CLAYTON UTZ

Racing Queensland Limited

Discussion about Potential Restructuring Issues

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1. Introduction

1.1 Overview and Purpose

We have been asked to provide advice to the Chair of Racing Queensland Limited (**Racing Queensland**) in respect of the extent of the State's power to legislatively alter the existence or structure of Racing Queensland.

Racing Queensland is a corporation that has been established under the Corporations Act 2001 (Cth) (**Corporations Act**). It has also been appointed as a "control body" within the meaning of s.26 of the Racing Act 2002 Qld (**Racing Act**) in respect of the three codes of racing being thoroughbred, harness and greyhound racing.

In practical terms, this means that Racing Queensland is the State regulator of racing in Queensland and has oversight of the operation, management and administration of the three codes of racing.

The regulatory framework within which Racing Queensland has been appointed as the control body and which then confers on Racing Queensland its regulatory powers, functions, roles and responsibilities can be described as a "hybrid" regulatory framework. This is because the Racing Act now confers regulatory powers and functions on a non-government entity, being a corporation incorporated under the Corporations Act. The more usual regulatory frameworks are established using either an independent statutory body or some form of government controlled entity (for example, through controls over the appointment of members and directors or with an ability to give statutory or non-statutory directions as to how State funds should be applied). However, Racing Queensland is quite unique in that it is a non-government entity incorporated under the Corporations Act and is not subject to the usual types of State control.

Having regard to the issues presented by this regulatory framework, we have been asked to consider the steps that could be taken in the future by the State to restructure the current regulatory framework and/or to facilitate the removal of Racing Queensland as the approved control body. In particular, we have been asked to consider both the powers and limitations on the State to undertake such actions and to consider what steps, if any, Racing Queensland could initiate to preserve the current regulatory structure of the racing industry.

1.2 Structure of this Paper

In dealing with the above issues, this Paper will set out:

(a) An overview of the current structure and operations of Racing Queensland (Section 3 of this Paper);

(b) The status of Racing Queensland, (including the Board of Racing Queensland (**Board**)) under the Racing Act and the nature of the control body regulatory framework that is established under the Racing Act (Section 4 of this Paper);

(c) The capacity of the State Government to remove Racing Queensland as currently constituted, as the appointed Control Body under the Racing Act in the following circumstances:

(i) **Scenario One** - By action to remove Racing Queensland as the control body under the Racing Act as currently drafted; and

(ii) **Scenario Two** - By action to remove Racing Queensland as the control body by the exercise of legislative power in enacting specific legislation (including by amendments to the Racing Act) facilitating such a removal; and

(iii) **Scenario Three** - By action to remove the current directors of Racing Queensland under the Racing Act (as currently drafted) or by the exercise of State legislative power to facilitate such removals.

Each of these options will be discussed at Sections 5, 6 and 7 of this Paper; and

(d) The strategies and steps, if any, that Racing Queensland may now initiate to preserve the current structure of the racing industry (Section 8 of this Paper).

2. Executive Summary

Our key conclusions are as follows:

(a) Under the Racing Act as currently drafted, the only express mechanism which is available to the State to alter the existence or structure of Racing Queensland is to cancel the approval of Racing Queensland as a control body. Such a cancellation can only occur if the Minister is satisfied that the grounds for disciplinary action exist. Another alternative is if under s.24AA of the Acts Interpretation Act 1954 (**Acts Interpretation Act**) the Minister were to seek to revoke his current approval of Racing Queensland as a control body following the same process that is required under the Racing Act to grant such an approval;

(b) The State currently has no legislative ability to directly interfere with the assets of Racing Queensland or the tenure of its directors;

(c) In the event that the approval of Racing Queensland as a control body is cancelled, the Constitution of Racing Queensland requires that the Board must call a general meeting to resolve to wind up Racing Queensland and then deal with its assets by transferring same to a successor control body;

(d) The State Parliament has a broad plenary power to enact legislation, limited only by restrictions contained in the Constitution of Australia 1901 (Cth) (**Commonwealth Constitution**);

(e) Section 109 of the Commonwealth Constitution provides that a State law will be invalid to the extent that it is inconsistent with a law of the Commonwealth. As Racing Queensland is established under a Commonwealth law, (being the Corporations Act). However, the Corporations Act expressly gives the State a broad power to "opt out" of the Corporations Act in respect of particular bodies or matters. Therefore, as a matter of practicality, we do not consider that s.109 of the Commonwealth Constitution will effectively operate to prevent the State from enacting legislation pertaining to the restructuring of Racing Queensland;

(f) Given its broad legislative power, the State could theoretically enact legislation to deal with a wide range of matters relating to the structure of Racing Queensland, including in relation to winding up, the appointment and removal of directors, the control by the State and even as regards the details of the provisions to be included in the Constitution of Racing Queensland

(g) However, if the State wished to disband Racing Queensland, in our view the simplest method, because of the provisions contained in the Constitution of Racing Queensland, would be for it to legislatively cancel the approval of Racing Queensland as a control body. This would, unless the Constitution of Racing Queensland can be amended have the flow-on effect of winding up Racing Queensland and divesting it of its assets;

(h) Although the State could we believe act to legislatively remove the current directors of Racing Queensland, 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 and be likely to attract political controversy.

