specifications stated that each zone would be treated as a separable portion within the contract. The first zones to be constructed were to be zone 1 (the extension and resurfacing of the existing jockey and officials' car park) and zone 9 (the resurfacing of the existing visitors' car park); the successful tenderer for those zones would then be considered the preferred contractor for the remaining zones. On 22 April 2010 Contour provided its recommendations concerning the three contractors.[73] Blacklaw submitted the lowest tender and was subsequently engaged to perform the civil works on zone 4 (the installation of a new access road on the western side of the complex),[74] zone 11 (connecting all existing subsoil drainage pipes under the cushion track to a new perimeter collection pipe),[75] redesignated zone C (work on the committee car park),[76] zone 2 (reconstruction of existing access roads with new pavement material),[77] redesignated zone A (work on the car park at the rear of the members' area),[78] zone

67 QLeave Project Finalisation Form, completed by David McDougall (Contour) on 30 November 2010.
68 Contour Consulting Engineers, Project 5206, Tax Invoice #1113 (25 May 2009) and #1185 (31 July 2009).
69 Letter from Chris Fulcher to Paul Brennan, 26 November 2009.
70 Letter from Ingrid Lambert to Paul Brennan, 3 February 2010.
71 Contour summary of invoices for Project CIV00546.
72 Letter from Andrew Davis to Jim Carruthers, 6 April 2010; Letter from Andrew Davis to Bryan Andersen, 6 April 2010; Letter from Andrew Davis to Colin Gursanscky, 6 April 2010.
73 Letter from Christopher Broadbent to Paul Brennan, 22 April 2010.
74 Email from Andrew Davis to Hans Raun, 21 May 2010, 3.19pm; Email from Andrew Davis to Hans Raun, 31 May 2010, 10.14am.
75 Email from Andrew Davis to Hans Raun, 21 May 2010, 3.10pm.
76 Email from Colin Gursanscky to Chris Fulcher, 5 May 2010; Email from Michael Sullivan to Andrew Davis, 22 June 2010.
77 Email from Andrew Davis to Colin Gursanscky, 28 June 2010, 1.56pm; Email from Colin Gursanscky to Andrew Davis, 9 July 2010; Email from Paul Brennan to Andrew Davis, 14 July 2010.
78 Email from Andrew Davis to Colin Gursanscky, 28 June 2010, 12.07pm; Email from Colin Gursanscky to Andrew Davis, 9 July 2010, 3.35pm.

6 (sealing the existing dirt roads),[79] and redesignated zone B (work on the internal roadways between the gardener's shed and the turnstiles).[80] A further separable portion, redesignated zone 4 (work on the day stables), was tendered for by Blacklaw to the value of $148,953.59 on 17 January 2011.[81] In March 2012, a closed tender process was conducted for the redesignated zone D (the reconstruction of concrete and asphalt pavements from the main ticketing entry up to the kiosk and bar area and across to the permanent marquee) in which AYT Construction Services submitted the lowest price by a substantial margin and was awarded the contract. [82]

7.4 Contour performed work on two further projects at Corbould Park: engineering and planning work related to advertising signage and a sewage pump station. The advertising signage project was comparatively small. It was completed between September 2010 and February 2011, and Sunshine Coast Racing paid Contour a total of $12,498.76 (incl GST) in fees.[83] The sewage pump station project was substantial; Contour's fees amounted to $72,845.81 (incl GST).[84] Contour conducted a closed tender process for the civil works contract with three tenders submitted, although one (Shadforths) did not conform to tender requirements.[85] As a result, the competitive process was essentially confined to only two submissions for a contract that was worth $523,377.70.[86]

8. Clifford Park, Toowoomba: Synthetic Track and Lighting Upgrade (May 2008 – July 2009)

8.1 On 28 May 2008, Mr Bentley sent a letter of offer to the Toowoomba Turf Club (TTC) concerning the construction of a synthetic track at Clifford Park and advised that QRL would be responsible for the engagement of the project manager, engineers and all relevant contractors.[87] Contour submitted a fee proposal for civil engineering, design, environmental engineering and project coordination to QRL on 29 May.[88] After the TTC accepted QRL's offer on 3 July, Contour's fee proposal was approved by QRL and a letter of engagement was signed.[89]

8.2 Contour sent out tender documents for civil works to five contractors (Ostwald Bros, Sedl Contractors, Blacklaw, Wagners and Lyway) on 15 December 2008. Also on this date, Mr Reid Sanders, then QRL Chief Stipendiary Steward, wrote to Mr Bentley to propose the appointment of Contour as project manager for the Toowoomba project. Mr Sanders acknowledged that he had previously encouraged Mr Bentley to keep the project management in-house.[90] Contour then submitted a fee proposal in relation to project management services for the proposed synthetic track at Clifford Park on 18 December 2008.[91] In quoting a fee of 1.9 per cent of the construction cost, Contour cited 3.5 per cent to 4 per cent as the current market rate for project management services on projects of this nature. The proposal noted, "If our involvement in other components of the project are reduced, we reserve the right to review the above fee structure

79 Email from Andrew Davis to Colin Gursanscky, 2 July 2010, 3.45pm.
80 Email from Andrew Davis to Colin Gursanscky, 2 July 2010, 3.35pm.
81 Email from Colin Gursanscky to David McDougall, 17 January 2011.
82 Letter from David McDougall to Paul Brennan, 2 March 2012.
83 Contour Consulting Engineers, Project 710, Tax Invoice #1686 (16 September 2010), #1775 (18 November 2010), #1824 (21 December 2010), #1920 (28 February 2011).
84 See Contour summary of invoices for Project CIV00645.
85 Letter from David McDougall to Paul Brennan, 25 March 2010.
86 Final Progress Claim from Blacklaw Civil Contractors to Contour, 31 October 2011.
87 Letter from Robert Bentley to Neville Stewart (TTC Chairman), 28 May 2008.
88 Contour fee proposal to QRL, 29 May 2008.
89 Letter of Engagement, signed 7 July 2008; Email from Reid Sanders to joan.ttc cc: Shara Reid, Robert Bentley, Malcolm Tuttle and Brett Thomson, 7 July 2008.
90 Email from Reid Sanders to Robert Bentley cc: Malcolm Tuttle, 15 December 2008.
91 Email from Ingrid Lambert to Reid Sanders cc: Brett Thomson attaching Contour Fee Proposal to QRL, 18 December 2008.

to account for losses of economies of scale with respect to our involvement."[92] Although highlighting their expertise obtained through the Corbould Park synthetic track, Contour again included the disclaimer that, "We do not profess to understand the detailed requirements of horses or the horse racing/training industries. Hence, all decisions relating to these issues remain the responsibility of Queensland Racing."[93]

8.3 Mr Sanders queried whether the fee was the best quote Contour could provide and obtained Mr Thomson's confirmation that the 1.9 per cent would be calculated on construction costs only, and not on the basis of other services provided by Contour.[94] Mr Tuttle asked Mr Sanders to "confirm that this proposal is in line with other costs of work carried out by Contour."[95] However, no quotes were obtained from other companies providing project management services so, essentially, the only measure of value for money achieved in the project management services fee for the Toowoomba project was as against Contour's own previous rates. A letter of engagement in relation to project management services for the Toowoomba project was executed by QRL and Contour on 7 January 2009.[96]

8.4 On 27 January 2009 Contour sent a tender evaluation letter to QRL recommending that the civil works contract be awarded to Blacklaw. Blacklaw was subsequently advised that its tender price of $4,082,564.13 had been accepted.

8.5 On 22 April the Toowoomba lighting upgrade contract was awarded to Toowoomba Town Lighting & Electrical (TLE). The contract sum was $1,293,567. Two other contractors had been invited to submit tenders for this contract, but one of these was considered non-compliant.[97] Ultimately, the tender competition was between TLE and Neil T Fallon Services, the company that had performed the lighting upgrade at Corbould Park. There is an unsigned contract between TLE and QRL on file dated 22 April 2009.[98] In later adjudication proceedings relating to a payment dispute, TLE claimed that the contract had not been executed until 15 June 2009.

8.6 The first race day on the new synthetic track at Clifford Park was held on 11 July 2009. Contour issued the final certificate 12 months after completion on 28 July 2010.

9. Callaghan Park, Rockhampton: Track Upgrade (December 2007 – March 2010)

9.1 Contour were engaged to provide project coordination/management and engineering design services for an upgrade to the sand and grass tracks at Callaghan Park, Rockhampton.

9.2 On 7 December 2007 Mr Brennan presented the QRL board with an outline of the problems with the track and training facilities at Callaghan Park.[99] These problems were recorded in the QRL board minutes as involving poor maintenance, incorrect soils used for track patching, a lack of drainage and the wrong quality sand being used on the training track.[100] Mr Brennan obtained board approval to spend $30,000 on a scoping exercise with Contour to provide the QRL board and executives with a better understanding of the problems at Callaghan Park. This approval was made without reference to any fee proposal from Contour or the Purchasing

92 Contour fee proposal (Project Management Services) to QRL, 17 December 2008, page 2.
93 Contour fee proposal (Project Management Services) to QRL, 17 December 2008, page 2.
94 Email from Reid Sanders to Brett Thomson cc: Shara Reid, 31 December 2008, 1.06pm; Email from Brett Thomson to Reid Sanders, 5 January 2009, 1.25pm.
95 Email from Malcolm Tuttle to Reid Sanders, Shara Reid, Robert Bentley and Paul Brennan, 19 December 2008.
96 Letter of Engagement, Contour Consulting Engineers and QRL, signed 7 January 2009.
97 Letter from Brett Thomson to Shara Reid and Robert Bentley, 22 April 2009.
98 Contract No. 0432-L between QRL and Town Lighting & Electrical P/L re: Racecourse Lighting at Clifford Park, Toowoomba, dated 22 April 2009, unsigned.
99 QRL, Board Meeting Minutes, 7 December 2007.
100 QRL, Board Meeting Minutes, 7 December 2007, page 9.

Policy. Compliance with the Purchasing Policy required tenders to have been called from three preferred contractors, or the appointment of a contractor from a panel of preferred suppliers selected following a competitive process. On 20 December 2007, Mr Thomson, Mr Sanders and Mr Brennan travelled to Rockhampton to commence planning the track upgrade works.[101]

9.3 On 11 January 2008 Contour submitted a fee proposal to QRL for preliminary engineering design services to scope the proposed upgrades to Callaghan Park.[102] The fee proposal noted that the scoping exercise was to consider the constraints and opportunities of the site, in the context of efficient and effective designs. The fee proposal stated:

> *Due to the unknown level of input required by our team, it is difficult to quantify a budget to scope this project. Subject to negotiation with yourself, we envisage providing the following services:*
>
> - *Liaison with surveyors, geotechnical engineer and other relevant specialist consultants.*
> - *Liaison with Queensland Racing on design options.*
> - *Provision of several options in plan format for Queensland Racing's consideration and/or presentation to other stakeholders.*
> - *Provision of budget costings for short listed options.*
> - *Consideration of ancillary issues such as treated effluent water supply for irrigation.*
> - *Review of surface and subsurface drainage requirements.*
> - *Engineering advice on related issues.*

9.4 Contour estimated their fees, as a guide only, at $23,000 (excl GST). On 16 January 2008, Mr Brennan executed Contour's letter of engagement on behalf of QRL.[103] For the works performed pursuant to this fee proposal dated 11 January 2008, Contour invoiced approximately $41,031.82 (excl GST) which included additional services outside of the fee proposal relating to "amendments to concept drawings, revised estimates and liaison with Warren Williams and others" and disbursements for flights for Contour employees to and from Rockhampton.

9.5 On 22 September 2008 Contour submitted a further fee proposal to QRL for engineering design services and project coordination/project management. Fixed fees and hourly rates were proposed for various elements of the engineering design works and a fee of $85,000, as a budget only, was proposed for project coordination/management services.

9.6 On 7 November Mr Brennan prepared a paper for the QRL board which detailed the project costs of the upgrade at Callaghan Park.[104] The board minutes record:

> *The Chairman advised the Board that the costs of the reconstruction had increased from the estimated figure of $3M. QRL had allocated $3M in the 2008/2009 budget and an additional $3M will be required to finalise this project. Whilst being above the initial budgetary figure Mr Brennan considered that the board had no option but to proceed as the track was nearing a WH&S [workplace health and safety] issue.*
>
> *The Chair noted the paper gave a satisfactory explanation of the increase over budgeted estimates. The costs at the time of budget preparation were preliminary estimations and further investigations revealed that the scope of works required was more extensive than originally anticipated.*

101 Letter of engagement from Paul Brennan to Contour Consulting Engineers, 11 January 2008.
102 Letter from Brett Thomson to QRL, 11 January 2008.
103 Letter of Engagement from Paul Brennan to Contour Consulting Engineers, 16 January 2008.
104 QRL, Board Meeting Minutes, 7 November 2008.

9.7 The QRL board minutes record that Mr Anthony Hanmer inquired about the effect the budget increase would have on QRL's cash flow and reserves. Mr Adam Carter advised that the additional investment would be accommodated within QRL's reserves. The QRL board subsequently approved the budget of $6 million for the upgrade of Callaghan Park.

9.8 In late December 2008 and early January 2009, Contour invited tenders for the civil construction works for the sand and grass track upgrades in two phases:

- Phase A – Sand Track construction (commencing 1 March 2009 to be completed by 1 July 2009)
- Phase B – Grass Track (Course Proper) construction (commencing 1 July 2009 to 1 November 2009).

9.9 Invitations to tender for the civil works were sent by Contour to eight contractors. Tenders closed on 23 January 2009. On 13 February, Contour advised QRL that the total project budget based on the shortlisted tenders was $5,953,500.[105] Then, on 9 March, Contour invited Shadforths to tender for the civil works and requested a tender submission by 11 March.[106] Shadforths submitted a tender submission on 11 March for $3,998,866.20 (excl GST).[107] It is not clear on the documents before the Commission why Shadforths was invited to tender after the close of the invitation to tender to the other contractors.

9.10 On 20 March, Contour provided a tender analysis to QRL noting that, from the nine tender invitations, only four contractors tendered a price.[108] Of those four contractors, Contour recommended the engagement of Shadforths noting that Shadforths had the lowest unadjusted price and that Contour considered them capable of managing the upgrade, having delivered on numerous projects of similar size and scope.[109] On 23 March 2009, Mr Brennan advised Contour that "Queensland Racing has accepted the advice of Contour and is happy to appoint Shadforths as the contractor for the Rockhampton Project."[110] Shadforths was advised on 31 March that it had been awarded the contract based on its tendered price.[111]

9.11 A contract for the civil works was subsequently executed in about July 2009 between Shadforths and QRL for the price of $4,961,790.68 (incl GST).[112] The procurement process culminating in this contract was not in compliance with the Purchasing Policy, which required a public tender.

9.12 Contour conducted further tender processes, including for the supply of turf and irrigation works. On 16 June 2009, Mr Tim Freeman of Contour emailed Mr Brennan an analysis of the tenders received for the supply of turf.[113] Mr Freeman stated that based on price and availability Contour had shortlisted and inspected the farms of two suppliers. Contour recommended Australian Lawn Concepts at a price of $383,000 (including maintenance) citing, among other things, that the farms of Australian Lawn Concepts were more favourable and that they offered a price advantage. On 17 June Mr Brennan advised Mr Freeman that "based on your recommendation I am happy to proceed with the purchase of Turf from Australian Lawn Concepts."[114] The procurement of this contract was not in compliance with the Purchasing Policy, which required a public tender.

105 Email from Timothy Freeman to Paul Brennan cc: Brett Thomson, 13 February 2009.
106 Letter from Contour to Shadforths Civil Engineering, 9 March 2009.
107 Letter from Dudley Farrow (Shadforths) to Contour, 11 March 2009.
108 Letter from Timothy Freeman to QRL, 20 March 2009.
109 Letter from Timothy Freeman to QRL, 20 March 2009.
110 Email from Paul Brennan to Ingrid Lambert cc: Brett Thomson, 23 March 2009.
111 Letter from Timothy Freeman to Ray Shadforths, 31 March 2009.
112 The exact date the contract was executed is unknown as the Commission is only in possession of an unsigned contract dated 1 May 2009. Later correspondence indicates the contract may have been signed in or around July 2009, see letter from Christopher Broadbent to Ray Shadforth and Michael Bishop, 8 July 2009.
113 See tender analysis: Email from Timothy Freeman to Paul Brennan, 16 June 2009.
114 Email from Paul Brennan to Timothy Freeman, 17 June 2009.

