BRIEFING NOTE

FROM	**Treasury**		
FOR	**Treasurer**		
SUBJECT	**Proposed Amendments to Queensland Racing Limited Constitution**		
Contact Officer:	Carol Perrett, Director, Investigations and Compliance, Office of Racing	Record No: RAC/00069	Date: 24 October 2008
Requested by:		Date Approval Required By:	

PURPOSE

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

BACKGROUND

2. The proposed amendments to the QRL constitution seek to:

   - extend the initial term of the founding directors from 3 to 6 years before the process of retirement by rotation commences;
   - change the process for the appointment of directors by removing the requirement for an independent recruitment consultant to prepare a short list of applications for director positions. Shortlisting is to be undertaken by the company secretary;
   - restructure the selection committee to provide for two Class A and two Class B representatives and an independent representative; and
   - clarify the mechanism by which the board may appoint directors up to the maximum seven appointments as currently permitted and to fill vacancies.

3. It is a condition of the control body approval granted to QRL, that it must obtain the ratification in writing of the Minister before implementing any amendment to the company's constitution.

ISSUES

4. In accordance with the requirements of the QRL constitution and the *Corporations Act 2001* (Cth), prior to seeking the ratification by the Minister of proposed amendments to the constitution of QRL, special resolutions (75% majority) of the Class A members, the Class B members and the company in general meeting must approve the proposed amendments.

5. At meetings held on 6 August 2008, the Class A members, the Class B members and the company in general meeting each passed special resolutions to amend the constitution of QRL.

6. 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.

7. On 19 and 20 August 2008, allegations were made that QRL, and in particular the Chair of the Country Racing Committee, failed to follow the due voting process. See attached correspondence from Gary Peoples (**Attachment 1**), ClarkeKann Lawyers (representing Gary Peoples and the other members of the Country Racing Committee) (**Attachment 2**), and Bill Carter QC (**Attachment 3**) which was referred to the Crime and Misconduct Commission.

8. 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 the Australian Securities and Investment Commission (ASIC).

9. The matter was then referred to the Australian Securities and Investment Commission (ASIC). 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.

10. 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 (**Attachment 4**).

Independent Recruitment Consultant

11. The issues surrounding the removal of the requirement for an independent recruitment consultant to prepare a short list of applications for director positions have been addressed in previous briefs (QTO-02576 dated 15 July 2008 and QTO-2989 dated 22 August 2008). The issues are again outlined below.

12. The removal of the requirement for an independent recruitment consultant to prepare a short list of applications for director positions, by reference to the selection criteria contained in Appendix A of the constitution, and for this process to be undertaken by the company secretary has the potential to diminish the transparency of the recruitment system.

13. In support of the proposal to remove the requirement for an independent recruitment consultant to prepare a short list of applications for director positions, QRL refer to the cost involved in engaging an independent recruitment company and state that it is unnecessary if the company secretary is competent to undertake this process.

14. The use of an independent recruitment company has been a fundamental aspect of the recruitment and appointment of board members to the thoroughbred control body since 2001 and has provided a good defence against criticism of the recruitment process. Furthermore, similar transparency safeguards concerning the use of an independent recruitment process was a primary consideration in the assessment of recent corporatisation applications by the harness and greyhound control bodies.

15. An independent recruitment company has the professional expertise to review applications against the selection criteria, independent of any real, or perceived, influence from QRL. It is considered that this requirement provides an important safeguard from an integrity perspective to ensure independence and impartiality in the short-listing of applicants. Under the proposed arrangements, it could be argued that the company secretary may be influenced by the views of the board in short-listing applicants.

16. The removal of this requirement has not only the very real potential to be criticised on the basis that it will diminish the transparency of the recruitment system, but also removes a mechanism for ensuring only qualified candidates are available for appointment to the QRL Board.

17. It is considered that the argument of cost savings to QRL is not a sufficient reason to change this aspect of the recruitment process as it is not a material cost.

Non-Compliance with the *Racing Act 2002* (the Racing Act)

18. Section 76 of the Racing Act provides that a resolution of the Queensland Country Racing Committee is valid if it is passed at a meeting of members or if at least three of its members give written agreement to the resolution.

19. 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 Queensland Country Racing Committee 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.

20. A valid and relevant consideration when exercising your discretion to either ratify or not ratify the amendments to the QRL constitution is whether there has been any clear non-compliance with the provisions of the Racing Act.

Decision

21. Your decision must be either to ratify or not ratify the proposed amendments to the QRL constitution. There is no power for you to modify the resolution passed by QRL, by ratifying only part of the resolution.

22. The legal advice (**Attachment 4**) should be considered in making your decision.

RECOMMENDATION

23. It is recommended that you:

- do 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; and
- sign the letter to QRL (**Attachment 5**).