(i) However, given the plenary power of the State to enact legislation, we do not consider that there is much that Racing Queensland can do to protect itself from State Government initiated restructuring. However, we would recommend that Racing Queensland take the following steps being:

(i) To continue to closely supervise its operations to ensure that Racing Queensland does not fall foul of any of the provisions of the Racing Act pertaining to disciplinary action, to avoid giving a future State Government any reason to cancel the approval of Racing Queensland as a control body; and

(ii) If possible, to investigate in detail the removal of clause 24 from its Constitution so that Racing Queensland will then not automatically be required to wind itself up and divest its assets upon the cancellation of its control body approval. One would need to fully investigate whether such a step would raise any specific compliance issues for Racing Queensland under its control body approval, the applicable taxation laws and under the Corporations Act given its current status as a company limited by guarantee.

3. Overview

3.1 Current Structure of Racing Queensland

The overall structure of Racing Queensland can be described in the following terms:

(a) Racing Queensland is a company incorporated under the Corporations Act, is limited by guarantee and does not have a share capital. Like any incorporated company, the specific details regarding the operation and administration of Racing Queensland are primarily to be found in the Constitution of Racing Queensland. In practical terms, this gives the Racing Queensland members, responsibility for such matters as defining the objects of the company and the appointment and removal of directors; and

(b) As a control body, Racing Queensland is then the recipient of relevant statutory and regulatory responsibilities and functions. The functions of Racing Queensland and the powers that it has in respect of those functions are conferred on Racing Queensland by legislation (namely, the Racing Act).

The key details relating to the structure of Racing Queensland as a corporate entity can be described in the following terms:

(a) Racing Queensland was established with the object of exercising the powers and performing the functions of a control body.[1] The income and property of Racing Queensland must be applied solely towards the promotion of this object;[2]

(b) The members of Racing Queensland are those persons who are the directors of Racing Queensland from time to time.[3] A person becomes a member of Racing Queensland when he or she becomes a director of the company and ceases to be a member of Racing Queensland when he or she ceases to be a director of the company.[4]

(c) The Board of Racing Queensland consists of seven directors, including a Chairman and Deputy Chairman.[5] Directors must retire in rotation, two at every Annual

[1] Clause 3.1 of the Constitution of Racing Queensland.

[2] Clause 3.2 of the Constitution of Racing Queensland.

[3] Clause 4.1 of the Constitution of Racing Queensland.

[4] Clauses 4.2 and 4.3 of the Constitution of Racing Queensland.

[5] Clauses 13 and 14 of the Constitution of Racing Queensland.

General Meeting held in an Election Year (being 2014 and then every second year thereafter).[6] Following a selection process and confirmation that a candidate is "eligible" to hold such an appointment,[7] the appointment of a candidate is announced by the Chairman at the Annual General Meeting.[8]

(d) Racing Queensland may, by ordinary resolution of its members, remove a director from office before the expiration of his or her term of office.[9] The Constitution sets out certain circumstances when the office of a director will become vacant, for example if the director dies, is convicted of a criminal offence, becomes bankrupt, becomes ineligible to be a director for any reason under the Corporations Act, ceases to be a director or member, resigns, is absent from three consecutive meetings of the Board without notice, is guilty of unbecoming conduct, or ceases to be an eligible member under the Racing Act.[10]

3.2 Current Operations of Racing Queensland

The principal activity of Racing Queensland is to encourage, control, supervise and regulate the administration of thoroughbred, harness and greyhound racing in Queensland.

Racing Queensland is, in effect, an amalgamation of the three previous control bodies for the three different codes of racing. Prior to 1 July 2010, there were three entities which held approvals under the Racing Act as control bodies being:

(a) Queensland Racing Limited, in respect of thoroughbred racing;

(b) Greyhounds Queensland Limited, in respect of greyhound racing; and

(c) Queensland Harness Racing Limited, in respect of harness racing,

(Former Control Bodies).

By virtue of certain transitional provisions inserted into the Racing Act by the Racing and Other Legislation Amendment Act 2010, as from 1 July 2010 the approvals of those control

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[6] Clause 12.8 of the Constitution of Racing Queensland.

[7] For the meaning of "eligible individual", see s.9 of the Racing Act 2002.

[8] See clause 15 of the Constitution of Racing Queensland.

[9] Clause 12.11 of the Constitution of Racing Queensland.

[10] Ibid.

bodies were cancelled and a new approval was granted to Racing Queensland in respect of all three codes of racing.[11]

The assets and liabilities,[12] employees,[13] and rights and obligations[14] of the Former Control Bodies were then transferred to Racing Queensland. The amalgamation was said at the time to be necessary to avoid duplication of effort, reduce administrative overheads and to drive efficiencies.[15]

As the control body for all three codes of racing, Racing Queensland is now responsible for regulating all aspects of racing in Queensland, including the licensing of venues and participants, assessing performance, promoting racing and allocating prize money.

[11] Section 428 of the Racing Act.

[12] Section 429 of the Racing Act.

[13] Section 432 of the Racing Act.

[14] Section 435 of the Racing Act.

[15] See Explanatory Memorandum, Racing and Other Legislation Amendment Bill 2010, at 2.

4. The Status of Racing Queensland under the Racing Act

In this section of the Paper, we will consider the control body regulatory framework that is established under the Racing Act, including the appointment and responsibilities of a control body, the specific obligations of Racing Queensland and the role and establishment of the Board of Racing Queensland within this framework.

4.1 The Regulatory Framework

At a general level, the regulatory framework under the Racing Act establishes a process whereby the Minister may approve an independent, non-State owned corporation as the "control body" for a particular code of racing. The control body then has responsibility for regulating all aspects of that particular code of racing in Queensland.