9.13 On 18 June, Mr Freeman emailed Mr Brennan an analysis of the tenders received for the irrigation works for the track upgrade.[115] Mr Freeman stated that Contour had approached four contractors. Of those four contractors, two contractors had declined to quote a price. Mr Freeman noted that the two contractors who had tendered a price, CQ Water and Turf Irrigation Services, had undertaken an inspection of the site to verify costs and were offered the opportunity to re-price the works in subsequent negotiations. Contour recommended the engagement of Turf Irrigation Services for a price of $255,000 (excl GST) citing, amongst other things, that they had a history of work for QRL at Toowoomba. Later that day, following approval from QRL, Turf Irrigation Services were advised they had been awarded the tender.[116] The procurement of this contract was not in compliance with the Purchasing Policy, which required a public tender.

9.14 For the engineering and project coordination/management services provided by Contour pursuant to the fee proposal dated 22 September, Contour charged approximately $402,223.19 (excl GST) which included additional services outside the scope of the fee proposal and disbursements (such as flights for Contour employees to and from Rockhampton).

9.15 The official opening of the Rockhampton sand track occurred in late July 2009.

9.16 On 8 September, Contour provided a further fee proposal for a fixed fee of $12,000 (excl GST) for engineering services relating to the preparation of a conceptual irrigation water supply management strategy.[117] The fee proposal arose following discussions with Rockhampton Regional Council regarding the course irrigation being supplemented by treated effluent from the Council's treatment plant neighbouring Callaghan Park. The total fees invoiced by Contour pursuant to this fee proposal were $12,000 (excl GST).

9.17 The official opening of the grass course proper was on 29 January 2010.[118]

9.18 On 4 March 2010, Contour submitted a revised project budget to QRL which had increased to $6.5 million.[119] Shadforths submitted its final progress claim, evidencing practical completion of the construction of the civil works on 31 March 2010.[120]

10. Albion Park: Harness Track Upgrade Works (September 2009 – February 2010)

10.1 On 19 June 2009, the Queensland Harness Racing Limited (QHRL) Commercial Advisory Committee resolved to obtain a cost for upgrading and repairing the harness racing track at Albion Park Raceway from harness racing track specialist Mr Graham Maher.[121] In September 2009, QHRL commissioned Contour to provide engineering services for the upgrade of the track in consultation with Mr Maher. Turns three and four of the track were upgraded to enhance the geometry of the track and the Creek circuit was resurfaced with a sand mix. The Commission has not located any evidence indicating a competitive process was undertaken to appoint Contour for this project.

10.2 The development costs were originally estimated at $287,000 (excl GST) by Contour. This was comprised of $251,700 in construction costs and $35,300 in consultants' fees.[122] QHRL sourced

115 See tender analysis: email from Timothy Freeman to Paul Brennan cc: Brett Thomson, 18 June 2009.
116 Email from Timothy Freeman to Paul Brennan, 18 June 2009.
117 Letter from Contour to QRL enclosing fee proposal for conceptual irrigation water supply management strategy, 8 September 2009.
118 Email from David Rowan to Brett Thomson cc: Nadene Townsend, 27 January 2010.
119 Email from Timothy Freeman to Paul Brennan cc: Sarah Walker and Brett Thomson, 4 March 2010.
120 Letter from Stuart Dodunski to Contour, 31 March 2010.
121 QHRL, Commercial Advisory Committee Minutes, 19 June 2009.
122 Contour Consulting Engineers, Estimate of Development Costs, Proposed Harness Racing Track Reconstruction, 22 September 2009.

crusher dust material for the base course of the track from Leighton Sand and Gravel.[123] Contour undertook a closed tender process for the project, inviting submissions from five local contractors of which four did not respond.[124] Gary Deane Constructions Pty Ltd submitted a tender price of $135,233.40 (excl GST), which was well within budget and accepted by Contour and QHRL.[125] Following discussions with QHRL on 12 January 2010, this price was later reduced to $132,770.60 after it was decided to remove an item from the final tender.

10.3 There is insufficient documentation on the Contour file to determine total final expenditure on the project. The total payment to contractor Gary Deane Constructions was $148,259.73.[126] At completion of the project, Contour's fees for engineering services were $31,402.25 (incl GST) in total. The consultants' fees charged by Contour for its services were not in accordance with the fee estimate provided to QHRL on 22 September 2009.[127] Instead of a percentage of construction costs as set out in the estimate, Contour claimed fixed lump sums for the civil engineering services and management of the tender process, and an hourly rate for site supervision work.[128]

11. Deagon: Extension of Administration Facility (October 2010 – April 2011)

11.1 Contour performed engineering services in relation to the extension of the RQL administration building facilities at Deagon. The total fees charged by Contour amounted to $49,472.50 (incl GST). Although the general nature of the construction project did not require a contractor with specialist expertise, RQL again commissioned Contour's services without conducting a competitive process. Contour submitted a fee proposal for $35,200 (excl GST) that was executed by Mr Tuttle as chief executive officer on 19 October 2010.

11.2 During the same period when extension works were undertaken at Deagon, RQL engaged Contour to provide engineering, architectural and project management services in relation to a proposed relocation of the RQL offices from Deagon to Corbould Park. No Contour fee proposal for these services has been identified by the Commission. The total amount paid to Contour by RQL in relation to this project was $38,159.28 (incl GST).[129]

12. Albion Park: Redevelopment Application (January 2011 – May 2011)

12.1 RQL engaged Contour to provide engineering and planning services in relation to the proposed redevelopment of Albion Park. RQL commissioned Contour's services without conducting a competitive process and without reference to the Purchasing Policy. On 19 January 2011, Mr Snowdon requested Contour to provide an initial estimate of fees for the preparation of hydrology, traffic, geotechnical and similar reports for a material change of use development application.[130] The intention was to redevelop Albion Park for sports and recreation use. Mr Snowdon had approached the Queensland Reds and the proposed new Brisbane rugby league team as potential users for the site. Contour provided an indicative fee budget to

123 Email from Damian Raedler to Christopher Broadbent, 27 October 2009.
124 Letters from Christopher Broadbent to Garry Deane Constructions Pty Ltd, Probuild Civil (Qld) Pty Ltd, Acadia Landscapes, RDS Civil Pty Ltd and Pensar Pty Ltd, 3 December 2009; Letter from Christopher Broadbent to Harness Racing Queensland, 12 January 2010.
125 Letter from Christopher Broadbent to QHRL, 12 January 2010.
126 Letter from Christopher Broadbent to QHRL, 8 February 2010.
127 Contour Consulting Engineers, Estimate of Development Costs, Proposed Harness Racing Track Reconstruction, 22 September 2009. Contour estimated its fees for civil engineering as $20,200 (excl GST) at 8 per cent of the construction cost and $5,100 for construction supervision (if required) at 2 per cent of the construction cost.
128 See Contour invoices #INV01251, #INV01310, #INV01411. The amounts invoiced to QHRL were: Civil Detailed Design and Documentation, $15,000 (excl GST); Tendering of Civil Works, $4,500 (excl GST); Site Supervision, $5795 (excl GST).
129 See Contour summary of invoices for Project CIV00704.
130 Email from Mark Snowdon to Glen Mallett, Brett Thomson, Andrew Stevens, 19 January 2011.

Mr Snowdon on 28 January 2011.[131] The indicative fee budget included the estimated costs for undertaking 15 assessments in relation to the development proposal.

12.2 Mr Snowdon tabled a report at the RQL board meeting on 4 February 2011 outlining the actions and costs required to be undertaken in order to create and lodge a Preliminary Application for the Albion Park Raceway. The board approved the expenditure of $50,000 for the Preliminary Application to be lodged with the Brisbane City Council.[132]

12.3 TTM Consulting (Qld) Pty Ltd undertook a preliminary traffic assessment for the proposed redevelopment. No competitive process was undertaken to appoint TTM Consulting. On 31 March 2011, TTM Consulting issued a tax invoice to RQL for $12,500 (excl GST) for traffic engineering services. This was the same fee proposed by TTM Consulting on 16 February 2011.[133] Mr Thomson reviewed the invoice and advised Mr Snowdon that the services provided generally concurred with the brief and budget.[134]

12.4 The total amount paid to Contour by RQL for the proposed Albion Park redevelopment project was $30,522.17 (incl GST).[135]

13. Industry Infrastructure Plan

13.1 Contour provided two stages of engineering and project coordination services to RQL in the development of the Industry Infrastructure Plan (IIP): first, in relation to the preparation of strategic asset management plans for racing infrastructure that formed part of a submission to government on 16 September 2010; and second, the provision of information in support of business cases required to obtain funding approval from government. The master plan development process involved analysis of the following racecourses for the Strategic Asset Management Plan (SAMP): Beaudesert, Cairns, Caloundra, Deagon, Ipswich, Gold Coast, Mackay, Rockhampton, Toowoomba and Townsville. Fees specifically invoiced in relation to the engineering advice and preliminary conceptual drawings provided by Contour during the SAMP stage amounted to $365,586.91 (incl GST).[136]

13.2 RQL's submission to government dated 16 September 2010 annexed Contour's company profile and proposed Mr Thomson's engagement as the civil engineer overseeing all IIP projects.[137] Contour envisaged its role as a type of *partnership* arrangement with RQL for the delivery of the IIP, whereby Contour would assume responsibility for all IIP projects as both project engineers and project coordinators.[138]

13.3 On 31 August 2011, following the approval of the amended IIP, Contour submitted a fee proposal in the amount of $2.76 million to "provide professional engineering and project coordination services to assist RQL in the provision of information in support of Business Cases, as required by State Government funding protocols for the Industry Infrastructure Plan" in relation to the Cairns, Townsville, Rockhampton, Deagon, Beaudesert and Gold Coast projects.[139] Shortly after commencing employment at Contour in late March 2012, Mr Brennan wrote to Mr Carter and Mr Snowdon to suggest that:

131 Email from Nadene Townsend to Mark Snowdon cc: Brett Thomson, Chris Fulcher, 28 January 2011.
132 RQL, Board Meeting Minutes, 4 February 2011.
133 Letter from Brian Camilleri to RQL, 16 February 2011.
134 Letter from Alison Pitts to Mark Snowdon, 6 April 2011.
135 See Contour summary of invoices for Project CIV00621.
136 Contour Consulting Engineers, Invoice #1657a, 25 August 2010 ($95,581.05 incl GST), Invoice #1683a, 31 August 2010 ($69,994.38 incl GST), Invoice #1729, 30 September 2010 ($53,317.06 incl GST, Invoice #1771, 31 October 2010 ($67,870.28 incl GST), Invoice #1813, 30 November 2010 ($43,966.18 incl GST), Invoice #1856, 23 December 2010 ($34,857.96 incl GST).
137 RQL, *Submission to Queensland Government*, 16 September 2010, page 5.
138 See, Email from Brett Thomson to Michael Hodges (Nettletontribe) cc: Mark Snowdon (Mannix), 1 October 2010; Contour Consulting Engineers, typed notes with handwritten annotation "BAT" (end of 2010); email from Brett Thomson to Mark Snowdon cc: Chris Fulcher, Ingrid Lambert and Anthony Shelley, 18 October 2010.
139 Contour fee proposal to RQL, 31 August 2011.

Due to the level of scrutiny that this issue may receive, Contour believes the best option is to utilize the proposal that was provided some 7 months ago and to treat the two outstanding issues by exception[140] [referring to increased expenditure on the Gold Coast project and the inclusion of the Ipswich project].

The fee proposal was then retrospectively executed by Mr Bentley on 29 March 2012.

13.4 Pursuant to an agreement approved by the Treasurer on 5 December 2011, costs incurred by RQL in the engagement of external consultants to assist with the development of business cases were to be reimbursed by government through the RICDS to the value of $2.75 million.[141] RQL received a payment of $3,075,919.64 from the State government for these expenses during caretaker mode on 2 March 2012, which was comprised of $2,596,290.58 for external consultants' fees, $200,000 for internal expenses and GST.[142] Contour performed planning work on the following major projects included within the IIP.

Beaudesert

13.5 RQL paid Contour $732,029.65 (incl GST) in fees for SAMP/IIP preliminary design, engineering, planning and project management works associated with the Beaudesert Racecourse.[143] Towards the end of 2011, there was concern within RQL that Contour was completing work on the Beaudesert project that was beyond its engagement, with Mr Snowdon complaining in an email to Mr Tuttle on 14 November 2011 that Contour "were given clear instruction to only work on material that will provide the necessary information for the business case and they have proceeded with detailed civil and architectural design." However, subsequent correspondence suggests that the additional work was done with at least tacit RQL approval. On 5 March 2012, RQL received $769,448 (excl GST) from government as reimbursement for the cost of engaging external consultants to assist in the preparation of the Beaudesert business case. According to RQL's spreadsheet summary of Beaudesert Infrastructure Plan invoices to 31 December 2011 provided to government to support the funding grant, Contour's fees constituted $647,898.23 (excl GST) of the total amount claimed. Construction was not commenced during the relevant period.

13.6 The Construction Cost Budget Report prepared by Contour for the Beaudesert Racecourse under the SAMP proposed works originally had a projected total cost of $20,769,325. This included the construction of grass and sand tracks, a stables complex, car parks and substantial upgrades to public buildings and racing infrastructure.[144] Under the IIP, the reduced scope of works included a reconstruction of the grass course proper, a new sand track, demolition of grandstand, installation of training lights, and the construction of a new public facility as well as a new jockeys' and stewards' facility.[145]

13.7 The business case for Beaudesert sought funding of $6,502,029, but noted that the total budget for the works was $7,271,512, which included the sum already claimed from government for RQL's expenditure on the services of external consultants in order to prepare the business case.[146] In correspondence to the Office of Racing regarding the terms of the proposed funding agreement, Mr Snowdon acknowledged that while the RQL Purchasing Policy required an open tender for contracts over $100,000, a closed tender process had already been conducted for the Beaudesert civil works and "we are intending to engage consultants under 'sole supplier' status due to the urgency of the project."[147] The basis for the claimed urgency was to enable the

140 Email from Paul Brennan to Adam Carter and Mark Snowdon, 29 March 2012, 6.36am.
141 Letter from Andrew Fraser to Robert Bentley, 5 December 2011.
142 DEEDI, Electronic Funds Transfer Advice, 2 March 2012.
143 See Contour summary of invoices for Project CIV00377, excluding Invoices #471, 500, 536 and 565 associated with the 2008 flood rectification works at Beaudesert.
144 Contour Consulting Engineers, Construction Cost Budget Report, Beaudesert Racecourse, September 2010.
145 RQL, *IIP Business Case for Beaudesert Racecourse, Beaudesert*, submitted to the Office of Racing on 24 January 2012, page 9.
146 RQL, *IIP Business Case for Beaudesert Racecourse, Beaudesert*, submitted to the Office of Racing on 24 January 2012, page 12.
147 Email from Mark Snowdon to Carol Perrett (Office of Racing), 1 February 2012, 7.54pm.

facilities at Beaudesert to absorb the Gold Coast racing program, so that the Gold Coast upgrade could be completed prior to the 2013 Magic Millions Racing Carnival. Subsequently, clauses within the funding deed for Beaudesert that required competitive procurement processes to be undertaken by RQL were removed by Crown Law at the request of the Office of Racing.

13.8 The Beaudesert business case was approved on 15 February 2012, with the first funding instalment of $3,949,286.76 (excl GST) paid to RQL on 17 February 2012.[148] On 6 March 2012, RQL lodged a revised business case with the Office of Racing that sought $940,000 in further funding to allow for a reasonable contingency for the project, the provision of training lights and additional expenditure on the public facility.[149]

Cairns

13.9 Between 2010 and 2012, Contour delivered design and project coordination services in relation to planned upgrade works of the Cannon Park Racecourse in Cairns. These services were originally delivered as part of the SAMP, and later towards the IIP.[150]

13.10 In June 2011, before submitting a preliminary project budget, Contour sought fee proposals for a detailed survey of the site from three local surveyors.[151] Each company responded with quotes ranging from $41,350 (excl GST) to $49,900 (excl GST). Although three quotes were obtained for a contract of less than $100,000, the absence of RQL selection of these companies as preferred suppliers meant that the process was not compliant with the Purchasing Policy.

13.11 On 6 August 2011 Contour provided RQL with a preliminary project budget.[152] This included $3,255,502 in construction works for course proper drainage and general improvements; course proper irrigations improvements; remediation works to existing stables; electrical and sewerage upgrade; and communications/electrical/timing/fibre optics. The budget also included $864,963 for ancillary expenses, including project management; geotechnical; and civil engineering. The total project budget was $4,326,489 (excl GST).