Only an "eligible corporation" may apply for approval as a control body, being a corporation that is registered under the Corporations Act that has a constitution that, at all times, requires at least 3 directors and persons appointed or employed as executive officers of the corporation to be "eligible individuals".[16]

The Minister may approve a corporation as a control body if the Minister decides that the corporation is suitable to be approved as a control body for the particular code of racing.[17]

A control body approval continues in force until it is cancelled.[18] Prior to 2010, such control body approvals only lasted for a six year period. However, this was considered to result in unnecessary cost and administrative burden,[19] and so the Racing Act was amended to allow an approval to be held for an indefinite period.

As previously discussed, the regulatory framework for racing in Queensland is rather unique, in that the control body is an independent entity from the State, yet it derives its functions and powers with respect to racing from the Racing Act. Furthermore, although it does not form part of the State, a control body falls within the scope of the Crime and Misconduct Act 2001 and is also subject to auditing by the Auditor-General in accordance with the provisions of the

[16] Section 8 of the Racing Act.

[17] Section 26 of the Racing Act.

[18] Section 28 of the Racing Act.

[19] See Explanatory Memorandum, Racing and Other Legislation Amendment Bill 2010, at 3.

Auditor-General Act 2009. [20] Both of these governance obligations are usually reserved for government controlled entities.

4.2 Racing Queensland as a Control Body

Under the Racing Act, the function of a control body is to manage its code of racing.[21] In the case of Racing Queensland, this function extends to the management of thoroughbred racing, harness racing and greyhound racing.

A control body has the powers that are necessary for performing its functions and all other powers necessary for discharging the obligations imposed on the control body under the Racing Act.[22]

Section 34 of the Racing Act sets out the powers of Racing Queensland as a control body. The list is extensive but includes:

(a) the licensing of animals, clubs, participants and venues;

(b) assessing the performance of licensed animals, clubs, participants and venues;

(c) preparing and implementing plans and strategies for developing, promoting and marketing the commercial operations of the code of racing;

(d) distributing amounts as prize money or for research and analysis; and

(e) allocating funding for venue development and other infrastructure relevant to the code of racing.

As Racing Queensland manages more than one code of racing, Racing Queensland must make decisions under the Racing Act which are in the best interests of all of the codes of racing whilst having regard to the interests of each individual code.[23]

Racing Queensland may also charge a fee for its services, but that fee must reflect the reasonable costs to Racing Queensland of providing the service.[24]

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[20] See ss.59 and 60 of the Racing Act.

[21] Section 31 of the Racing Act.

[22] Section 33(2) of the Racing Act.

[23] Section 34A of the Racing Act.

[24] Section 35 of the Racing Act.

The State currently has a limited ability to control the operations of Racing Queensland under the Racing Act. The main control provisions are summarised below.

Firstly, Racing Queensland must on an annual basis submit to the chief executive a plan for managing its code of racing.[25]

Secondly, Racing Queensland is required to notify the chief executive within 14 days if:

(a) there is a change in an executive officer of Racing Queensland;[26]

(b) Racing Queensland ceases to be an "eligible corporation;[27] or

(c) an executive officer of Racing Queensland ceases to be an "eligible individual".[28]

The chief executive of the Department may also investigate Racing Queensland to determine whether it is suitable to continue to manage its code of racing. However, this may only occur if the chief executive suspects that Racing Queensland is no longer suitable to continue to manage its code of racing, or, if the investigation is undertaken as a part of an audit program approved by the Minister.[29]

The primary way by which the State may interfere with the day to day operations of Racing Queensland is through the Minister's ability to give a direction to Racing Queensland to make a new policy, review an existing policy, make rules of racing about a matter or review existing rules of racing, if that is considered necessary:[30]

(a) to ensure public confidence in the integrity of the Queensland racing industry;

(b) to ensure Racing Queensland is managing its code of racing in the interests of the code;

(c) to ensure the welfare of Racing Queensland's licensed animals;

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[25] Section 41 of the Racing Act.

[26] Section 42 of the Racing Act.

[27] Section 43 of the Racing Act.

[28] Section 44 of the Racing Act.

[29] Section 47 of the Racing Act.

[30] Section 45 of the Racing Act.

(d) to ensure Racing Queensland's actions are accountable and its decision-making processes are transparent; or

(e) to ensure Racing Queensland's rules of racing have sufficient regard to the rights and liberties of individuals as mentioned in s.4(3) of the Legislative Standards Act 1992.

4.3 The Role and Establishment of the Board

The Board of Racing Queensland is established in accordance with the Constitution of Racing Queensland.

The Constitution of Racing Queensland provides that the management of the company is a responsibility of the Board. The Board may exercise all powers of the company as are not, under the Corporations Act or the Constitution, required to be exercised by the company in general meeting.[31]

The Board may also make by-laws for the general management and running of the company,[32] and may borrow money, mortgage or charge the company's property and issue debentures and other securities.[33]

We note that the State currently does not have any real control over the establishment or as regards the role of the Board of Racing Queensland.

[31] Clause 16.1 of the Constitution of Racing Queensland.

[32] Clause 16.2 of the Constitution of Racing Queensland.

[33] Clause 16.3 of the Constitution of Racing Queensland.

5. Scenario One - Removal under the Current Racing Act

Our review of the Racing Act indicates that the State current has no ability to exercise powers over the assets of Racing Queensland or to affect the appointment and/or removal of its directors. Therefore, the extent of the State's current powers over Racing Queensland operate primarily through its ability to cancel the approval of Racing Queensland as a control body.

5.1 Powers of the Minister to cancel the approval of a control body

On 1 July 2010, the Minister approved Racing Queensland as the control body for thoroughbred, harness and greyhound racing in Queensland.[34] This approval of Racing Queensland as a control body now continues until it is cancelled.[35]

Cancellation as a result of disciplinary action

The Racing Act gives to the Minister an express power to cancel an approval as a control body only as a result of disciplinary action.[36] The Minister may take disciplinary action against Racing Queensland if:

(a) it is no longer an eligible corporation;

(b) an executive officer of Racing Queensland is not an eligible individual;

(c) Racing Queensland is no longer suitable to manage the code;

(d) Racing Queensland contravenes a provision of the Act, whether or not a penalty is provided for the contravention;

(e) Racing Queensland fails to comply with a condition relating to its approval;

(f) Racing Queensland contravenes a direction given by the Minister under section 45 of the Racing Act;

(g) Racing Queensland fails to take disciplinary action under Chapter 3 of the Racing Act in respect of a licence holder when Racing Queensland was required to do so; or

[34] See ss.428(2) and (3) of the Racing Act.

[35] Section 28 of the Racing Act.

[36] See s.58(2)(c) of the Racing Act.

(h) in its approval application, or a notice or other document given by Racing Queensland to the Minister or chief executive, Racing Queensland stated something that it knew was false or misleading in a material particular.[37]

These grounds are expressly stated to be the only grounds for which disciplinary action may be taken.[38]

If the Minister believes a ground exists to take disciplinary action, the Minister must give Racing Queensland a show cause notice, with a show cause period of at least 28 days after the giving of the notice.[39] If, after considering Racing Queensland's response to the show cause notice the Minister still believes that a ground for disciplinary action exists, the Minister has a range of options available to him. Those options include suspension, variation or cancellation of the approval of the control body.[40]

Revocation without cause

Section 28 of the Racing Act states that a control body's approval continues in force until it is cancelled. It is not totally clear whether s28 of the Racing Act was meant to allow the Minister to revoke an approval without cause, that is, in addition to the Minister's express power of cancellation as a result of disciplinary action than under the Racing Act.

However, we would also note that Section 24AA of the Acts Interpretation Act provides that:

"**24AA Power to make instrument or decision includes power to amend or repeal**

If an Act authorises or requires the making of an instrument or decision—

(a) the power includes power to amend or repeal the instrument or decision; and

(b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision."

However, s.4 of the Acts Interpretation Act then provides that the application of any of the provisions of the Acts Interpretation Act may be displaced, wholly or partly, by a contrary intention appearing in any other Act.

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[37] Section 52(1) of the Racing Act.

[38] Section 52(3) of the Racing Act.

[39] Sections 53(1)-(3) of the Racing Act.

[40] Section 58(2) of the Racing Act.

The power to repeal or amend a decision can only be exercised if the decision-maker is not *functus officio*. A decision-maker will considered to be *functus officio* if they have performed a statutory duty or exercised a statutory power which is then not capable of being exercised on more than one occasion. Justice Gummow in the decision of Minister for Immigration Local Government & Ethnic Affairs v Kurtovic described the *functus officio* principle as follows:[41]

> "... in any given case, a discretionary power reposed by statute in the decision-maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision-maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statute conferring the particular power in issue".

Additionally, in the case of Firearm Distributors Pty Ltd v Carson, Justice Chesterman of the Queensland Supreme Court stated that the power to amend or repeal a decision in s.24AA of the Acts Interpretation Act was not available where the decision making process was completed.[42]

In our view, there is nothing contained in the Racing Act which would indicate, by a clear contrary intention, that s.24AA of Acts Interpretation Act has been displaced. The nature of the power to approve a control body does not appear to be a power that can only be exercised once. Therefore, we consider that the better view is that s.24AA of the Acts Interpretation Act could operate to allow the Minister to repeal a decision to approve Racing Queensland as a control body.

However, in repealing his decision, the Minister would be required to act in accordance with s.24AA(b) of the Acts Interpretation Act, which states that the power to repeal an earlier decision must be exercised in the same way and subject to the same conditions, as the power to make the instrument or decision.

We would also note that the approval of Racing Queensland as a control body was taken to have been made under s.26 of the Racing Act.[43] Therefore, if the Minister were to seek to revoke the current control body approval of Racing Queensland, the Minister would be required to follow the same process set out in Chapter 2, Part 2 of the Racing Act with respect

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[41] (1990) 21 FCR 193 at 211.

[42] [2001] 2 Qd R 26 at 29 [33] and 32 [40].

[43] Section 428(3) of the Racing Act.

to the granting of an approval. This process includes assessment by the chief executive and preparation of a report for the Minister's consideration. The Minister would also be required to then afford natural justice/procedural fairness to Racing Queensland before the Minister took the step of revoking the approval of Racing Queensland as a control body.[44]

We consider that a decision of the Minister to revoke the approval of Racing Queensland as a control body could be made subject to judicial review in the Supreme Court by Racing Queensland under the terms of the Judicial Review Act 1991 if the relevant procedural/administrative processes required by law were not followed. However, this limitation would not apply if the State sought to cancel the current control body approval of Racing Queensland by the passing of special legislation.

5.2 Status of Racing Queensland once approval is cancelled

From a legislative perspective, cancellation of the approval of Racing Queensland as a control body would not directly operate to alter the corporate status of Racing Queensland. It would simply be the case that Racing Queensland would no longer be permitted to carry on the activities of a control body.