13.12 On 7 September 2011 Mr Bentley apparently advised Contour that work on the Cairns project needed to be fast-tracked. On this basis, Contour sought to undertake geotechnical testing within seven to 10 days.[153] Contour indicated it would seek quotes from two geotechnical engineering firms, and did so.[154] The two quotes were similar, and so selection was based on availability to commence the work immediately. This process did not comply with the Purchasing Policy, which required three quotes be obtained for expenditure of this value where pre-existing preferred supplier arrangements were not in place.

13.13 On 20 September 2011 Contour provided a revised preliminary project budget to RQL. This budget narrowed the scope of the works to be done and removed the electrical, sewerage and communications upgrades. The total revised budget was $1,960,000 (excl GST).[155] It appears that the scope of the project was decreased due to budgetary considerations related to the government funding for the SAMP/IIP.[156]

13.14 In September 2011 Contour issued tender documentation for part of the civil works being the design and construction of irrigation services to the turf track at Cannon Park Racecourse. It sought tenders for two alternative options and received tender responses from four contractors.

148 Funding Deed between the State of Queensland (acting through DEEDI) and RQL re: Beaudesert Racecourse, executed 16 February 2012.
149 Letter from Robert Bentley to Michael Kelly, 19 April 2012.
150 RQL, Board Meeting Minutes, 6 August 2010, pages 6-7.
151 Letters from Contour to Brazier Motti, Terra Modus Surveying and Charles O'Neill Pty Ltd, 21 June 2011.
152 Email from Contour to Mark Snowdon and Paul Brennan cc: Brett Thomson and Chris Fulcher, 6 August 2010.
153 Email Chris Fulcher to Kate Broadbent cc: Mark Snowdon, Brett Thomson, 8 September 2011.
154 Email Chris Fulcher to Contour and RQL cc: Mark Snowdon, 9 September 2011.
155 Email Chris Fulcher to Mark Snowdon cc: Paul Brennan, Brett Thomson, 20 September 2011. Attachment: Contour Preliminary Project Budget, 14 September 2011.
156 Email Chris Fulcher to Mark Snowdon cc: Paul Brennan, Brett Thomson, 20 September 2011.

The quote from each tenderer for each option was more than $100,000.[157] The form in which the tender documentation was provided to interested tenderers is not apparent from the project file. There is nothing to suggest that an open tender was conducted as required by the Purchasing Policy.

13.15 The Contour project file and invoices issued to RQL demonstrate that Contour did not undertake any significant work on this project subsequent to the call for tenders for the irrigation system. No assessment, decision or recommendation to RQL in respect of the tenders which were received appears to have been conducted.

13.16 On 20 October 2011 Contour provided RQL with a further revised preliminary project budget. The budget further reduced the scope of services so that the revised total budget was $1,909,715 (excl GST).[158]

13.17 Later, on 28 November, Contour provided RQL with a revised fee proposal for $56,179, for services to "complete concept and design to tender documentation phase". The letter confirmed Contour's understanding that construction phase services had been removed from the scope of Contour's work and were to be undertaken by others.

13.18 The invoices issued by Contour to RQL for project and coordination management, concept engineering, civil engineering, and flooding and drainage amounted to $60,819.50 (excl GST).[159] This was $4,640 more than the final revised fee proposal.

13.19 The government approved the business case for Cannon Park on 16 February 2012, with a budget of $1.95 million.

13.20 RQL subsequently prepared its own tender documentation for the design and construction of the upgrade to the track, including the irrigation system which had already been subject to a tender process. An open tender process was conducted, with the advertisement placed in the *Cairns Post* on 7 March 2012.[160] The closing date for tenders was 22 March 2012 to accommodate the 14-day advertising period prescribed by the government funding agreement.

13.21 On 16 March 2012 Contour emailed a turf supplier, seeking to become part of the supplier's tender. Contour offered its preliminary design drawings on the basis that the supplier would pay Contour for the designs if they won the tender.[161] The subsequent development of the project occurred outside the relevant period.

Deagon

13.22 Contour's involvement with the Deagon Racecourse upgrade began on 6 August 2010 when Mr Christopher Broadbent, on behalf of Contour, submitted to Mr Brennan of RQL an estimate of $47,628,075 for the redevelopment work, with a 5 per cent contingency of $2,381,404, for a total of $50,009,479.[162] This redevelopment was to include, among other things, a new 20m wide harness racing circuit, lighting for that harness circuit, new greyhound track infrastructure (including tracks, fencing, lure, rail and starting boxes), lighting for that greyhound infrastructure, new public facilities, a new racing science centre, a new 400-space car park, stables for 120 horses and tie-up stalls for 120 dogs. Following a series of meetings, the budget was revised

157 Tenderer E option 1 was priced at $115,092 and option 2 at $273,218. The company offered a 2 per cent discount on either option if it was awarded the contracts for both Beaudesert and Cairns, making its quote approximately $112,290 and $266,754. Tenderer F provided a quote for one option only, for $276,250 (excl GST). Tenderer G quoted $199,700 and $285,800. Tenderer H quoted $166,630 and $248,166 (all excl GST).
158 Preliminary Project Budget, Cannon Park Racecourse: Upgrade Works to Existing Course Proper, 20 October 2011.
159 Invoice 27 July 2011, $1,027.50; 6 September 2011, $7,410; 29 September 2011, $20,065; 26 October 2011, $27,342; 13 December 2011, $3,775; 9 February 2012, $560; 14 March 2012, $640 (all excl GST). Contour also invoiced $14,172 in fees related to the Cairns component of the SAMP/IIP.
160 Email from Todd Martindale to Mark Snowdon cc: Deanna Dart, 6 March 2012.
161 Email Brett Thomson to Joe McCullagh (StrathAyr) cc: Chris Fulcher, 16 March 2012.
162 Email from Christopher Broadbent to Paul Brennan, 6 August 2010.

to a total of $58,000,589 on 15 September 2010,[163] $56,730,213 on 5 October 2010,[164] and $57,548,178 on 6 October 2010.[165] Contour issued its final invoice for the Deagon project in February 2012. Planning approval was unlikely so the Deagon development was discontinued.

13.23 At the outset of the site upgrade, Contour sought tenders for surveying services. On 24 August 2010, Definium submitted a quote of $18,100 (excl GST) based on the scope of the works outlined in Contour's fee proposal.[166] On 26 August, THG and KHA submitted quotes of $28,150[167] and $18,200[168] (both excl GST) respectively. Contour forwarded these quotes to RQL along with their comments on each subcontractor on 27 August 2010.[169] In this instance, unusually, Contour did not identify a recommended subcontractor and simply requested that RQL accept one of the fee proposals by signing and returning the relevant letter of authority. Mr Brennan approved KHA's tender on 31 August 2010.[170] This initial process preceded the ongoing engagement of KHA for the Deagon project, through which, according to the summary of invoices provided to the Office of Racing by Mr Tuttle on 2 February 2012, work to the value of $60,470 (excl GST) was performed.

13.24 RQL instructed Contour to maintain strict confidentiality amongst subcontractors working onsite. On 3 September 2010, Mr Brennan sent an email to Mr Fulcher and Mr Andrew Davis asking them to advise the surveyors that, "...if they are spoken to by anyone at the site that they aren't to provide any detail in relation to the work they are undertaking. We have stated to our staff on the grounds that the surveyors will be coming next week to finalise survey for new training and meeting rooms and to review the lay of the land for the implementation of a water storage facility at the complex."[171] Mr Davis forwarded this requirement to KHA the same day. [172]

13.25 On 15 June 2011, Duke Environmental wrote to Contour outlining a fee of $15,265 (excl GST) to undertake a lighting audit, develop a waste management/recycling plan and a waterways and wetlands survey.[173] On 17 June 2011, Duke Environmental wrote again to Contour particularising a further fee of $24,640 (excl GST) relating to an acid sulphate assessment, groundwater testing, a noise emission impact assessment, a traffic noise impact assessment and a conceptual stormwater management plan.[174] Due to the relationship between Contour and Duke previously explained, all engagements concerning Duke Environmental on the Deagon project were conducted without any competitive processes or independent fee-checking to ascertain whether value for money was being achieved.

13.26 At a meeting with government on 8 November 2011, RQL was asked to discuss "matters including procurement and probity" and explain the "special relationship" between Contour and Duke Environmental.[175] In an email dated 18 November, Mr Snowdon advised Mr Thomson and Ms Duke of the concerns expressed by government and queried a $17,810.00 (excl GST) invoice provided by Contour on behalf of itself and Duke in relation to a public meeting concerning the Deagon project.[176] Mr Snowdon disputed that the work presented by Contour and Duke

163 Contour Consulting Services, Strategic Asset Management Plan, Deagon Racecourse, Rev C, September 2010.
164 Email from Christopher Broadbent to Mark Snowdon, 5 October 2010.
165 Email from Christopher Broadbent to Mark Snowdon, 6 October 2010.
166 Email from Ian Seeto to Andrew Davis, 24 August 2010.
167 Email from Adam Nagel to Andrew Davis, 26 August 2010.
168 Email from Josef Petelski to Andrew Davis, 26 August 2010.
169 Letter from Andrew Davis to Paul Brennan, 27 August 2010.
170 KHA Confirmation of Acceptance, 31 August 2010.
171 Email from Paul Brennan to Chris Fulcher and Andrew Davis, 3 September 2010.
172 Email from Andrew Davis to Josef Petelski, 3 September 2010.
173 Duke Environmental, Letter of Engagement, 15 June 2011.
174 Duke Environmental, Letter of Engagement, 17 June 2011.
175 Email from Mark Snowdon to Paula Duke and Brett Thomson cc: Malcolm Tuttle, Paul Brennan, Adam Carter, Shara Reid, Deanna Dart and Chris Fulcher, 18 November 2011.
176 Email from Mark Snowdon to Paula Duke and Brett Thomson cc: Malcolm Tuttle, Paul Brennan, Adam Carter, Shara Reid, Deanna Dart and Chris Fulcher, 18 November 2011.

reflected the hours of work claimed and requested that in future Duke prepare independent fee submissions and provide these directly to RQL. Mr Thomson sent an explanation to Mr Snowdon on 22 November 2011 in which he stated that "Contour have a bona fide business relationship with Duke Environmental" and that "prior to the IIP projects, we have made known to RQL the relationship between the directors of Duke Environmental and Contour (Marriage between Brett Thomson and Paula Duke, and Brett Thomson's part ownership of Duke Environmental)." Mr Thomson presented Duke Environmental as simply providing "human resourcing to Contour on an 'arms-length' commercial basis" and declared that "[a]ll environmental engineering deliverables and outputs as sourced by RQL are from Contour."[177]

13.27 Subsequently, Ms Duke sent a fee proposal letter to Mr Thomson on behalf of Duke Environmental concerning preparation for and attendance at the meeting that had occurred on 17 November 2011, as well as three future community consultation sessions regarding the Material Change of Use development application for Deagon.[178] The fees claimed were significantly reduced – for example, Ms Duke reduced her hourly rate from $265/hr to $215/hr and claimed five hours work instead of the eight hours claimed on the original invoice. Mr Fulcher approved this proposal on behalf of Contour on 22 November 2011.

13.28 In the fee proposal to RQL dated 31 August 2011, Contour estimated a budget of $1.65 million to provide engineering and project coordination consulting services associated with the preparation of the IIP business case for Deagon. Contour provided invoices to the Commission indicating that the total fees received by Contour in relation to the Deagon racecourse upgrade amounted to $468,147.57 (incl GST).[179] Of the $635,417.36 that was claimed back from government in relation to Deagon through the agreement to reimburse external consultants' costs for the preparation of business cases, $411,230.74 (excl GST) was for Contour fees.

Gold Coast

13.29 Between 2010 and 2012, Contour provided engineering and project management services to RQL for the proposed upgrade to the Gold Coast Racecourse. Contour's services also included the preparation of conceptual drawings and the undertaking of site assessments. On 12 October 2009, Contour submitted a fee proposal to provide preliminary civil engineering services, a preliminary flood level assessment, project coordination and an additional survey in relation to the project. The proposal was for a total of $73,800.

13.30 In September 2010, Contour provided a construction cost report and preliminary budget to RQL for the entire project. The object of the proposal was to upgrade the infrastructure on the existing site and associated facilities. The preliminary project budget was $48,354,704 (excl GST). This included $32,391,251 (excl GST) in construction works, $6,335,000 (excl GST) for a new member's facility, $7,325,848 (excl GST) in ancillary expenses and a five per cent contingency of $2,302,605 (excl GST).[180]

177 Email from Brett Thomson to Mark Snowdon and Paula Duke cc: Malcolm Tuttle, Paul Brennan, Adam Carter, Shara Reid, Deanna Dart and Chris Fulcher, 22 November 2011.
178 Letter from Paula Duke to Brett Thomson, 22 November 2011.
179 See Contour summary of invoices for Project CIV00380.
180 Contour Consulting Engineers, Construction Cost Budget Report, Gold Coast Racecourse, September 2010.

13.31 In October 2010, Contour sought a fee proposal from Bennett & Bennett to undertake additional survey works at the Gold Coast site.[181] Despite the requirement to obtain at least three quotes under the RQL Purchasing Policy, Contour did not seek fee proposals from any other contractors. Bennett & Bennett had previously been engaged by the Gold Coast Turf Club (GCTC) and its various consultants to undertake survey work.[182] Bennett & Bennett submitted a fee proposal of $14,900 (excl GST) and were authorised to proceed with the works on 28 October 2010.[183]

13.32 In November 2010, Duke Environmental were invited by Contour to submit a fee proposal to undertake environmental assessments of the proposed project. On 30 November, Duke submitted a fee proposal of $130,005 (excl GST).[184] After reviewing Duke's fee proposal, Mr Snowdon raised concerns in relation to the budget and lack of competitive tender process undertaken, asking "[f]or this amount of fees, shouldn't we be seeking several quotes for comparison and transparency?"[185]

13.33 The RQL Purchasing Policy at the time required the board's discretion to waive an open tender process for contracts over $100,000. However, the board does not appear to have done so. Duke Environmental submitted two further amended fee proposals to Contour. After removing two soil assessment investigations from the scope of works, Contour engaged Duke on 15 December 2010 at a revised fee of $109,988 (excl GST).

13.34 Contour sought fee proposals from three local geotechnical specialists to undertake investigations at the site. Morrison Geotechnic Pty Ltd submitted a cost estimate of $14,987.50 (excl GST) and Soil Surveys Engineering Pty Ltd put forward a proposed estimate of $17,545 (incl GST).[186] Douglas Partners Pty Ltd submitted a more expensive quote of $40,315 (incl GST).[187] On 10 December 2010, Soil Surveys Engineering submitted a revised fee proposal of $12,320 (incl GST).[188] This quote was accepted by RQL on 20 December 2010.

13.35 The business case for the GCTC was approved by government on 16 February 2012, just prior to the commencement of the caretaker period. It designated that the third synthetic track was to be installed at the Gold Coast, with an allocated budget of $4.3 million. Other budgeted upgrades included public and members facilities ($9.4 million) and track upgrades ($26.1 million). Between August 2010 and March 2013, the total payment to Contour by RQL in relation to the Gold Coast project was $443,561.99 (incl GST).[189] This amount included $51,674.70 for engineering services undertaken by Duke Environmental.[190] Correspondence from Contour to Mr Snowdon on 22 June 2011 suggests that complications with the flood modelling process may have had a cost impact upon the project.[191]

Ipswich

13.36 During the relevant period, the total of the fees charged to RQL by Contour for preliminary engineering and drafting services associated with the SAMP and IIP was $72,125.91.[192]

181 Letter from Chris Fulcher to Grant Pennycuick, 26 October 2010.
182 Letter from Grant Pennycuick to Mark Snowdon, 27 October 2010.
183 Letter from Grant Pennycuick to Mark Snowdon, 27 October 2010.
184 Letter from Paula Duke and Martina McGrergor to Brett Thomson, 30 November 2010.
185 Email from Mark Snowdon to Russell Thomson cc: Brett Thomson, 2 December 2010.
186 Letter from L Bexley to Russell Thomson, 6 December 2010; Letter from P Elkington to Russell Thomson, 6 December 2010.
187 Letter from Heath Thomas to Russell Thomson, 6 December 2010.
188 Letter from P Elkington to Russell Thomson, 10 December 2010.
189 Contour summary of invoices for Project CIV00426.
190 Contour Consulting Engineers, Project CIV00426, Tax Invoice #1833, 12 January 2011.
191 Letter from Russell Thompson to Mark Snowdon, 22 June 2011.
192 See Contour summary of invoices for Project CIV00691.