However, under the Constitution of Racing Queensland, in the event that Racing Queensland ceased to be a control body under the Racing Act, the Board is then required to call a general meeting at which meeting the members are to then resolve to wind up the company.[45]

Furthermore, upon the winding up or dissolution of Racing Queensland, if any property remains after the satisfaction of its debts and liabilities, that property must be given or transferred to a control body or to the control bodies for thoroughbred, harness and greyhound racing in Queensland as approved by the Minister at or before time of dissolution. If no such approval has been granted by its Minister, the property will be transferred to an institution(s) with similar objects to Racing Queensland, as determined by a Judge of the Supreme Court of Queensland.[46]

5.3 Practical Issues

On the basis of the Racing Act as currently in force the only option available to the State, without further legislative amendment would be to cancel the approval of Racing Queensland

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[44] See Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57 and s.20(2)(a) of the Judicial Review Act 1991.

[45] Clause 24.2 of the Constitution of Racing Queensland.

[46] Clause 24.1 of the Constitution of Racing Queensland.

as a control body. This might be done by two different means: either as a result of disciplinary action or by revoking the relevant statutory approval following the same process that is required for granting the approval[47].

The cancellation of the approval of Racing Queensland control body would not operate to alter at law the existence or structure of Racing Queensland. Racing Queensland would still continue to exist (at least for a period of time) as a corporate entity, although the primary purpose for its establishment would no longer exist.

However, as a matter of practical reality, the cancellation of the approval of Racing Queensland as a control body would then result in the winding up of Racing Queensland and the divesting of its assets to a successor control body. This is because of the provisions in the Constitution of Racing Queensland.

We have not been provided with any information regarding the conditions surrounding the approval of Racing Queensland.[48] For example, we are unaware whether it was a condition of the Minister's approval that Racing Queensland include in its Constitution a provision effectively requiring it to wind itself up on ceasing to be a control body. We are also unaware as to whether Racing Queensland must notify the Minister if it proposes to amend its Constitution.

Racing Queensland may wish to investigate in detail the removal of clause 24 from its Constitution so that Racing Queensland will then not automatically be required to wind itself up and divest its assets upon the cancellation of its control body approval. One would need to fully investigate whether such a step would raise any specific compliance issues for Racing Queensland under its control body approval, the applicable taxation laws and under the Corporations Act given its current status as a company limited by guarantee

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[47] See s.24AA of the Acts Interpretation Act 1954.

[48] See s.428(3) of the Racing Act.

6. Scenario Two - Exercise of Legislative Powers

In this section of the Paper we will consider the ability of the State Government to enact new legislation to alter the status or existence of Racing Queensland.

6.1 Scope of the Legislative Powers of the Queensland Parliament

In Queensland, the legislative power of the Queensland Parliament is derived from s.8 of the Constitution of Queensland, which states that the Legislative Assembly has the power to make laws for the "peace, welfare and good government of the colony in all cases whatsoever".[49]

The scope of this power is also confirmed in the Australia Act 1986 (Cth), which declares that the powers of each State Parliament "include full power to make laws for the peace, order and good government of that State that have extraterritorial operation".[50] These provisions confer a "plenary" power and do not constrain State legislative power in any way.[51]

Given the plenary nature of these powers, State legislation will not be void for uncertainty,[52] or lack of due process,[53] but may be struck down if the law provides for the abdication of power to another law-making body.[54]

6.2 Limitations on the Legislative Powers of the Queensland Parliament

As State Parliaments are conferred with plenary power, the only limits on a State's legislative power are those which may be found, expressly or impliedly, in the Commonwealth Constitution.

The Commonwealth Constitution contains a number of restrictions on State legislative power, including:

(a) that the States are restricted from raising and maintaining naval and military forces, taxing property owned by the Commonwealth[55] and issuing coinage and legal tender.[56]

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[49] Section 2 of the Constitution Act 1867; s.8 of the Constitution of Queensland 2001.

[50] Section 2(1) of the Australia Act 1986 (Cth).

[51] Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 10; see also Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1 at 23 per Gleeson CJ and 33 per Gaudron, Gummow and Hayne JJ.

[52] Scott v Moses (1957) 75 WN (NSW) 101.

[53] R v Smith [1974] 2 NSWLR 586.

(b) the Constitutional guarantee of the absolute freedom of interstate trade, commerce and intercourse[57] and prohibition on discrimination against residents of other States;[58]

(c) if a State law is inconsistent with a valid Commonwealth law, the Commonwealth law will prevail to the extent of the inconsistency;[59]

(d) a State may not abridge the implied constitutional freedom of political communication;[60]

(e) State legislation must observe the constitutionally entrenched separation of judicial power at Federal level;[61] and

(f) the States cannot impose duties of customs and excise or grant bounties on the production of goods.[62]

Apart from these key limitations in the Commonwealth Constitution, the State power to make laws is unlimited.

6.3 Key Limitation on the Queensland Parliament's Legislative Capacity - s.109 of the Commonwealth Constitution

Section 109 of the Commonwealth Constitution provides that where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

As Racing Queensland is established under the Corporations Act which is a Commonwealth law the State may be restricted from enacting legislation which is inconsistent with that Act.

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[54] Cobb & Co Ltd v Kropp [1967] 1 AC 141; Powell v Apollo Candle Co Ltd (1885) LR 10 App Cas 282; see also Dean v A-G(Qld) [1971] Qd R 391; Tonkin v Brand [1962] WAR 2; Pauls Ltd v Elkington [2001] QCA 414.

[55] Section 114 of the Commonwealth Constitution.

[56] Section 115 of the Commonwealth Constitution.

[57] Section 92 of the Commonwealth Constitution.

[58] Section 117 of the Commonwealth Constitution.

[59] Section 109 of the Commonwealth Constitution.

[60] Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.

[61] Also known as the "Kable doctrine", see Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.

[62] Section 90 of the Commonwealth Constitution.

The power to legislate with respect to corporations is not within the exclusive constitutional domain of the Commonwealth. Therefore, the fact that a State law pertains to the regulation of corporations will not automatically make it constitutionally invalid. It would have to be considered whether the two laws are inconsistent.

There are three different ways in which a State law may be inconsistent with a Commonwealth law being:

(a) ***Direct inconsistency*** - Where it is impossible to obey both laws. For example, a State law may require that you *must* do X and a Commonwealth law requires that you *must not* do X;[63]

(b) ***"Conferral of rights" test*** - Where a State law alters, impairs or detracts from the operation of a law of the Commonwealth;[64] and

(c) ***The Commonwealth law "covers the field"*** - Where a Commonwealth law evinces an intention, either expressly or impliedly, to cover the field in respect of its subject matter such that any State law on the same subject matter will be invalid.[65]

Finally, in the event that there is inconsistency in terms of s.109 of the Commonwealth Constitution the State law will only be valid to the extent of that inconsistency.[66]

Inconsistency under the Corporations Act

Of relevance, Part 1.1A of the Corporations Act expressly deals with the interaction between the Corporations Act and State and Territory laws. Because the States referred their legislative powers to the Commonwealth for the Corporations Act to be enacted, the Corporations Act contains specific carve out provisions which allow the States to elect to legislate with respect to particular matters that would be otherwise be dealt with by the Corporations Act.[67]

Section 5E of the Corporations Act expressly states that the Corporations Act is not intended to exclude or limit the concurrent operation of any law of a State.

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[63] R v Licensing Court of Brisbane; Ex parte Daniell (1920) 28 CLR 23.

[64] Australia Boot Trade Employees Federation v Whybrow & Co (1910) 10 CLR 266.

[65] Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466.

[66] Butler v Attorney-General (Vic) (1961) 106 CLR 268.

[67] See Govey and Manson, "Measures to address Wakim and Hughes: How the Reference of Powers Will Work", (2001) 12 Public Law Review 254 at 262.

Specifically, the Corporations Act is not intended to limit a State from enacting legislation that would:

(a) impose additional obligations or powers on a company or its directors;

(b) impose limits on the interests a person may have in a company;

(c) prevent a person from being a director of, or involved in the management of, a company; or

(d) require a company to have a constitution or have particular rules in its constitution.[68]

However, the section will not apply if there is a direct inconsistency between a State law and the Corporations Act.[69]

Therefore, there is a clear legislative indication in the Corporations Act that the Corporations Act is not intended to "cover the field" with respect to corporations.[70]

Section 5F allows a State law to declare a matter to be "excluded matter" for the purpose of the whole or specified provisions of the Corporations Act. The term "Matter" is defined to include an act, omission, body, person or thing.[71] The effect of such a declaration will be that the declared provisions of the Corporations Act will not apply in the State in relation to an excluded matter.[72] However, it should be noted that the declaration will only operate to exclude the Corporations Act *within* the geographical area of the State.[73]

Section 5G of the Corporations Act is also intended to prevent s.109 inconsistencies by allowing a State or Territory to limit the application of the Corporations Act. This section applies only if the State law is not capable of operating concurrently with the Corporations Act.[74]

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[68] Section 5E(2) of the Corporations Act.

[69] Section 5E(4) of the Corporations Act.

[70] See R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 545 at 562 per Mason J.

[71] Section 5F(6) of the Corporations Act.

[72] Section 5F(2) of the Corporations Act.

[73] See Re Queensland Power Trading Corporation T/A Enertrade and ASIC (2006) 24 ACLC 120.

[74] Section 5G(2) of the Corporations Act.

If a State wished to enact legislation which is inconsistent with the Corporations Act, the State must include a provision in its legislation declaring the legislation to a "Corporations legislation displacement provision" (either generally or in relation to a specific provision of the Corporations Act).[75]

Provided that a Corporations legislation displacement provision is included in the State legislation then:

(a) the Corporations Act will not prohibit the doing of an act, or impose liability for doing an act, that is specifically authorised by the State legislation;[76]

(b) the Corporations Act will not prohibit the State legislation from specifically requiring a company to be subject to the direction and control of a particular person, or requiring the directors to comply with instructions given by a particular person;[77]

(c) the State legislation may also provide for the calling or conduct of a meeting, in which case Chapter 2G of the Corporations Act will not apply;[78]

(d) the State legislation may also provide for a scheme of arrangement, receivership, winding up or other external administration of a company, in which case Chapter 5 of the Corporations Act will not apply;[79]

(e) the State legislation may also provide for the inclusion of a particular provision in a company's constitution, even though the procedures of the Corporations Act have not been complied with;[80] and

(f) a provision of the Corporations Act does not operate to the extent that is necessary to ensure that no inconsistency arises between a provision of the Corporations Act and the State legislation.[81]

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[75] Section 5G(3) of the Corporations Act.

[76] Section 5G(4) of the Corporations Act.

[77] Section 5G(5) of the Corporations Act.

[78] Section 5G(7) of the Corporations Act.

[79] Section 5G(8) of the Corporations Act.

[80] Section 5G(9) of the Corporations Act.

[81] Section 5G(11) of the Corporations Act.

The effect of s.5G of the Corporations Act is that, provided that a Corporations legislation displacement provision is contained in the State legislation, the State legislation must be obeyed and given effect to, despite there being a provision of the Corporations Act that would otherwise stand in its way. [82]

It can be seen, therefore, that the State has retained a very broad ability to exclude aspects of the Corporations Act. In our view, s.5G of the Corporations Act operates to give to the State very broad legislative powers with respect to the regulation of corporations, without the risk of the State legislation being struck down as being inconsistent with the Corporations Act.