13.37 The original concept design plan for Bundamba Racecourse produced by Contour as part of the SAMP had a projected budget of $28,633,196. It included the construction of the following track facilities and infrastructure:[193]

- 1000 metre harness track
- 445 metre greyhound track
- 420 metre greyhound training track
- Upgrade of existing course proper
- Access tunnels
- Internal roads and car parking
- Multi-functional public facilities building
- Dam
- Intersection and road access upgrade including traffic signals
- Kennel/veterinarians/stewards' building.

13.38 A procurement process was conducted by Contour in order to engage a surveyor to assess the site to assist with the engineering design. As was the case for the Deagon project, Contour sought quotes from three surveying companies: Definium ($27,350), KHA ($20,350) and THG ($21,600). On 20 September 2010, Contour wrote to RQL setting out the respective quotes and providing some commentary, but ultimately leaving the decision of which firm to engage to RQL.[194] On 24 September 2010, THG provided a revised quote of $20,400 (excl GST) which was subsequently accepted by RQL.[195] Although Definium, KHA and THG appear to have been Contour's favoured suppliers for surveying services in this period, there is no evidence that any of these companies underwent the process described in the RQL Purchasing Policy to be approved as RQL preferred suppliers.

13.39 On 1 December 2011, Contour sent a fee proposal letter directly to the Ipswich Turf Club (ITC) to provide engineering and project coordination services related to the redevelopment of the Bundamba Racecourse, should government funding be granted.[196] The scope of work was to include the council application processes associated with road works and the subdivision of a section of ITC land, in addition to the demolition and construction of infrastructure. Contour stated that it was not possible to provide a fixed fee proposal at that stage, however attached a schedule of the company's hourly rates and disbursements.

13.40 The business case ultimately submitted to government had a much-reduced budget of $5,964,565 and involved the construction of a tunnel, carpark, road infrastructure, 150 tie-up stalls on the infield and a new swab stall, as well as the demolition of some existing buildings and the relocation of a dam. The Treasurer declined to approve the release of RICDS funds on 17 February 2012. The basis for the rejection was that the proposal was not sufficiently oriented towards improving the capacity of the ITC to conduct race meetings, but rather assisted the club to enter into a future commercial development.[197]

193 Contour, Strategic Asset Management Plan, *Construction Cost Budget Report – Proposed Upgrades to the Racing, Training and Patrons Areas at Bundamba Racecourse, Ipswich*, September 2010 (Rev B).
194 Letter from Andrew Davis (Contour) to Paul Brennan cc: Mark Snowdon, 20 September 2010.
195 Email from Andrew Davis to Mark Snowdon cc: Brett Thomson and Chris Fulcher, 24 September 2010; Email from Mark Snowdon to Andrew Davis, 25 September 2010.
196 Fee proposal letter from Chris Fulcher to Wayne Patch (Ipswich Turf Club), 1 December 2011.
197 Letter from Andrew Fraser to Timothy Mulherin, 17 February 2012. Note that the Ipswich Turf Club and RQL disputed Treasury's characterisation of the business case. For further discussion of the rejection of the Ipswich business case see Chapter 9 at 9.11.17 to 9.11.24.

Rockhampton

13.41 In relation to Rockhampton, Contour charged a total of $83,322.50 for IIP concept engineering and management, project coordination and management, and engineering services.[198] The business case was approved by government on 16 February 2012, with a total project budget of $1.6 million. The IIP plans for Callaghan Park were focused around greyhound racing, with the construction of a multi-use building providing administration offices, steward's rooms, greyhound holding pens and veterinarian rooms; a greyhound crossing system to the course proper; and enhanced patron facilities and an elevated race viewing area.[199]

13.42 Although the first funding instalment of $110,000 was received by RQL, work on the project was not commenced during the relevant period. In March 2012, RQL applied to government for an additional $198,000 in funding through a revised business case to cover additional expenditure on new starting boxes and a reasonable contingency for the project.[200]

Townsville

13.43 Contour performed preliminary engineering services relating to the proposed racetrack redesign works at Cluden Park Racecourse in Townsville. The original SAMP for Cluden Park that was submitted to government on 16 September 2010 proposed a total budget cost of $14,132,009 for the project, which included remediation of the existing turf track, construction of greyhound racing and training tracks, a kennel block, a 100-stable complex, swab stall upgrade, equine pool and upgrade to members' facility.[201] The scope of works changed significantly under the IIP. For Townsville thoroughbred racing, RQL sought $6.348 million from government to undertake upgrades to the racing and training facilities, as well as the member and public facilities.[202] In relation to Townsville greyhounds, RQL sought $6 million in funding to transfer the racing site from the Townsville showgrounds to Cluden Park and build a 540m track, car park, administration and kennel building, judges' tower, and maintenance shed and yard.[203] RQL lodged the business cases for Cluden Park with the Office of Racing on 6 March 2012, during the caretaker period. The invoices provided to the Commission show that RQL paid Contour $55,834.80 (incl GST) in fees for planning work over the period from June 2010 to April 2012.[204]

14. Ooralea Park, Mackay: Track and Facilities Upgrade (November 2009 – April 2012)

14.1 At the end of the relevant period, the upgrade works at the Ooralea Park Racecourse in Mackay was the only IIP project for which substantial construction works had been undertaken. The Mackay business case (prepared by Contour) was the first to be approved by government, after RQL fast-tracked the project citing workplace health and safety concerns. Although approval of the business case and funding grant was issued on 7 June 2011, briefing notes from the Department of the Premier and Cabinet (DPC) and Treasury criticised the superficiality of the business case, including the failure to identify the specific workplace health and safety works

198 See Contour Invoice #2129 (6 September 2011), Invoice #2175 (29 September 2011), Invoice #2195 (26 October 2011), Invoice #2228 (13 December 2011) and Invoice #2285 (9 February 2012).
199 RQL, *IIP Business Case for Callaghan Park, Rockhampton*, submitted to the Office of Racing on 8 February 2012, page 7.
200 Letter from Robert Bentley to Michael Kelly, 19 April 2012.
201 RQL, *Submission to Queensland Government*, 16 September 2010, Appendix G – Strategic Asset Management Plan, Construction Cost Budget Report for Cluden Park Racecourse, Townsville, page 2.
202 RQL, *IIP Business Case for Cluden Park, Townsville Thoroughbreds*, submitted to the Office of Racing on 6 March 2012.
203 RQL, *IIP Business Case for Cluden Park, Townsville Greyhounds*, submitted to the Office of Racing on 6 March 2012.
204 See Contour summary of invoices for Project CIV00535.

required.[205] It was recommended that only a limited portion of the funding sought should be granted in order to rectify the so-called urgent workplace health and safety issues. Nevertheless, on 15 July 2011, the Funding Deed between the State of Queensland and RQL was executed, with $7.443 million designated to be paid in two instalments: $4.946 million for urgent redevelopment works and $2.497 million for the redevelopment of public and member facilities. The payment to RQL of the initial instalment of $4.946 million for urgent works was made on 19 July 2011.

14.2 In March 2009, Mr Brennan completed an inspection report that declared many of the facilities at Mackay to be unsatisfactory.[206] In November 2009, QRL accepted Contour's Fee Proposal to provide limited engineering consulting services in relation to the development of a concept master plan of possible upgrades to the Mackay racecourse. Contour then conducted a structural inspection at the Mackay racecourse on 12 July 2010 and compiled a brief summary document of "critical safety concerns".[207] On 14 July 2010, Messrs Thomson, Fulcher, Bentley and Brennan met to discuss potential infrastructure works at a number of racecourses including Mackay.[208] Shortly afterwards, Contour prepared a document detailing the preliminary project budgets and Ooralea Park was assigned a budget of $18,283,500.[209]

14.3 In August 2010, RQL commissioned Contour to undertake a "limited visual inspection and brief report of the current status of the existing building structures located at the Mackay Racecourse" and a more extensive report was completed.[210] The following major structural defects requiring urgent attention were identified:

- Aluminium balustrading over administration building in disrepair and unsafe
- Steel roof structure over grandstand unsafe and in need of repair or removal before further use of the area
- Light steel roof framing elements at south and southwest sides of the grandstand unsafe and need prompt demolition
- Structural support framing to the betting arena roll-a-doors and wall girts to the southern and western sides of the betting arena in need of prompt repair and partial replacement.

14.4 Despite the identified urgency, no works were undertaken at Ooralea Park to remedy these safety concerns. However, for the remainder of 2010 and early 2011, RQL and Contour continued to focus on Mackay as a central project under the IIP proposal.

14.5 Prior to the receipt of the government funding grant, Mr Snowdon and Mr Tuttle drafted a letter to Mr Kelly at the Office of Racing sent under Mr Bentley's hand on 7 July 2011, advising that Contour's appointment for the Mackay project without competitive tender was necessary due to the urgency of commencing works "from a workplace health and safety aspect". After funding was received in July 2011, Mr Snowdon forwarded the business case and funding agreement to Mr Thomson at Contour on 1 August 2011, with the reminder to "be mindful of the requirements of gov when preparing the docs."[211] During this period, RQL purported to implement purchasing processes to comply with government requirements, which were to be overseen by the IIP Control Group (IIPCG) chaired by Mr Tuttle.[212]

205 Attachment A (amended recommendations agreed by DPC & Treasury), Treasury Cabinet Budget Review Committee briefing note re: CBRC submission 4210, 6 July 2011, page13; DPC Cabinet Budget Review Committee Submission briefing note, 6 July 2011.
206 QRL Essential Services Checklist, Mackay Turf Club, completed by Paul Brennan 25 March 2009.
207 Letter from Brendan Lowther to Paul Brennan, 30 August 2010.
208 File note of CCE, 14 July 2010, author unknown, Contour project file 709.
209 Contour, "Preliminary Project Budget dated 06.08.2010", Contour project file 709.
210 Letter from Brendan Lowther to Paul Brennan, 30 August 2010.
211 Email from Mark Snowdon to Brett Thomson cc: Christopher Fulcher, 1 August 2011.
212 RQL, Industry Infrastructure Plan Control Group Charter (Version 1.01), 30 September 2011.

14.6 On 10 August 2011, Contour invited tenders from eight contractors in relation to the civil construction contract for the track upgrade works. Three tender submissions were received. Contour provided a tender report to RQL in late August. Mr Thomson requested that Mr Snowdon confirm the processes RQL required regarding the selection of tenderers.[213] As all tender submissions were over budget, Contour negotiated with the favoured tenderer, StrathAyr, to review project scope and review budget requirements.[214] On 9 September 2011, Mr Snowdon advised StrathAyr that its tender for the Track Improvements Contract at Oooralea Park had been accepted, with a revised budget of $2,991,223.42 (excl GST) to fit within the budget approved by Treasury.[215]

14.7 The use of a new form implemented by the IIPCG to assist with adherence to appropriate approval processes, the Industry Infrastructure Plan – Contract Approval Form (Contract Approval Form), was first introduced for this engagement. However, as the form was endorsed by all officers subsequent to the formal engagement of StrathAyr,[216] the measure failed to achieve the purpose for which it was instituted.

14.8 A contract in relation to Contour's involvement in the Mackay project was drafted in July 2011.[217] According to the draft contract, as *Consultant*, Contour was responsible for acting as "Lead Consultant, Civil/Structural/Environmental engineers and architects". RQL was to nominate a project manager from its internal staff. Contour's fees for the lead consultant role were listed as 2.7 per cent, and for civil engineering services, 5 per cent of the project budget. RQL did not conduct a competitive process for these appointments. The contract was not executed until December 2011; however, Contour continued in both roles and RQL paid Contour's monthly invoices for the services provided.

14.9 In addition to the track upgrade, Contour conducted separate tender processes for the following works on other track and club facilities:

- Stewards and jockey facility, and swab stall
- Betting ring rectification and removal of grandstand roof
- Function facility
- Relocation of judges' tower.

14.10 A closed tender process was conducted for work on the stewards' and jockey facility and swab stall, with nine tender offers received. Buildplan was approved as the winning tenderer on 23 November 2011 by the IIPCG, and the following day the company was advised that its tender had been accepted. A lump sum contract amount of $643,019 (excl GST) was negotiated.[218]

14.11 Eight tender offers were received in a closed tender process for the contract relating to the betting ring rectification and removal of the grandstand roof.[219] Fergus Builders was identified as the preferred contractor after submitting a revised price of $170,500 (incl GST), which was the lowest tender offer.

213 Email from Brett Thomson to Mark Snowdon cc: Russell Thompson, Chris Fulcher, Warren Williams, Paul Brennan and Kate Broadbent, 31 August 2011.
214 Email from Russell Thompson to Mark Snowdon, Robert Bentley, Brett Thomson, Chris Fulcher, Warren Williams, Paul Brennan and Kate Broadbent, 1 September 2011, attaching minutes of meeting on 29 August 2011, Contour project file 709.
215 Email from Mark Snowdon to Malcolm Tuttle, Paul Brennan, Shara Reid, Adam Carter, cc: Kearra Christensen, Toni Fenwick, Robert Bentley, Wendy Thomas, 9 September 2011; Contract between RQL and StrathAyr, undated.
216 Mark Snowdon (first level approval) signed 20 September 2011; Adam Carter (second level approval) signed 27 September 2011; Shara Reid (third level approval) signed 27 September 2011; and Malcolm Tuttle (final level approval) signed on behalf of the Industry Infrastructure Control Group on 28 September 2011.
217 Contract 0709-2 between RQL and Contour re: Ooralea Park Racecourse, Mackay (draft), Contour project file 709.
218 Letter from Malcolm Tuttle to Paul Blair (National Buildplan Group Pty Ltd), 24 November 2011; Contract between RQL and National Buildplan Group Pty Ltd, 2 December 2011.
219 Tenders were received from Woollam Constructions, Fergus Builders, ICD Group, JM Kelly, John Foster Projects, Buildplan, Deluxe Projects and SJ Higgins.

14.12 Fergus Builders were also engaged to undertake the relocation of the judges' tower on 1 February 2012, with a lump sum contract of $152,465.50 (incl GST).[220] Contour and Mr Snowdon are listed as the selection panel on the Contract Approval Form. The form was completed post-appointment, with Mr Tuttle providing the final stage of approval on behalf of the IIPCG on 8 February 2012. Although the form noted that Fergus Builders had already commenced work on the project as at 1 February 2012, Mr Carter signed off on the appointment's compliance with RQL Purchasing Policy and the RQL business plan as approved by the government. The justification advanced for the engagement of Fergus Builders was that it was convenient, since the company was already established on site as the contracting company conducting the demolition and refurbishment of the grandstand and betting ring.[221] Although JM Kelly is listed on the Contract Approval Form as having submitted a tender, there is no record of a JM Kelly tender submission on the Contour file. There is nothing in the material made available to the Commission to indicate that any tender process was conducted for this contract. However, during the tender process for the relocation of the judges' tower, Mr Thompson (Contour) reassured the chairman of the Mackay Turf Club, Mr Ian Joblin, that, "The tender process has been set up to follow strict RQL and State Government purchasing probity requirements and this has been implemented in accordance with these requirements to date. RQL & CCE have evaluated tenders and appropriate reports/recommendations have been made and presented to RQL for approval."[222]

14.13 An open tender was conducted for the function facility contract, with an advertisement appearing in *The Courier-Mail* on 22 November 2011. Nine tender offers were received by the due date of 19 December 2011. Contour provided a revised tender report to RQL in February 2012 and the contract was awarded to Buildplan on 29 February 2012. The winning tender price was $1,966,511. A contract between RQL and Buildplan was executed on 18 May 2012.

14.14 There were some concerns within RQL regarding Contour's performance on the Mackay project. On 13 October 2011, Mr Brennan and Mr Snowdon agreed that Contour needed to have "more day to day involvement in Mackay".[223] Further, RQL appears to have begun to worry that the terms of the engagement of Contour on the project might not be satisfactory to government. On 5 November 2011, Mr Tuttle sent a detailed email to the board setting out matters to be attended to in the delivery of the IIP, including:

- *Write to Government advising what has occurred to date re the engagement of consultants to satisfy Government timelines (re Mackay) also advising how we have satisfied ourselves in terms of value for money and probity.*
- *Engagement of Contour for Mackay (dealing with IP ownership)*
- *Confirm work by Contour for the development of business cases is minimal and nothing further is required in terms of engagement*
- *Re-confirm with all relevant consultants (including Contour)* ***No work without engagement***
- *Pair out all work subsequent to the business cases (This is not just a roll over for Contour – competitive tender to apply")*

220 Letter from Malcolm Tuttle to Shannon Ackerman (Fergus Builders), 8 February 2012.

221 See Contract Approval Form – Judges Tower Relocation Contract, "Brief overview of reasons for selecting preferred entity", 1 February 2012. See also, email from Russell Thompson (Contour) to Mark Snowdon cc: Warren Williams, Ian Joblin (Mackay Turf Club), Paul Brennan and Brett Thomson, 22 November 2011, 10.10am in which Mr Thompson writes: "If we deal with builders that are going to be on site we should save on establishment costs and be in a position to negotiate a reasonable outcome. Hence we are proceeding to seek prices for this work from the builders that will be engaged on site i.e. Buildplan & JM Kelly and let this as a variation to one of these contracts."

222 Email from Russell Thompson to Mark Snowdon cc: Warren Williams, Paul Brennan, Brett Thomson and Ian Joblin, 22 November 2011.

223 Email from Paul Brennan to Mark Snowdon, 13 October 2011.

- *Competitive tender processes required as per RQL purchasing standards and compliant with any/all requirements of Government*
- *Settle with RQL Board probity standards required re the engagement of consultants (Ensure probity standards are applied, met, and satisfy Government as required)*
- *Ensure appropriate separation of disciplines with the engagement of consultants (ie project management, civil engineering, structural engineering, environmental etc)*
- *Deal with tender process on project by project basis (if this is not the case there needs to be an open, transparent, justifiable and competitive process highlighting why projects have been conjoined).*

14.15 However, at the IIPCG meeting on 10 November 2011, Contour's multiple roles on the Mackay project were noted and acknowledged as "less than ideal", but with urgency again cited as sufficient justification. The meeting minutes noted that:[224]

> *Mr Snowdon has undertaken to ensure that in these circumstances any instructions or invoices between the consultant and project manager are vetted and approved by him. This ensures that there is transparency and that reasonable levels of probity are satisfied.*

14.16 On 19 December 2011, the RQL board retrospectively approved the following in relation to Mackay:

- *Resolution to engage contractors*
- *Resolution to approve business cases*
- *Resolution to approve budget amendments*
- *Resolution to approve IIP budget amendments.*

14.17 At this meeting, Ms Reid tabled the executed (but undated) contract between RQL and Contour that was settled on 16 December 2011 – notwithstanding that work had long since commenced and RQL had already paid Contour substantial fees for work intended to be encompassed within the scope of the contract.

14.18 On 30 January 2012, RQL received the second instalment of the 15 July 2011 funding deed in the amount of $2.497 million.

14.19 As at 19 April 2012, the Mackay project budget had been exceeded by $676,000, with a further business case submitted to government to claim further funding to compensate for this amount. It was necessary for the RQL board to undertake to cover the additional amount until approval was received from government.[225]

14.20 Contour ceased involvement in the Mackay project on 30 June 2012 at the request of RQL.

224 Industry Infrastructure Plan Control Group, Meeting Minutes, 10 November 2011, signed by Malcolm Tuttle, pages 1-2.
225 Letter from Robert Bentley to Michael Kelly, 19 April 2012, page 2.

Appendix F

Industry Financial Information

Gambling industry in Australia

- For 2009-10 gambling turnover in Australia was $160 billion, with $19 billion attributable to the racing industry.[1]
- Gambling expenditure[2] for the same period was $18 billion, with $3 billion attributable to the racing industry.[3]
- In 2008-09 gambling represented 3.1 per cent of household consumption, and an estimated 70 per cent of Australians participated in some form of gambling.[4]

Gambling turnover

- In 2009-10 Queensland had the third highest *gambling* turnover in Australia of $27.3 billion, with New South Wales and Victoria ranking 1 and 2 with turnover of $65.3 billion and $42.5 billion respectively.[5]
- For the same period Queensland ranked fourth with respect to *racing* turnover ($2.2 billion) behind New South Wales ($5.4 billion), Victoria ($4.2 billion) and Northern Territory ($4.1 billion).[6]

Government revenue

- The Queensland government collected revenue from racing of $38 million in 2009-10. The New South Wales and Victorian governments collected revenue of $156 million and $125 million respectively[7] during the same period.
- Total racing revenue as a percentage of state gambling revenue in Queensland was 4.13 per cent.[8]
- State specific taxation regimes impact significantly on the taxation revenue generated by each State and Territory government.

1 Government Statistician 2012, *Australian Gambling Statistics 1984-85 to 2009-10*, 28th edition, Summary Table A, Total Gambling Turnover 2009-10, Queensland Government, Treasury and Trade.
2 Gambling expenditure represents the net amount lost, the amount wagered less the amount won, by people who gamble.
3 Government Statistician 2012, *Australian Gambling Statistics 1984-85 to 2009-10*, 28th edition, Table Racing 5, Total Racing Expenditure, Queensland Government, Treasury and Trade.
4 Productivity Commission 2010, *Gambling Inquiry Report*, Australian Government.
5 Government Statistician 2012, *Australian Gambling Statistics 1984-85 to 2009-10*, 28th edition, Summary Table A, Total Gambling Turnover 2009-10, Queensland Government, Treasury and Trade.
6 Government Statistician 2012, *Australian Gambling Statistics 1984-85 to 2009-10*, 28th edition, Summary Table A, Total Gambling Turnover 2009-10, Queensland Government, Treasury and Trade.
7 Government Statistician 2012, *Australian Gambling Statistics 1984-85 to 2009-10*, 28th edition, Table Racing 10, Government Revenue from Total Racing, Queensland Government, Treasury and Trade.
8 Government Statistician 2012, *Australian Gambling Statistics 1984-85 to 2009-10*, 28th edition, Table Racing 14, Total Racing Revenue as a % of Total State Gambling Revenue, Queensland Government, Treasury and Trade.

Racing Queensland

- The racing industry in Queensland is significantly reliant on the revenue it receives from wagering operators. In 2011-12 revenue of $109 million was received[9], representing 67 per cent of total income. In 2012-13 this increased to $110 million[10], representing 65 per cent of total income.
- Revenue received from race information fees for 2011-12 and 2012-13 was $35 million and $40 million respectively.[11]
- Revenue received from wagering operators and race information fees accounts for an estimated 89 per cent of total annual revenue received by Racing Queensland.

9 Racing Queensland 2013, *Annual Report 2012/13*, Racing Queensland Limited, Brisbane.
10 Racing Queensland 2013, *Annual Report 2012/13*, Racing Queensland Limited, Brisbane; Queensland All Codes Racing Industry Board 2013, *Annual Report 2012/13*, Queensland All Codes Racing Industry Board trading as Racing Queensland, Brisbane.
11 Racing Queensland 2013, *Annual Report 2012/13*, Racing Queensland Limited, Brisbane; Queensland All Codes Racing Industry Board 2013, *Annual Report 2012/13*, Queensland All Codes Racing Industry Board trading as Racing Queensland, Brisbane.

Appendix G

Establishment and Operations

Pre-commencement

1. The Commissioner's appointment and statutory powers commenced on 1 July 2013. The Commissioner and Counsel Assisting read background material to familiarise themselves with the racing industry and the Terms of Reference during several weeks in June. The Secretary (Executive Director) whose appointment commenced on 10 June 2013 undertook recruitment activity, established the Commission's premises and made other operational arrangements during this period.
2. Public notices appeared in *The Courier-Mail* and *The Australian* newspapers on 25 June and 6 July 2013 which provided information on the introductory hearing; advised the manner in which relevant parties could seek leave to appear and be legally represented; the practice guideline; and contact information.
3. The Commission commenced operations on 1 July 2013 in the State Law Building (50 Ann Street, Brisbane).

Evidence Collection

4. The Commission conducted its Inquiry under the *Commissions of Inquiry Act 1950*. It served requirements to produce documents and to give statements on a number of people and entities. As foreshadowed in Practice Guideline No. 1 those statements were made available on the Commission's website for public perusal and in the Data Hub for access to those who were given leave to appear. It was hoped that this would serve two purposes – to encourage any person with information which might challenge any aspect of the content of those documents to provide a statement to the Commission or to identify a possible train of enquiry. The other purpose was to expose the evidence provided to the Commission to as wide an audience as possible. After giving evidence at the public hearings each witness who wished to do so was invited to provide a supplementary statement and those statements were then available for perusal on the website.

Hearings

5. Hearings were conducted in courtroom 34, level 7 of the Brisbane Magistrates Court at 363 George Street, Brisbane.
6. An initial public sitting was convened on 15 July 2013 at which general introductory remarks were made about the nature and scope of the Inquiry. They can be found in Appendix H.
7. Public hearings commenced on 19 September 2013 and were completed on 15 October 2013 comprising 15 hearing days during which 14 witnesses were examined.
8. The Inquiry hearings were open to the public and live streamed via the Commission's website www.racinginquiry.qld.gov.au. A media room was established adjacent to courtroom 34. The transcripts were uploaded daily on the Commission's website.

Inquiry Staff

9. Commission staff commenced progressively during July and August 2013. The Commission had a complement of 21 full-time equivalent staff which comprised 14 lawyers (including the Commissioner and two counsel assisting) and 7 non-legal staff. The names and positions of Commission staff are in Appendix J.

10. The selection of staff for the Commission resulted in a diverse and complementary mix of skills and expertise. Staff were subject to criminal history checks undertaken by the Queensland Police Service, and were required to disclose any possible conflict of interest on commencement and during their engagement with the Commission.

11. As had early been appreciated, it was not possible to complete the Inquiry in the three months stipulated by executive government. An extension was granted with the Report to be given to the Premier on 7 February 2014.

12. After the completion of hearings and during the extension of time period approved by the Governor-in-Council, staff numbers were progressively reduced which ensured the Commission was able to operate within the original budget approved by the Cabinet Budget Review Committee.

Statistics

13. The Commission received a large number of documents for review. It is estimated that in excess of 200,000 documents were received from 68 individuals and entities. The following key statistics underpin the operations of the Commission:
    - 158 requests for documents and information were issued
    - 118 requests for statements were issued
    - 15 witnesses were interviewed
    - 14 witnesses were examined at hearing
    - 15 public hearing days
    - 13 submissions received
    - 17,379 visits to the Commission website (September to November 2013)
    - 105,794 website pages accessed.

14. The document review commenced in July and continued until October 2013. This review, coupled with preparation for hearings, resulted in long hours being worked by a very dedicated Commission workforce. The staff effort during this time was considerable and is to be commended.

External Engagements

15. The Commission made the following external engagements:

Entity	Purpose
Mr Andrew O'Brien Barrister-at-law	Legal research and advice
Mr Neville Cottrell *Gray Robinson & Cottrell*	Quantity surveyor
Law in Order	Scanning and photocopying services
LitSupport	Scanning and photocopying services
Auscript	Recording and transcription services for public hearings
Management Options Pty Ltd	Procurement advice
Mariart	Design and layout services for the Commission's Report
Allclear	Printing of the Commission's Report
E.Law International	Dataroom services
Ms Sandra Clayton	Editorial services

Records Management

16. The Commission utilised the records management system of the Department of Justice and Attorney-General (eDOCS) to manage its records during the life of the Commission. Whilst its searching capability was invaluable, eDOCS did not prove to be a suitable tool for a document-centric Commission.

17. The Commission's records have been managed in accordance with the Commissions of Inquiry Retention and Disposal Schedule (QDAN 676) issued by Queensland State Archives (QSA) under the *Public Records Act 2002*. At the cessation of the Commission all permanent and temporary records (excluding administrative documents) were accepted by QSA with temporary administrative records transitioned to the Department of Justice and Attorney-General as custodian. Restricted Access Periods (RAPs) apply to both permanent and temporary records. The Department of Justice and Attorney-General is the custodian of the electronic records of the Commission.

18. Persons wishing to make application to access the records of the Commission should contact the Department of Justice and Attorney-General: GPO Box 149, Brisbane QLD 4001, mailbox@justice.qld.gov.au.

Appendix H

Opening Remarks

Monday 15 July 2013
Initial Public Sitting

Opening Remarks of the Commissioner

Under the *Commission's of Inquiry Act 1950*, the Governor in Council has appointed me to make "full and careful inquiry in an open and independent manner in relation to the operations of the former racing control bodies in Queensland" and the entities which they controlled.

The Terms of Reference, which will be read shortly, set out the reach and limits of this Inquiry. They principally concern matters relating to governance. The Commission is directed to investigate and report on the procurement, contract management and financial accountability processes of the control bodies over a period of almost five and a half years from 2007 to mid 2012.

Particular attention is to be given to the contractual arrangements with Contour Consulting Engineers Pty Ltd who undertook a large body of work on Queensland racecourses.

The Terms of Reference direct inquiry into the culture and management practices of the control bodies especially at Queensland Racing Limited, the immediate past control body. Particular attention is to be given to the corporate governance of Racing Queensland Limited to ascertain if its directors, executive management and key personnel acted in the best interests of the company and of the racing industry. An important aspect of this Term of Reference is an investigation into the employment contracts of four named persons who were senior executives of Racing Queensland Limited.

The Commission is also directed to investigate the arrangement between Queensland Race Product Co Limited, a company established in 1998 to receive race information fees, on behalf of the control bodies, and the Tatts Group concerning fees paid by the Tatts Group for Queensland wagering on interstate races including any conflicts of interest which may have influenced outcomes.

The Commission is further directed to inquire into the events surrounding the transfer of funds from the State to Racing Queensland Limited's infrastructure account in February 2012; and the nature and sufficiency of oversight by the Minister responsible for racing during the Inquiry period, and by executive government generally and the Chief Executives.

The Commission is also asked to make any recommended legislative and/or organisational changes to promote good corporate governance and an accountable culture for the new control body for racing in Queensland, the Queensland All Codes Racing Industry Board.

The racing industry in Queensland employs thousands of people. By any measure that is significant. It contributes directly and indirectly 100s of 1000s of dollars to the State's economy. It plays a role, in social as well as economic terms in country life. It is a source of employment and of entertainment in the city.

Racing is said by many commentators to be in decline. General knowledge would suggest that this is due to many factors beyond the influence of mere personalities. External forces have had an impact on the profitability of the industry – a long drought in much of the State; the equine influenza epidemic; as well as technological developments affecting betting; and a much larger entertainment world.

However, it requires little knowledge of the racing industry in Queensland to understand that it has been mired in controversy for decades - something which all involved must accept has not advanced the overall interests of racing. How to resolve this state of affairs has proved elusive.

There have been other relatively recent Commissions of Inquiry into racing in Queensland. In 2004 a three Commissioner Inquiry, known as the Shanahan Inquiry, was directed to report broadly on the integrity, that is, regulatory functions of the control bodies and whether that function ought to be separate from the commercial aspects of racing. That Commission recommended, amongst other matters relating to integrity, that there should be a separation between the regulatory aspects of racing from the commercial to ensure the overall integrity of the industry. That did not occur.

The Daubney/Rafter Commission of Inquiry was directed to investigate quite specific matters in late 2004 including allegations of the artificial inflation of betting odds in Queensland and the conduct of the then control body, the Queensland Thoroughbred Racing Board and its staff, in respect of the appointment and termination of stewards and other staff.

As will be apparent from the Terms of Reference, this Inquiry is much more extensive than those previous Inquiries both as to subject matter and as to temporal ambit. Nevertheless, its scope is defined by the Terms of Reference and anyone interested in it should read the Terms carefully; although there may be many areas of the racing world which some consider require attention, the Commission does not have the power, time or the resources to investigate every matter which might be raised. If anyone wishes to provide information which they believe should be investigated but which may be outside the Terms of Reference, they should contact the Secretary to the Commission to outline the nature of the information and discuss whether it will be received.

Although this Inquiry has long been foreshadowed, my appointment as Commissioner commenced on the 1st of July. I therefore had no powers to embark on the investigation until that date.

To assist in carrying out the Inquiry the Crown has appointed Mr James Bell QC and Mr Tom Pincus of counsel. Other appropriately qualified people have been retained or seconded to the Commission.

As you will shortly hear from counsel, the process of acquiring documentary material from a large number of bodies and of individuals relating to the period of the Inquiry commenced on the 1st of July. The next step is to obtain statements from persons who may have information to contribute to assist us to find the facts, uncontaminated by mere comment.

The purpose of today's public hearing is to make these preliminary remarks and to allow those interested to have some understanding of the program for the Inquiry from Counsel Assisting. May I request that any person who has not received or who does not soon receive a notice to provide a statement but who believes that he or she does have relevant information which might assist the Commission in carrying out its work contact the Commission Secretary, Ms Joanne Bugden, whose contact details are on the Commission's website. Any person doing so has the protection given to witnesses under the *Commissions of Inquiry Act* and may seek to be afforded confidentiality for what they wish to convey.