6.4 Legislative options which may be open to the State

Option 1 - Cancel the Approval of Racing Queensland as a Control Body

The Racing Act as currently drafted only expressly allows the Minister to cancel the approval of Racing Queensland as a control body if a ground for disciplinary action can be established.

However, there is no restriction on the State further amending the Racing Act to allow the Minister to cancel a control body's approval on any grounds that the Minister considers appropriate, or on no grounds at all.

The approval of Racing Queensland as a control body is an entitlement which was conferred by State legislation and there is no prohibition on it being taken away by State legislation. We note that the approvals of the Former Control Bodies were effectively revoked by State legislation.[83]

Legislative cancellation of the approval of Racing Queensland as a control body would have the effect that, in accordance with the current Constitution of Racing Queensland, the members of Racing Queensland would then be required to resolve to wind up Racing Queensland and transfer its assets to a successor control body.

Option 2 - Wind up Racing Queensland and/or Divest Racing Queensland of its Assets

As discussed above, provided that the State includes a Corporations Act displacement provision in any special purpose or new legislation, the State may be able to legislate with respect to corporations in almost any manner that it wishes to.

Therefore, the State could theoretically legislate to:

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[82] HIH Casualty and General Insurance Ltd v Building Insurers' Guarantee Corporation [2003] NSWSC 1083.

[83] See s.428(1) of the Racing Act.

(a) Exempt all or part of the Corporations Act from applying to Racing Queensland;

(b) Include particular provisions in the Constitution of Racing Queensland;

(c) Provide that Racing Queensland is subject to the control of a particular person (for example, the Minister);

(d) Require Racing Queensland to comply with instructions given by a particular person (for example, the Minister or chief executive of the Department); or

(e) Provide for a scheme for the external administration of Racing Queensland.

In our view, the clearest way that the State might act to legislatively wind up Racing Queensland is set out in the Racing and Other Legislation Amendment Act 2010, which gave Racing Queensland its approval as a control body.

Prior to 1 July 2010, the Former Control Bodies were all Corporations Act companies which held approvals under the Racing Act as a control bodies.

Section 428 of the Racing Act provided that the approvals held by the Former Control Bodies were cancelled as from midnight on 30 June 2010 and that the Minister was to then grant an approval to Racing Queensland to be the control body for thoroughbred racing, harness racing and greyhound racing.

Section 429 of the Racing Act provided that as from 1 July 2010:

(a) anything that was an asset or liability of a Former Control Body immediately before 1 July 2010 became an asset or liability of Racing Queensland;

(b) an agreement or arrangement in force immediately before 1 July 2010 between a Former Control Body and another entity was taken to be an agreement or arrangement between Racing Queensland and the other entity; and

(c) any property that was, immediately before 1 July 2010 held by a Former Control Body on trust or subject to conditions continued to be held by Racing Queensland on the same trust or subject to the same conditions.

Importantly, s.430 of the Racing Act stated that:

> "Each former control body's constitution is taken to include, and to have always included, a provision allowing a director of the former control body to give the former control body's agreement to the enactment of provisions having the effect of provisions set out in this part, in particular, provisions—

(a) cancelling the former control body's approval and giving, to the new control body, an approval as the control body for all codes of racing; and

(b) divesting the former control body of its assets and liabilities and vesting the assets and liabilities in the new control body; and

(c) stating that no compensation is payable to the former control body or its members or directors for any action taken under this part."

We understand that this provision was inserted to provide the directors of the Former Control Bodies with protection against liability for giving their consent to what would otherwise have been an act not in the commercial interests of their respective corporations.[84]

We would note that ss.429 and 430 were declared to be Corporations Act displacement provisions for the purposes of s.5G of the Corporations Act.[85] As discussed above, because the Corporations Act was expressly displaced by sections 429 and 430 of the Racing Act, there would be no argument under s.109 of the Commonwealth Constitution that those provisions of the Racing Act were inconsistent with any provisions of the Corporations Act.

Given the broad legislative power which the State has by virtue of its plenary power and s.5G of the Corporations Act, we do not consider that it would be necessary for the State to first obtain the consent of Racing Queensland prior to cancelling its approval or divesting it of its assets.

[84] See Explanatory Memorandum, Racing and Other Legislation Amendment Bill 2010, at 2.

[85] Section 431 of the Racing Act.

7. Scenario Three - Removal of the Board

In this section we will consider what actual or potential powers may be available to the State to remove directors of the Board of Racing Queensland.

7.1 Current Power to Remove Directors of the Board under the Racing Act

There is currently no ability under the Racing Act for the State to remove a director of Racing Queensland. The State's power extends only to removing the approval of Racing Queensland as a control body. Cancellation of the approval of Racing Queensland as a control body will not necessarily affect the status of the directors of Racing Queensland appointed under its Constitution.

7.2 Removal under Constitution of Racing Queensland

As discussed in section 3.1 of this Paper, the Constitution of Racing Queensland provides for a rotating retirement of two directors every two years following the expiry of the initial term (being the period to 30 June 2014). Four months prior to the holding of an Annual General Meeting a director selection process will take place.[86]

This process involves the appointment of an independent recruitment consultant to identify persons who are eligible to act as a director under the Racing Act and who meet the requirements specified in Appendix A of the Constitution.[87] A selection committee is to be convened, which will include the Chairman of the Board, a sitting director of an ASX Top 200 listed company, and a person appointed by the Director-General of the Queensland Government department responsible for racing in Queensland.[88]

The selection committee will determine by majority vote who should be the person to fill the vacancies,[89] which will be given effect to at the next AGM.[90]

Racing Queensland may, by ordinary resolution of its members, remove a director from office before the expiration of his or her term of office, if the director:

(a) dies;

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[86] Clause 15.1 of the Constitution of Racing Queensland.