The Commission has published a Practice Guideline which covers many procedural matters about the Commission's task, including directions about leave to appear. Any person summoned to attend and give evidence before the Commission may, if they choose and without any further grant of leave, be legally represented before the Commission while they are giving evidence. Otherwise, appearances and representation before the Commission will only be allowed by leave. In accordance with the Practice Guideline some persons have already sought leave to appear by written application and been granted leave. There will be further practice guidelines published on the website and certainly before the resumed public hearings.

It is, I think, useful to say something briefly about what an Inquiry held pursuant to the *Commissions of Inquiry Act* is and what it is not.

This Commission's task is to investigate events which have occurred - what happened and why - and to evaluate those findings against certain identified criteria. At this very preliminary stage the direction of the information gathering is not fully resolved. As the Inquiry progresses and more is found out about the

subject matter of the Terms of Reference there may be turning points. One lead may suggest another. It will likely be necessary to revisit aspects of the Inquiry when something later gives a different complexion.

This investigation bears little resemblance to a trial in a court where, usually, over a lengthy period prior to the commencement of the trial evidence has been gathered by opposing parties and, when that process is completed and refined, it is presented to a court for findings about that evidence and the law which applies to it.

It must be understood that this Inquiry begins with no views about any issues within the Terms of Reference. Counsel Assisting play no adversarial role. There are no parties as understood in litigation.

I also wish to make clear that there will be no findings made against any individual or corporation unless appropriate opportunity is given to be heard to those persons or bodies in relation to any possible finding.

Although there is a great deal of interest in this Inquiry you will understand that until we have a better grasp of the subject matter there is no utility in having public hearings. The Commission has a website and the public hearings when they occur, will be live streamed. Generally, statements made and documents tendered will be available for perusal on that website. Counsel Assisting will now make some opening remarks, and I ask in the course of that process that they read in full the Terms of Reference.

Opening Remarks of Counsel Assisting Mr Tom Pincus

Commissioner, the Commission is to inquire into the operations of the former racing control bodies in Queensland which are defined as the relevant entities, being Racing Queensland Limited (that is defined as RQL) and its predecessor bodies which amalgamated in July 2010 which are Queensland Racing Limited (QRL), Greyhounds Queensland Limited and Queensland Harness Racing Limited and their controlled entities including Queensland Race Product Co Limited, over the period 1 January 2007 to 30 April 2012 (the relevant period) with respect to the following matters.

(a) (i) The adequacy and integrity of, and adherence to, the procurement, contract management and financial accountability policies, processes and guidelines for the relevant entities, including measures to ensure contracts awarded delivered value for money. And as a point of clarification, the concept of the "integrity" of policies, processes, guidelines and measures is taken to overlap partly with that of their adequacy, but to focus attention on issues surrounding moral or ethical soundness and robustness in relation to their development and content.

(ii) The events surrounding the contractual arrangements between the relevant entity or entities and Contour Consulting Engineers Pty Ltd, (which I will refer to hereafter as Contour), to manage contracts on behalf of those entities. This involves, as is apparent, a broad investigation to determine how each and every contractual arrangement existing during the relevant period between any of the relevant entities and Contour arose and was implemented.

(iii) Whether the resulting contracts were underpinned by sound procurement practices and whether appropriate payment policies and processes were implemented and were adhered to. And by way of clarification the term "resulting contracts" is taken to refer not only to contracts between any relevant entity and Contour, but also to contracts entered into by any relevant entity or Contour with third parties for the purpose of any work done or to be done for or on behalf of a relevant entity; that is, the term includes principal and subcontracts.

This aspect also necessitates consideration of whether, at relevant times in relation to work in which Contour was involved, appropriate payment policies and processes were in place and complied with. It may involve consideration of policies and processes of both the relevant entities and of Contour itself.

(b) The adequacy and integrity of and adherence to management policies, processes and guidelines and the workplace, culture and practices of the relevant entities, in particular RQL, and the appropriateness of the involvement of the Boards of those entities in the exercise of functions by the executive management team and other key management personnel, including the officer holding the position

of company secretary and those involved in integrity matters. As a point of clarification the word "processes" is taken in context to mean processes prescribed by some means, or otherwise able to be identified, or generally followed or expected to be followed.

This Term of Reference is not understood to require inquiry into every process in fact followed during the course of every individual act of management within a relevant entity during the relevant period. The concept of "integrity" has already been mentioned and it's to be understood, here, consistently with the previous observation. As to the question of "adherence to" workplace culture and practices, it is expected that it can only be considered to the extent that the Commission identifies cultures and practices prescribed by some means or otherwise generally followed or directed to be followed.

(c) The adequacy and appropriateness of RQL's corporate governance arrangements, in particular:

(i) whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, acted with integrity and in accordance with RQL's constitution, in the best interests of the company and the racing industry;

(ii) whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, operated consistently with relevant applicable State and Commonwealth policies and legislation including the Racing Act 2002 (Queensland) and the *Corporations Act 2001* (Commonwealth);

(iii) the policies, rules and procedures to identify and manage potential and actual conflicts of interest and to minimise the risks of directors and executives improperly using their position and information obtained for personal or financial gain;

(iv) the adequacy of employment contracts in restraining former directors and executives from seeking employment with RQL's preferred contractors and suppliers.

By way of clarification in relation to some of the concepts arising in (c), this Term of Reference is generally understood, without intending to confine it in any way, to require consideration of RQL's framework of rules, relationships, systems and processes within and by which authority is exercised and controlled, encompassing the mechanisms by which the companies – the relevant entities – and those in control are held to account. That is the definition of "corporate governance" adopted in the second edition of the ASX Corporate Governance Council's, *Corporate Governance Principles and Recommendations with 2010 Amendments*, Commissioner.

Racing Queensland was, of course, incorporated on 25 March 2010 so that the period of relevance to this Term of Reference is shorter: it is 25 March 2010 until 30 April 2012. The concepts of "adequacy" and "appropriateness" overlap, but the latter term is understood to emphasise that the inquiry is into not just whether the arrangements were generally sufficient for any corporate entity, but also whether they were suitable for RQL in its particular circumstances.

There is not understood to be any limit to the acts and operations which are the subject of this aspect of the inquiry, other than that, because it concerns RQL, the applicable period commences on 25 March 2010. The legislation and policies referred to are understood to be legislation and policies relevant to RQL to corporate governance. Relevant applicable State policies will be identified in a subsequent iteration of clarifications to be provided as part of the break down and the Terms of Reference on the Commission's website. As to relevant applicable Commonwealth policies, it's presently understood that there are none that could be described as relevant and applicable but, in considering whether the corporate governance arrangements were adequate and appropriate generally, reference will be made inter alia to the ASX Corporate Governance Principles that I have already mentioned and also to Standards Australia's Corporate Governance Standards.

As to the term "preferred contractors and suppliers" in (c)(iv), that is understood, without limitation, to include Contour, but other entities will be identified in due course, if some arise.

Term of Reference (d) concerns whether there was sufficient and appropriate oversight by the responsible minister, executive government and chief executive, including under the provisions of the *Racing Act 2002* for the operations of the relevant entities. That requires no clarification.

(e) The events surrounding the renegotiation of employment contracts of four RQL senior executives, Chief Executive Officer Malcolm Tuttle, Director of Integrity Operations Jamie Orchard, Director of Product Development Paul Brennan and Senior Corporate Counsel and Company Secretary Shara Reid, formerly Murray, in 2011 and resulting payouts on their voluntary termination in March 2012 under those contracts, and whether the directors and senior executives acted consistently with their responsibilities, duties and legal obligations, with reference to the key findings of the Auditor-General in his Report to Parliament, entitled "*Racing Queensland Limited: Audit by Arrangement*", tabled in July 2012.

By way of clarification, this involves a broad investigation to determine the course of events, including in relation to how each employment contract came to be renegotiated, how the renegotiation process progressed between the parties, what process was followed internally within RQL in relation to the renegotiation, and how the payouts arose to be made, were approved and were, in fact, made. The Auditor-General's report will be available via the Commission's website to assist in understanding these matters.

(f) The arrangement between Queensland Race Product Co Limited and the Tatts Group (comprising Tatts Group Limited and each of its subsidiaries including TattsBet Limited, and formerly UNiTAB), concerning fees paid by the Tatts Group for Queensland wagering on interstate races through TattsBet, in particular:

  (i) how Queensland Race Product Co responded to the introduction of race information fees

  (ii) whether the Boards of the relevant entities and/or Queensland Race Product Co sought expert legal advice or other advice regarding the effect on fees payable by the Tatts Group to Queensland Race Product Co as a consequence of race information fees being introduced and, if not, why this advice was not sought

  (iii) the reasons why any expert advice sought at any time following the introduction of race information fees was or was not acted upon and

  (iv) whether the directors and senior executives of both the relevant entities and Queensland Race Product Co acted in good faith and consistently with their responsibilities, duties and legal obligations and the best interests of the company at the material time race information fees were introduced, or at any other time, and whether their actions may have been influenced by any conflict of interest of being both a director of the relevant entities and/or Queensland Race Product Co and/or the Tatts Group or by a relationship with any other person, or whether they used their position/s to gain a personal advantage.

(g) The events surrounding the approved transfer of funds by the former Queensland Government to RQL's infrastructure trust account in February 2012, on what basis the transfer was made, whether any improper influence was exercised by RQL directors, and if the transfer was appropriate and justified.

(h) Any other relevant matter relating to the relevant period or otherwise that the Commissioner considers necessary.

In relation to (h), of course, its scope is confined generally by reference to the overall inquiry which is into the operations of the relevant entities. No specific additional matters have so far been identified as necessary for inquiry. However, the reference to "the relevant period or otherwise" makes clear, if there were otherwise any doubt, that the scope of the Inquiry extends to events beyond the confines of the relevant period as necessary, and it's plainly necessary where such events aid the investigation and understanding of matters occurring within the relevant period.

And, finally, although not a factual term of reference, it should be mentioned that the Commission in making recommendations is required to consider any recommended legislative and/or organisational changes to promote good corporate governance, integrity and a transparent and accountable culture for the new control body for racing in Queensland, the Queensland All Codes Racing Industry Board established under the *Racing Act 2002* and trading as Racing Queensland.

Thank you, Commissioner.

Opening Remarks of Counsel Assisting Mr James Bell QC

Commissioner, those reading the Practice Guideline published on the website will have noted that unlike other inquiries there is no general invitation for public submissions at this stage. Instead, our approach is to require the provision of relevant documents from those we understand are likely to have them and, further, to require sworn or verified statements from people who have been identified as likely to be able to assist the inquiry into the Terms of Reference. From our perspective as Counsel Assisting, this process is important to identify from the start what is evidence of fact, and what is rumour or innuendo.

Commissioner, even though the rules of evidence do not apply here the Practice Guideline dictates that any statement of which the witness has been informed or which he or she believes to be true must be accompanied by the source of the information or the grounds for the belief. This requirement will enable the Commission to investigate the source of those matters where appropriate. It is anticipated that the separation of the facts from the rumour will be a significant task nevertheless. As noted in the report of the Daubney/Rafter Inquiry, the racing industry is particularly riven with rumour and gossip. Matters presented as fact often turn out on proper investigation to be nothing more than speculation or the repetition of rumour.

Partly for this reason the process is designed in a way in which we hope will permit an identification of the objective material relevant to the terms of reference before descending into competing versions of events and submissions. The process does not mean that there will be no opportunity for submissions. That opportunity will arise as the Inquiry progresses. Commissioner, as you have said, the process we have in place should not lead people with something important to tell the Inquiry to feel inhibited from doing so by the perception that it will be difficult to get information across. Although we prefer people consult the Practice Direction and provide material in the form of witness statements, anyone whom that does not suit, for whatever reason, should contact the Commission's Secretary to discuss the way to go about it, even a regime for confidentiality if necessary.

As you know, Commissioner, a number of people have sought leave to appear and be represented by legal practitioners. Leave has been granted to Racing Queensland and to Queensland Race Product Co Limited. Further, the State of Queensland and Contour have been given leave to be represented as have a number of individuals. However, the participation which each of them will enjoy will be confined by you as you see appropriate. In giving leave, each of the parties has been notified that it is given on that express condition.

Commissioner, I have mentioned that the Inquiry's approach involves certain persons receiving a requirement to produce documents. Since the 1st of July, which was, as you said, the first day of the Commission of Inquiry, 92 people have been served with such a notice and the Commission has already received 14,000 documents. Consideration of that material is under way as further documents stream into the office of the Commission. This is a very labour intensive process on which Commission staff are working diligently. It is a necessary one to identify and collate the documents needed to understand relevant events and determine further avenues of investigation.

I mention the requirement to provide information in the form of a sworn statement. So far, the Commission has delivered 45 such requirements to relevant persons to deliver statements by the 26th of July 2013. For those persons, the preparation of statements involves the consideration of many documents, as the Terms of Reference are wide ranging and encompass numerous transactions over a period of more than five years. The Commission has already sought to assist some of those persons with access to relevant documents for the purpose of preparing their statements. Some of the requirements for statements include topics for evidence which are expressed in fairly broad terms. That is a consequence of the broad nature of some of the Terms of Reference and the relatively early stage of our investigations.

The Commission will take a practical approach to assessing compliance with the requirements in this light and I ask that those preparing statements include their detailed account of matters they believe arise from the wording of the notice. If further matters need to be addressed, they will be addressed by requiring supplementary statements and/or in interviews and/or at public hearings.

Commissioner, I have also interviewed a number of people about information which they wish to offer to the Commission. Some of that information, if proven to be based on fact, is of a serious nature. It is, however, not appropriate for me to provide any details at this early time. In due course, after a reasonable period has been allowed for the Commission to consume all the information in the documents and the statements, public hearings will commence. At present, it is difficult to predict the date when that will occur, but I expect to be in a position to notify the public of the program within four weeks of receipt of the statements.

I anticipate that a program will be published on the website and otherwise to members of the press on or before the 26th of August. To allow insufficient time to digest and collate the information would guarantee an inquiry that did not meet the expressed requirements of the Order in Council and that which the public deserves, namely, a full and careful inquiry. Each witness who is required to give evidence during the public hearings will receive a summons to appear on a specific date. On that date the statement which they have already provided will constitute their evidence-in-chief. They will be subjected to examination by those who have been granted leave to appear and by Counsel Assisting. Those with leave to appear will not, as I have indicated, have liberty to examine generally, but it will be subject to your direction, Commissioner.

Commissioner, I anticipate that the hearings will be arranged according to each Term of Reference. Witnesses who give evidence which is relevant to one term will generally be called during the same period. Some witnesses will cover more than one term and my present view is to call them last. It is appropriate that I thank those who have been expressed a willingness to cooperate with the Commission. Whether or not that cooperation will continue we will have to wait and see.

Those persons who are required to participate in the Inquiry by the delivery of documents, the provision of statements or by giving evidence may participate knowing that the Commission will be undertaking its inquiries as directed – openly and independently.

Counsel Assisting certainly come to the Inquiry with an open mind as to what will be revealed. I encourage those people with information relevant to the Terms of Reference to come forward now and offer that information to the Commission. By doing so, the truth of the matters which we are directed to investigate will be revealed. To doubt our resolve to get to the truth would be a mistake. However unpalatable it may seem to come forward with relevant information, not to do so because nothing is likely to change is to underestimate our resolve. Thank you, Commissioner.

Thursday 19 September 2013

Opening Remarks of Counsel Assisting Mr James Bell QC

Commissioner, the Inquiry into the matters raised by the Terms of Reference commenced on the 1st of July. 162 people and entities have produced 200,000 documents to the Commission. The Commission continues to work diligently to identify relevant information contained in them. That task is ongoing. For example, there are a substantial number of emails of Queensland Racing Limited and Racing Queensland Limited which are in the process of being reviewed now. More than 100 statements have been provided to the Commission. Nearly all of them are available to members of the public on the Commission website. Two statements and one exhibit from another statement have not been published as the Commission determined that those documents contain submissions, rather than evidence.

In addition to informal discussions which individuals and legal representatives have had with the Commission, the Commission has conducted 15 interviews with potential witnesses. Where those persons could provide information which was considered relevant or potentially relevant it has been reduced to a statement and been published on the website. I emphasise now that the Commission's publication of the statements on the website is to permit their scrutiny and encourage the provision of material in response by other witnesses and members of the public with knowledge of the relevant facts. The Commission seeks to conduct this Inquiry in an open manner and that publication should be seen as part of the process of holding public hearings.

The Commission does not propose now to go through a process of formally tendering in evidence the statements received and to receive piecemeal objections to them. It is neither feasible in the time available nor necessary. Rather, those statements published on the website constitute material which the Commission will take into account as it considers appropriate. In doing so, it will take into account other material received, including during these hearings, which may well contradict or disprove contentions made in the existing statements.

It will also receive submissions in due course about matters alleged which are said to be irrelevant or which should be given little or no weight. All persons accessing the statements, including members of the press, should note that the publication of the statements does not in any way indicate that their contents have been accepted as true or even as relevant to the Inquiry. Indeed, the Commission has received and investigated a variety of allegations which appear to be nothing more than rumour, innuendo or uninformed gossip. In short, nothing in the statements should be taken as proved unless and until it is the subject of findings in the ultimate Report of the Inquiry.

Commissioner, on the 15th of July in your opening statement, you observed that this Inquiry bore little resemblance to a trial in a court. You indicated that the Commission began with no views about the issues raised in the Terms of Reference and noted that the role of Counsel Assisting is not adversarial. You made clear that no finding would be made adverse to an individual or corporation unless appropriate opportunity was given to those persons to be heard in relation to the matter. I wish to reaffirm that commitment as the Commission now commences these public hearings. Further, this is only one stage of an ongoing Inquiry. An open invitation has been made and is made again to all concerned, including the witnesses to be examined here, to provide the Commission with further relevant evidence by providing statements and documents. It is proposed that the opportunity to do so will remain until the 11th of October.

As indicated in the Commission's Practice Guideline, submissions generally will be provided by any person with leave to appear until the 11th of October and otherwise as directed by you, Commissioner. Depending on the matters already addressed in evidence and the submissions received, the Commission may provide draft findings on some subjects for response by people who may be adversely affected by them. It is not intended during these public hearings and again would not be feasible or sensible in the time available to us to attempt to air every relevant issue raised in the statements or other material considered by the Commission. Instead, our intention is to focus on exploring some matters of interest which have, so far, been identified where we consider that exploratory questioning of witnesses may assist the investigation.

There are five particular areas which we propose to investigate more fully with relevant witnesses who have been summoned to appear. I will outline these matters in broad terms now. Although the outline should provide some guidance as to the topics to be explored, the Inquiry remains an ongoing process and what follows cannot be taken as somehow fixing or confining the scope of our investigations.

The Inquiry is into events which occurred during the period commencing on the 1st of January 2007 and finishing on the 30th of April 2012. During this period, although the control bodies of the three codes of racing in Queensland changed, some board members and senior executives remained throughout.

On 1 July 2010, Racing Queensland Limited became the control body of all three codes. This was the first time that such an amalgamation had occurred in Queensland. Prior to that, from 1 July 2006, a different company, Queensland Racing Limited, was the control body for thoroughbred racing. Harness Racing was controlled by Queensland Harness Racing Board from the commencement of the relevant period to the 30th of June 2008. Thereafter, until the amalgamation in July 2010, it was controlled by Queensland Harness Racing Limited. For greyhounds, it was Greyhound Racing Authority and, from 1st July 2008, Greyhounds Queensland Limited to the amalgamation.

The amalgamation of the three codes of racing came about through amendments made to the Racing Act in early June 2010. The Terms of Reference bring into focus the governance and management of the control bodies during the relevant period. It necessarily follows that the persons who held board positions and senior executive positions are likely to know most about the subject of the Inquiry. Hence, they make up many of the witnesses to be called at these public hearings. A full list is available on the Commission's website. Mr Bentley, the chairman of Queensland Racing Limited and later Racing Queensland Limited, is to be the first witness. I then intend to examine Mr Hanmer and Mr Ludwig who were directors of those companies throughout the relevant period until their resignation with Mr Bentley on the 30th of April 2012, the last day of the relevant period.

The Commission has served a requirement to appear on other directors of Racing Queensland, namely Mr Lette, Mr Ryan, Mr Milner, Ms Watson, Mr Lambert and Mr Andrews. Whether it is necessary to call them all or any of them will depend on the evidence received from the first three directors examined. The executive management personnel who have been required by summons to appear at the public hearings are Mr Tuttle, Mr Orchard, Mr Brennan and Ms Reid, formally Ms Murray. They are the people expressly named in the Terms of Reference. They also had involvement in events which other Terms of Reference include, particularly Mr Tuttle and Mr Brennan, concerning procurement. Ms Reid was the company secretary and legal officer of Racing Queensland and previously Queensland Racing. She was involved in that capacity and events relevant to a number of the Terms of Reference. It is yet to be determined whether her health is such that she will be able to appear and be questioned. Mr Snowdon has been summoned to appear for questioning in relation to procurement related matters. He was initially a consultant to Racing Queensland Limited and then employed as project director of the Industry Infrastructure Plan from July 2011. Mr Thomson of Contour Consulting Engineers has been summoned as to that firm's role in various projects undertaken by Queensland Racing and Racing Queensland. Again, the evidence given by earlier witnesses will determine whether and the extent to which Mr Snowdon and Mr Thomson need to be examined.

The Terms of Reference also require inquiry into government oversight of the control bodies.

The Commission has summoned each of the responsible Ministers during the relevant period: Mr Fraser, Mr Lawlor and Mr Mulherin MP. The Commission has also required Mr Kelly and Ms Perrett to appear because they held senior positions in the Office of Racing throughout the relevant period and were much involved with the relevant events.

I will now identify the areas, Commissioner, which we will bring into focus during these public hearings. We have of course had the ambit and scope of the Terms of Reference in mind at all times and will continue to do so. But occasionally, to provide context and to understand the issues which confronted the control bodies from 2007, it may be necessary to refer to events prior to the 1st of January 2007.

Commissioner, at all relevant times since privatisation of the TAB in Queensland in 1999, TattsBet Limited conducted a wagering business in Queensland. I'll simply call it Tatts although its name changed over time from TAB Queensland Limited to UNiTAB Limited and then to TattsBet Limited.

In that wagering business, Tatts used Australian racing information which was information which was available to the control bodies to be supplied to Tatts. On the 9th of June 1999, the control bodies for the three codes of racing entered into a written agreement with Tatts named the Product and Program Agreement. Throughout the relevant period, revenue was paid by Tatts to the control bodies pursuant to the agreement. Indeed, most of the revenue of the control bodies came from this source.

A company named Queensland Race Product Co Limited was also a party to the agreement. Prior to 2010, the three control bodies held the power to appoint the six directors of Product Co.

At any time, four directors were to be appointed by the thoroughbred control body and one director was appointed by each of the Harness Racing and Greyhound control bodies. After 2010 the directors were appointed solely by Racing Queensland Limited. Product Co, Commissioner, was the agent of the three control bodies for dealing with Tatts under the Product and Program Agreement. Product Co, with the control bodies, was obliged to supply Tatts with racing information in relation to all three codes of racing and for racing throughout Australia. In exchange, Tatts was obliged to pay to Product Co a fee which, by the relevant period, represented 39 per cent of its gross wagering revenue.

A TAB however named operated in each State and Territory in broadly the same fashion. In due course, other wagering operators commenced business throughout Australia and, in particular, on the internet. Those operators were making no financial contribution to racing in Australia yet they relied upon the industry to hold the race meetings so their wagering businesses could operate. From about 2005, commencing in Victoria, all the States and Territories except the Northern Territory, introduced what was described as Race Fields Legislation. This was intended to capture these other wagering operators and to make them contribute to the industry.

The legislation involved making it illegal to publish or use Race Fields Information in a wagering operation without holding a licence. Such a licence required the wagering operator to pay a percentage of its turnover or revenue to each State's control body. Initially, the interstate control bodies did not require Tatts to pay fees for their wagering licence in accordance with what was known as the Gentlemen's Agreement. However, by 2008 New South Wales commenced to impose the licensing fee on Tatts for the use of New South Wales Race Fields Information and its wagering operation. In due course, other States, including Queensland by amendment to the Racing Act, followed.

Since Tatts already paid a fee under the Product and Program Agreement to Product Co for the Queensland control bodies it was not required to pay a further fee in Queensland pursuant to that legislation. The charges imposed on Tatts by the interstate control bodies as for the other wagering operators were substantial. Indeed, during the relevant period Tatts was collectively charged in the order of $91,000,000. The importance to the Inquiry of this background comes about because Tatts passed on those charges to Product Co, the agent of the Queensland control bodies. Tatts deducted the fees it was required to pay interstate from the 39 per cent share of its revenue paid to Product Co.

Queensland Racing gave consideration to whether Tatts was legally entitled to make that deduction. On the 18th of November 2008, Queensland Racing received written advice from its solicitor, Mr Grace, on the question. The substance of the advice was that Tatts was not entitled to make the deduction. The board members of Queensland Racing Limited and those of Product Co received the advice. Nevertheless, they allowed Tatts to make and continue to make the deduction throughout the whole of the period of this

Inquiry to the tune of $91,000,000. The Commission intends to inquire in this public hearing as to why this occurred and how it was that no action was taken by the boards on that advice.

By not doing so the question must be asked: did the directors of each of the control bodies and Product Co act in good faith and in the best interests of Product Co and necessarily, the thoroughbred, harness and dog racing industries. The Commission will also inquire whether any of those directors were influenced by any conflict of interest or duty to account for their inaction over these significant deductions from Queensland racing revenue stream. Mr Bentley was a director of Tatts during the whole of the relevant period. Obviously, it would be his duty to advance the interests of Tatts on this issue. The Commission will inquiry into whether that conflict was properly managed.

Now, the question of whether the thrust of Mr Grace's advice was correct, namely that Tatts was not entitled to make the deductions it made, can only be finally determined by a court with the jurisdiction to do so and only if proceedings are commenced by Product Co, a control body, or indeed by Tatts itself for a declaration that it was entitled to deduct these interstate fees. To date that has not occurred. However, it is proper to note that after careful deliberation the Commission considers the argument compelling that Tatts was not entitled, in law, to make those substantial deductions and that Mr Grace's advice in 2008 was correct. Arguably then, Tatts has been permitted to deprive the racing industry in Queensland of some $91,000,000 during the relevant period and more since.

When Mr Grace's advice became known to the boards of Queensland Racing and Product Co, two directors agitated for action: Mr Andrews and Mr Lambert. They continued to agitate throughout 2009; however, by December 2009 Mr Andrews and Mr Lambert ceased to be directors of Queensland Racing and Product Co. Whether this occurred because other directors failed to act in good faith or in accordance with their duty or were influenced by a conflict will be investigated here.

Commissioner, the Commission will also investigate during the public hearings the procurement policies, processes and guidelines in place within Queensland Racing during the relevant period.

The terms of the purchasing policy of Queensland Racing and, later, Racing Queensland must have been very confusing to all concerned. Those policies have been difficult to understand. They contain internal contradictions. It is quite unclear as to what can be understood from the policies, how they are to be applied, for example, to services provided by Contour Consulting Engineers, mentioned in the Terms of Reference during the relevant period. Queensland Racing Limited and Racing Queensland Limited, on the present evidence available, seem to have made no attempt themselves to apply the policies, at least in respect of the larger projects undertaken.

There also seems to have been no consideration given to their application to the engagement of Contour, at least until late 2011. Contour did itself conduct some competitive procurement processes for the most significant subcontractors; for example, civil construction work contracts went to tender. However, these processes were not conducted in accordance with Racing Queensland procurement policy. Indeed, Contour's directors deny any knowledge of the policy of Queensland Racing or Racing Queensland until late 2011. These issues will be matters for further inquiry during these public hearings.

There have been allegations in the press to the effect that Contour was awarded either 150 million or 20 million worth of contracts without tender.

It is clear that those figures have been greatly exaggerated, and Contour, in fact, earned something like $5.5 million from what was extensive and ongoing Queensland Racing and Racing Queensland work during more than five years of the relevant period. It is important to note that the responsibility to ensure that the procurement policy was complied with was not that of Contour, or of any other consultant or contractor engaged on infrastructure projects, but of the relevant entities. The point of the procurement policy was to ensure that value was obtained and that the process was transparent. Where the policy was not followed and has not been followed, it is now difficult or impossible to determine retrospectively whether value for money was achieved or not. That is the whole point of having the policies.

On some projects, Contour was retained to manage the project and also to provide other services on the same project. Contour was involved in the Industry Infrastructure Plan in developing business cases for work in which they would be involved as consultants and contractors. The Commission will explore how the relevant entities sought to manage the apparent conflicts involved in Contour's multiple roles. Funding deeds were entered between the State and the relevant entities, setting out the terms on which government funding was to be provided for infrastructure projects. There seems to have been lack of compliance with requirements contained in those deeds in relation to the installation of synthetic tracks in 2007 to 2009 and subsequently in relation to the Industry Infrastructure Plan in 2011 in respect of procurement and payment processes and reporting to government.

Commissioner, the Commission will investigate the renegotiation of employment contracts for four most senior executives of Racing Queensland Limited, namely, for Mr Tuttle, Mr Orchard, Mr Brennan and Ms Reid. Those persons were offered new terms on the 5th of August 2011. The variations amounted to a 30 per cent increase in their pay in each case but importantly also a right, which did not exist before, to terminate their employment and receive all redundancy benefits, severance pay etcetera should the government change at the forthcoming election. This change meant that each of the key executives was entitled to elect to leave Racing Queensland in those circumstances with an increase in benefit – which the Commission has calculated as follows: for Mr Tuttle, $553,000, for Mr Orchard, $363,000, for Mr Brennan, $320,000 and for Ms Reid, $198,000. Of course, what did occur was that the election was lost and the government did change and all four terminated on the Monday after the election on Saturday, the 26th of March 2012.

Further, the chairman, Mr Bentley, as he was entitled to do under the new terms of employment, waived the requirement for each employee to give seven days notice. Thus, the company lost its most senior executives and most important employees – its CEO, its legal officer, its integrity director and its product development officer – at the same time and without the benefit of handover to those who would take over their roles. During these public hearings, Commissioner, the Commission will seek to investigate why these new contracts were offered and how the offers could be said to be in the best interests of Racing Queensland. Why was the chairman minded to grant a waiver of the requirement in each case for seven days notice of termination, and how was that in the best interests of the company?

Commissioner, the Commission has investigated the management policies, processes and guidelines and the workplace culture and practices of the relevant entities, particularly Racing Queensland Limited, since it was the governing body on the 1st of July 2010. The management issues arising for examination include whether the chairman, Mr Bentley, was active in the day-to-day business of Queensland Racing Limited and then Racing Queensland Limited to an extent which was not appropriate for a chairman.

There will also be some exploration of whether the directors acted in accordance with Racing Queensland's Code of Conduct, including in relation to changes in the make-up of the board and the use of proxy votes.

The Commission has investigated the corporate governance arrangements of Racing Queensland Limited, including whether its directors acted with integrity and in the best interests of the company and the racing industry, whether there was compliance with the Racing Act 2002 and the *Corporations Act 2001* and whether conflicts of interest were appropriately managed generally. These issues arise for attention in the context of various other issues for inquiry during the Racing Queensland period noted above.

They will include consideration of events surrounding the dismissal of Ms Kerry Watson as a director of Racing Queensland in December 2010. This occurred as a response to her letter to Mr Bentley, copying Mr Kelly of the Office of Racing and Minister Lawlor, and raising concerns about the Industry Infrastructure Plan. This gives rise to a question: was the dismissal done with integrity and in the best interests of the industry?

Commissioner, there are matters for inquiry in the public hearings in respect of the oversight undertaken of the racing control bodies during the relevant period by the three relevant responsible ministers: Mr Fraser, Mr Lawlor and Mr Mulherin MP. Mr Fraser was Treasurer during the period September 2007 to March 2012 and also Minister responsible for the racing portfolio until March 2009. He considered a number of issues of importance during his time as Minister. In 2008, a question arose in relation to the integrity of one director, Mr Ludwig. The complaint made to the Minister was that Mr Ludwig had voted as proxy for a committee constituted under the Racing Act without first obtaining the authority of the committee to be proxy and without a meeting of the committee to discuss the subject of the vote. Mr Fraser referred the matter to the CMC and ASIC. Each body concluded that it did not have jurisdiction to consider the matter. Queensland Police investigated and concluded there was insufficient evidence to prosecute a charge of fraud. However, despite the powers in the Racing Act and the suggestion of ASIC that they be used, Mr Fraser did not elect to use them. Why? Mr Fraser was the responsible Minister at the time when oversight questions arose in relation to the installation of synthetic racetracks. He was involved as Treasurer in authorising, just before the commencement of the caretaker period in February 2012, the much publicised release of Industry Infrastructure Plan funds to Racing Queensland. The Commission is specifically asked to inquire into the events surrounding the release of these funds.