[87] Clause 15.2 of the Constitution of Racing Queensland.

[88] Clause 15.4 of the Constitution of Racing Queensland.

[89] Clauses 15.6-15.8 of the Constitution of Racing Queensland.

[90] Clause 15.9 of the Constitution of Racing Queensland.

(b) is convicted of a criminal offence;

(c) becomes bankrupt;

(d) becomes prohibited from being a director by virtue of the Corporations Act;

(e) ceases to be a director by operation of a provision of the Corporations Act;

(f) ceases to be a member;

(g) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the Corporations Act relating to mental health;

(h) resigns as a director by notice in writing to the Company;

(i) is absent from three consecutive meetings of the Board without previously having obtained leave of the Board;

(j) ceases to be an eligible individual under the Racing Act; or

(k) is guilty of any conduct which in the opinion of the Board is unbecoming of a director of the company or is prejudicial to its interests.[91]

7.3 Limitations and Practical Issues

At present the only way by which a director of Racing Queensland might be legitimately removed is through the process set out in the Constitution of Racing Queensland. We note that, provided a director continues to meet the definition of "eligible individual" in the Racing Act,[92] the power of appointment and removal of directors lies entirely with Racing Queensland.

However, given the broad scope that the State has to "opt out" of the Corporations Act scheme, we consider that it not would be beyond the legislative power of the State to enact legislation affecting the appointment or removal of the directors of Racing Queensland. Such legislation could potentially provide for:

(a) inserting a provision in the Constitution of Racing Queensland, or amending the current provisions of the Constitution, pertaining to appointment and removal of directors;

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[91] Clause 12.11 of the Constitution of Racing Queensland.

[92] See s.8 of the Racing Act.

(b) providing that the appointment and removal of directors was to be subject to the direction or approval of the Minister; or

(c) even removing, by legislation, the current directors of Racing Queensland.

We note that paragraph (c) is likely to be the only option which could have the legal effect of immediately removing all of the directors of Racing Queensland.

However, in our view, it would be quite an extraordinary step for the State Parliament to seek to remove directors of a corporation who had all been validly appointed under the processes set out in that corporation's Constitution if there was no suggested or proven misbehaviour. Such facilitating legislation would potentially be inconsistent with the usual fundamental legislative principles contained in s.4 of the Legislative Standards Act 1992 and clearly would then be the subject of close political scrutiny.

The real issue would be how would the removal of the directors sit in terms of the State's grand plan for further reforming the structure of the racing industry in Queensland.

8. Possible Strategies for Racing Queensland

8.1 Security of Current Racing Queensland Structure

As the Racing Act currently stands, the tenure of Racing Queensland is reasonably secure, in that Racing Queensland cannot be removed as the control body unless grounds for disciplinary action exist or, if the Minister proceeds to institute the process of seeking to revoke the approval of Racing Queensland as a control body. Furthermore, there is no current provision in the Racing Act that would allow the State to interfere with the existence or corporate structure of Racing Queensland.

However, should Racing Queensland have its approval as a control body cancelled, then this will effectively mean the end of Racing Queensland under the terms of its current Constitution. This is because, in accordance with clause 24 of its Constitution, the members of Racing Queensland must then resolve to wind it up and transfer its assets to its successor control body.

Although the current legislative position of Racing Queensland is reasonably secure, the State would not be prevented from enacting legislation in the future which altered this position. As we have demonstrated in this Paper, the State's legislative power is plenary and limited only by the restrictions contained in the Commonwealth Constitution. Specifically, any argument that the State cannot enact legislation which is inconsistent with the establishment of Racing Queensland under the Corporations Act would not have very strong prospects of success, given that the State has a very broad ability to "opt out" of the Corporations Act regime.

There are a broad range of legislative steps that the State could potentially take to alter the structure or existence of Racing Queensland. However, given that the Constitution of Racing Queensland already contains a clause effectively requiring Racing Queensland to automatically wind itself up upon losing its approval as a control body, in our view, if the State wished to disband Racing Queensland, the simplest and cleanest method would be to simply legislate to cancel the approval of Racing Queensland as a control body. Such a step would legally be less controversial, as there would be no potential s.109 inconsistency argument with the operation of the Corporations Act. Because of the provisions currently contained in the Constitution of Racing Queensland, this step would also have the flow-on effect of winding up Racing Queensland and transferring its assets.

8.2 Options and Strategic Actions

Unfortunately, given the wide plenary power of the State to make legislation, in our view there are very few steps which Racing Queensland can take to protect itself from a future restructuring of the racing industry in Queensland. Clearly, the most effective State actions

will involve the passing of State legislation and/or the commencement of natural justice processes which will involve some time.

However, we suggest that Racing Queensland should take the following steps to minimise the relevant risks being:

(a) To continue to closely supervise its operations to ensure that Racing Queensland does not fall foul of any of the provisions of the Racing Act pertaining to disciplinary action, to avoid giving a future State Government any reason to cancel the approval of Racing Queensland as a control body; and

(b) To investigate in detail the removal of clause 24 from its Constitution so that Racing Queensland will then not automatically be required to wind itself up and divest its assets upon the cancellation of its control body approval. One would need to fully investigate whether such a step would raise any specific compliance issues for Racing Queensland under its control body approval, the applicable taxation laws and under the Corporations Act given its current status as a company limited by guarantee.