Mr Lawlor was the responsible Minister from March 2009 until February 2011 and was involved in securing the commitment of government to redirect $80 million which rose later to $110 million of wagering tax revenue for the improvement of the racing industry infrastructure. He also approved the new constitution for Racing Queensland Limited as the amalgamated control body for the three codes of racing in 2010. The approach to this issue requires investigation. Mr Mulherin was Minister for Racing from the 21st of February 2011 until the change of government on the 26th of March 2012. His responsibility covers the period of the development of the Industry Infrastructure Plan and funding deeds made under it from the middle of 2011 and the transfer of funds in February and March 2012. The Commission will explore with him the degree of government oversight in relation to those matters generally and, in particular, will seek to understand the circumstances of his announcement on the 1st of February 2012 while negotiation of the funding deed for the $8.2 million upgrade of Beaudesert facilities was still underway and the required business case was still being considered by Treasury that upgrades would start before the end of the month.

The Inquiry must also involve the role of oversight undertaken by the Chief Executive of the relevant department which necessarily involved the Office of Racing. This Inquiry involved senior members of the office who had powers delegated to them and played lead roles in the relevant events throughout – Mr Kelly and Ms Perrett. In particular, the role played by the Office in assessing the conditions to be imposed by the Minister and their advice to him in relation to the constitution to be adopted as appropriate for Racing Queensland. Similarly, Mr Kelly and Ms Perrett were involved with the proposed amendments in 2008 to the constitution of Queensland Racing Limited and the response to the allegations of unlawful or invalid use of a proxy by Mr Ludwig. They were also involved with Racing Queensland seeking to comply with government conditions for the Industry Infrastructure Plan in late 2011 and early 2012. The Commission is concerned to understand how they saw their role and the way they performed it.

Commissioner, I now conclude by mentioning matters of procedure for the public hearings. Correspondence has been entered into with legal representatives of people who have been given leave to appear. The Commission has notified each of those persons that the principal criterion that you have indicated that you will observe in exercising your powers in the conduct of the public hearings is the extent to which, in your judgment, the witness can help the Inquiry. Your powers include determining which witnesses are to be called, to what extent their evidence will be directed, whether or not examination will be allowed of any witness, as there is no legal right to examine any witness and how the witnesses will be examined, bearing in mind the inquisitorial nature of this Inquiry. With the principal criterion of assistance to the Inquiry in mind, you have determined the applications made on behalf of all parties who have the leave to appear as to who will be allowed to examine witnesses and on what topics. You have also determined applications for the Commission to call other witnesses who have provided statements. Your

determinations have been communicated to all relevant parties. It is appreciated that persons representing particular parties may wish to reapply once they've heard evidence from different witnesses when they are examined. I propose, Commissioner, that the process for any such application is to notify Counsel Assisting the Commission, so that appropriate time can be allocated for you to consider it.

However, it should be emphasised that it is for the Commission and not the parties to determine what is important to be examined during the course of the public hearings. The hearings are not the opportunity for parties to seek to address matters which they consider may be the subject of findings in due course which are adverse to them. To the extent that such matters are not already addressed by statements and are not addressed during examination, that opportunity will be given later.

Commissioner, on the list on the website I have included Murray Procter as one person to be called. I've now made the judgment to dismiss that requirement as he has provided a detailed statement which is available on the website.

Appendix I

Acknowledgements

The Inquiry wishes to thank the following for their assistance.

Crown Law Library
Department of Justice and Attorney-General

State Library of Queensland
Government Research and Information Library

Mr Spencer Routh OAM
Former University of Queensland
Reference Librarian

Ms Lucinda Kasmer
Special Legal Adviser
Department of the Premier and Cabinet

Ms Melinda Pugh
Assistant Crown Solicitor
Crown Law

Mr Peter Rose
Greyhound owner (prior)
Greyhound history researcher

Brisbane Magistrates Court
Queensland Courts Service
Department of Justice and Attorney-General

Clerk of the Parliament
Mr Neil Laurie

Ms Annastacia Palaszczuk
Leader of the Opposition
Approving the release and use of Cabinet and CBRC documents, generated during the previous administration, to the Commission.

Facilities Services
Department of Justice and Attorney-General

Information Technology Services
Department of Justice and Attorney-General

Information and Court Technology
Queensland Courts Service
Department of Justice and Attorney-General

Queensland State Archives
Department of Science, Information Technology, Innovation and the Arts

Mr John Lingard
Letsgohorseracing.com.au

Mr Phil Purser
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Appendix J

Commission Staff

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Mr Jordan Schofield

Media Manager
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Mr Brandon Naidoo

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Ms Rexine Cooney
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Appendix K

Legal Representatives

Persons Given Leave to Appear	Legal Representatives
State of Queensland	Mr GA Thompson QC and Mr E Morzone instructed by Crown Law
Queensland All Codes Racing Industry Board and Queensland Race Product Company Limited	Mr P Flanagan QC and Mr M Copley QC instructed by Clayton Utz
Mr Robert Bentley, Mr William Ludwig, Mr Anthony Hanmer, Mr Wayne Milner, Mr Malcolm Tuttle, Mr Paul Brennan, Ms Shara Reid, Mr Jamie Orchard and Mr Peter Smith	Mr K Wilson QC instructed by Rodgers Barnes & Green
Tatts Group Limited and its subsidiaries	King & Wood Mallesons
Contour Consulting Engineers Pty Ltd, Mr Brett Thomson and Mr Chris Fulcher	Porter Davies Lawyers
Mr Michael Kelly and Ms Carol Perrett	Mr A MacSporran QC and Mr M Nicolson instructed by Patrick Murphy Lawyers
Mr Andrew Fraser	Mr M Burns QC instructed by Gilshenan Luton
Mr Peter Lawlor	Mr M Plunkett instructed by Gall Standfield & Smith
Mr William Andrews	Mr R Anderson instructed by Gabriel Ruddy & Garrett
Mr Kevin Seymour and Mr Michael Godber	Mr A Duffy instructed by Schweikert Harris

Appendix L

Exhibits List

Exhibit Number	Description
1	Racing Queensland Magazine – July 2010
	The statements produced to the Commission and their attachments accessible on the Commission's website were treated as evidence by the Commission and not formally tendered.

Appendix M

Report Glossary

Term	Explanation
Australian Securities and Investments Commission (ASIC)	Australia's corporate, markets and financial services regulator.
Authority to Introduce submission (ATI)	Submission used to provide information to Cabinet to facilitate the introduction of a Bill into the Parliament.
Authority to Prepare submission (ATP)	Submission used to explain to Cabinet the reasons for initiating a legislative proposal, and seeking Cabinet approval to commence drafting a Bill.
Brisbane Racing Club (BRC)	Formed in 2009 on the amalgamation of the two metropolitan racing clubs – the Queensland Turf Club and the Brisbane Turf Club
Cabinet	Cabinet is the peak decision-making body of the Queensland Government and is responsible for the development and coordination of government policies.
Cabinet Budget Review Committee (CBRC)	Government body responsible for making budgetary decisions.
Callaghan Park	Racing facility located at Rockhampton, Queensland.
Cannon Park	Racing facility located at Cairns, Queensland
Chief Executive	The Director-General of a department of Government.
Clifford Park	Racing facility located at Toowoomba, Queensland.
Contour Consulting Engineers Pty Ltd (Contour)	Provider of engineering and project management services.
Control Body	A body responsible for regulating and supervising a code or codes of racing.
Corbould Park	Racing facility located at Caloundra, Queensland.
Cronulla Park	Racing facility located at Logan, Queensland.
Department of Employment, Economic Development and Innovation (DEEDI)	Queensland Government Department responsible for employment, economic development and innovation.
Department of Local Government, Planning, Sport and Recreation (DLGPSR)	Queensland Government Department responsible for local government, planning, sport and recreation.
Department of National Parks, Recreation, Sport and Racing (DNPRSR)	Queensland Government Department responsible for national parks, recreation, sport and racing.

Term	Explanation
Deputy Director-General (DDG)	A senior government officer of a department, reporting to a Director-General (or equivalent).
Director-General (DG)	The senior government officer of a department, reporting to a Minister.
Executive Government	Includes the Premier, Ministers, Executive Council and government departments/agencies.
Gentlemen's Agreement	Agreement between each TAB and the control bodies for each State whereby they agreed that there would be no requirement for the wagering operators to pay for the use of interstate racing authorities' product when operating their wagering business in their own State.
Greyhounds Queensland Limited (GQL)	Body responsible for the promotion of greyhound racing in Queensland and Australia. GQL existed from 1 July 2008 to 1 July 2010. Its predecessor was the Greyhound Racing Authority.
Greyhound Racing Authority (GRA)	Body responsible for the promotion of greyhound racing in Queensland. GRA existed from 2002 to 1 July 2008.
Industry Infrastructure Plan (IIP)	Contained details of the facilities and the work to be undertaken, to which funding made available through the Racing Industry Capital Development Scheme was to be allocated.
Machinery of Government (MoG)	A change to the structure of government departmental responsibilities.
Matter to Note	Used to inform Cabinet of forthcoming significant decisions and public announcements that would not otherwise go to Cabinet. These matters are for noting by Cabinet.
Non-TAB club	A club where the TAB does not provide for wagering on the races held.
Ooralea Park	Racing facility located at Mackay, Queensland.
Product and Program Agreement (PPA)	The agreement where Product Co agreed to supply *Australian Racing Information, Queensland Racing Calendar and Queensland Racing Program to TattsBet.*
Queensland All Codes Racing Industry Board (QACRIB)	The control body for the three codes of racing (thoroughbred, harness and greyhound racing), responsible for coordinating, managing and regulating the industry. The QACRIB commenced on 1 May 2013. Its predecessor was RQL.
Queensland Audit Office (QAO)	Independent office of the Queensland Auditor-General.

Term	Explanation
Queensland Country Racing Committee (QCRC)	Comprises members from country racing associations. Makes recommendations about the racing calendar to the thoroughbred control body.
Queensland Harness Racing Board (QHRB)	Body whose principal activity was to promote, regulate and control the administration of harness racing in Queensland. QHRB existed from 2002 to 1 July 2008.
Queensland Harness Racing Limited (QHRL)	Body whose principal activity was to promote, regulate and control the administration of harness racing in Queensland. QHRL existed from 1 July 2008 to 1 July 2010. Its predecessor was the Queensland Harness Racing Board.
Queensland Race Product Co Ltd (Product Co)	Agent for the Queensland racing industry in its commercial arrangement with Tatts.
Queensland Racing Industry Inter-code Agreement	Arrangement established for the distribution of revenue received by Product Co from Tatts between the three codes of racing.
Queensland Racing Limited (QRL)	Body whose principal activity was to encourage, control, supervise and regulate administration of thoroughbred horse racing in Queensland. QRL existed from 1 July 2006 to 1 July 2010. Its predecessor was the Queensland Thoroughbred Racing Board.
Queensland Thoroughbred Racing Board (QTRB)	Body whose principal activity was to encourage, control, supervise and regulate administration of thoroughbred horse racing in Queensland. QTRB existed from 2002 to 1 July 2006.
Queensland Treasury/Treasury Department (Treasury)	Body responsible for providing core economic and financial policy advice to the Queensland Government. Queensland Treasury is part of the Department Queensland Treasury and Trade.
Racing Industry Capital Development Scheme (RICDS)	Source of funding generated through the redirection of 50 per cent of net wagering tax, to be used to fund priority capital works.
Racing Information Services Australia Pty Ltd (RISA)	Conducts a national consolidated racing information service business to service the Australian horse racing industry and other users of horse racing information.
Racing Queensland Limited (RQL)	Body whose principal activity was to encourage, control, supervise and regulate the administration of thoroughbred, harness and greyhound racing in Queensland. RQL existed from 1 July 2010 to 30 April 2013. Its predecessors were: Queensland Racing Limited; Queensland Harness Racing Limited; and Greyhounds Queensland Limited.
TAB club	A racing club where the TAB provides for wagering on the races held.

Term	Explanation
Strategic Asset Management Plan (SAMP)	Details proposed future arrangements for thoroughbred, harness and greyhound racing facilities across Queensland. The SAMP is dated September 2010.
Under Treasurer (UT)	The senior government officer of Queensland Treasury and Trade, reporting to the Treasurer.
TattsBet Limited (TattsBet)	A subsidiary of the Tatts Group. Previously known as UNiTAB Limited.
Three control bodies	The bodies which represent the thoroughbred, harness and greyhound codes of racing.
Wadham Park	Thoroughbred racing facility located at Canungra (Gold Coast), Queensland.

Appendix N

Acronyms

Acronym	Description
AC	Audit Committee
ACCC	Australian Competition and Consumer Commission
AFRC	Audit Finance and Risk Committee
APC	Australian Productivity Commission
AR	Australian Rules of Racing
Arben	Arben Management Pty Ltd
ASCR	*Australian Solicitors Conduct Rules 2012*
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
ATA	Australian Trainers' Association
ATI	Authority to Introduce a Bill submission
ATO	Australian Taxation Office
ATP	Authority to Prepare a Bill submission
BDO	BDO Kendalls Australia Pty Ltd
Blacklaw	Blacklaw Civil Contractors Pty Ltd
BRC	Brisbane Racing Club
BTC or BATC	Brisbane Turf Club formerly Brisbane Amateur Turf Club
CBRC	Cabinet Budget Review Committee
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CGW	Cooper Grace Ward
CIF	Community Investment Fund
CMC	Crime and Misconduct Commission
Commission	Queensland Racing Commission of Inquiry
Contour	Contour Consulting Engineers Pty Ltd
Contract Approval Form	Industry Infrastructure Plan – Contract Approval Form
CRC	Country Racing Committee
CU	Clayton Utz
D&O	Directors and Officers
DDG	Deputy Director-General
DEEDI	Department of Employment, Economic Development and Innovation

Acronym	Description
Deloitte	Deloitte Touche Tohmatsu Ltd
DG	Director-General
DJAG	Department of Justice and Attorney-General
DLGPSR	Department of Local Government, Planning, Sport and Recreation
DNPRSR	Department of National Parks, Recreation, Sport and Racing
DPC	Department of the Premier and Cabinet
DPIF	Department of Primary Industries and Fisheries
EI	Equine Influenza
Godfrey Group	Godfrey Remuneration Group
GCTC	Gold Coast Turf Club
GQL	Greyhounds Queensland Limited
GRA	Greyhound Racing Authority
HR	Human Resources
HRRC	Human Resources and Remuneration Committee
IIP	Industry Infrastructure Plan
IIPCG	Industry Infrastructure Plan Control Group
Issues Paper	Queensland Racing Industry Issues Paper
ITC	Ipswich Turf Club
LNP	Liberal National Party
LPP	Legal Professional Privilege
LSC	Legal Services Commissioner
Mercer	Mercer Consulting (Australia) Pty Ltd
MoG	Machinery of Government
NAB	National Australia Bank
NR	Norton Rose
OECD	Organisation for Economic Co-operation and Development
OLGR	Office of Liquor, Gaming and Racing
PPA	Product and Program Agreement
Product Co	Queensland Race Product Co Ltd
QACRIB	Queensland All Codes Racing Industry Board
QAO	Queensland Audit Office
QCRC	Queensland Country Racing Committee
QHRB	Queensland Harness Racing Board
QHRL	Queensland Harness Racing Limited
QPC	Queensland Principal Club
QPS	Queensland Police Service
QTRB	Queensland Thoroughbred Racing Board

Acronym	Description
QRL	Queensland Racing Limited
QTC	Queensland Turf Club
RBG	Rodgers Barnes & Green
RICDS	Racing Industry Capital Development Scheme
RISA	Racing Information Services Australia Pty Ltd
RISE	Race Information Services Enterprise Pty Ltd
RNC	Remuneration and Nomination Committee
Rockhampton Racing	Rockhampton Racing Pty Ltd
RQL	Racing Queensland Limited
RSC	Racing Science Centre
SAMP	Strategic Asset Management Plan
Shadforths	Shadforths Civil Engineering Contractors
Solicitors Rules	*Legal Profession (Solicitors) Rule 2007*
Sunshine Cost Racing	Sunshine Coast Racing Pty Ltd
SWOT	Strengths, weaknesses, opportunities, threats
TattsBet	TattsBet Limited
TattsGroup	Tatts Group Limited
TBAQ	Thoroughbred Breeders' Association of Queensland
TLE	Toowoomba Town Lighting & Electrical
Treasury	Queensland Treasury
TRV	Total Remuneration Value
TTC	Toowoomba Turf Club
TTM	TTM Consulting (Qld) Pty Ltd
UT	Under Treasurer
Venue Management	Queensland Venue Management Pty Ltd