Gerard Bradley
Under Treasurer Date / /

☐ Approved ☐ Not approved ☐ Noted

Treasurer's Comments

Andrew Fraser
Treasurer
/ /

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

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15 September 2008

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Director – Investigations and Compliance
Racing Division
Queensland Treasury
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Our reference: 12223/15313/80082112

Dear Carol

Proposed Amendments to the Constitution of Queensland Racing Limited

We refer to our recent telephone discussions and to your email dated 8 September 2008 which enclosed a number of documents of relevance to this matter.

We have been asked to provide our urgent advice on two issues of relevance to the proposed amendments to the Constitution of Queensland Racing Limited (**QRL**).

For convenience, we will deal with the issues that arise as follows:

1.0 Executive Summary

Our conclusions are:

(a) The Minister for Racing (**Minister**) has a discretion whether to ratify the proposed amendments to the Constitution of QRL. In our view, the Minister should not decide this issue whilst the Australian Securities and Investments Commission (**ASIC**) is still considering the matters referred to it. Otherwise the Minister may be seen as pre-empting or pre-judging the ASIC investigation. The only exception would be if the ASIC review or investigation is unduly delayed.

(b) We consider that the Minister's decision, whether it is to ratify or not ratify the proposed amendments to the Constitution of QRL, will be open to review under Part 3 and/or Part 5 of the *Judicial Review Act 1991* (Qld) (**JR Act**), or by the seeking of declaratory relief under the general inherent jurisdiction of the Supreme Court.

(c) In our view, the Minister has, if the ASIC investigation does not clarify the legality of the QRL special resolution process, three options open to him for the purposes of determining the application for approval made to him by QRL, being to either:

(i) refuse to ratify the proposed amendments to the Constitution of QRL on relevant policy grounds, i.e. because some aspects of the proposed changes are objectionable on policy grounds;

(ii) refuse to ratify the proposed amendments to the Constitution of QRL on the basis that the apparent non-compliance with the Racing Act is of a sufficient

concern to cause the Minister to be concerned about the overall legitimacy of the process that was undertaken; or

(iii) ratify the proposed amendments to the Constitution of QRL on the grounds that there are no relevant statutory non-compliance issues or policy grounds that would prevent the Minister from now ratifying the Constitutional amendments.

(d) Clearly, if ASIC takes the view that the resolutions passed at the meeting of Class A Members and by QRL in general meeting are invalid, then the Minister will have no option but to refuse to ratify the proposed Constitutional amendments as no valid application will then be before him to approve.

(e) We have discussed the risks associated with these three options and the risk of a legal challenge to the Minister's decision under each of these options being successful.

2.0 Background

Pursuant to an approval notice dated 22 December 2005, made by the then Minister for Racing under s.26 of the *Racing Act 2002* (Qld) **(Racing Act)**, QRL is the Control Body for the thoroughbred code of racing. This approval took effect from 1 July 2006. As is permitted under s.27 of the Racing Act, the approval of QRL as the Control Body for the thoroughbred code of racing was made subject to four conditions, one of which is that QRL must obtain the ratification in writing of the Minister before implementing any amendment to its Constitution.

QRL proposes to amend its Constitution in the following ways, being:

- to extend the initial term of the founding directors from three years to six years before the process of retirement by rotation commences;
- to change the process for the appointment of directors by removing the requirement that an independent recruitment consultant prepare a short list of applicants for director positions. It is proposed that this short listing process will now be undertaken by the Company Secretary;

- to restructure the director selection committee of QRL to provide for two Class A and two Class B representatives and an independent representative; and
- to clarify the mechanism by which the Board of QRL may appoint directors (up to the maximum of seven appointments as is currently permitted) and to fill vacancies.

We note that as QRL is incorporated under the *Corporations Act 2001* (Cth) **(Corporations Act)** that it may only modify or repeal its Constitution, or a provision of its Constitution, by a special resolution.[1] A "special resolution" is a resolution that is passed by at least 75 percent of the votes cast by members entitled to vote on the resolution.[2] We note that the Constitution of QRL is otherwise silent as to the manner by which it may be amended.

We have been provided with copies of the following documents:

- Minutes of the General Meeting of QRL held on 6 August 2008;
- Minutes of a meeting of Class A Members of QRL held on 6 August 2008; and
- Minutes of a meeting of Class B Members of QRL held on 6 August 2008.

The minutes of each of the meetings held on 6 August 2008 note the passing of a resolution to amend the Constitution of QRL in the terms generally set out above.

We are also aware that on 19 August 2008, the Hon. W. J. Carter QC wrote to the Minister to raise a number of issues including an issue with respect to the meeting of the Class A Members of QRL and the validity of the vote cast by the representative of the Queensland Country Racing Committee (**QCRC**) at the relevant meeting held on 6 August 2008.

We are instructed that the Minister referred the matters raised by Mr Carter QC to the Crime and Misconduct Commission (**CMC**). On 25 August 2008, the CMC announced that it would not investigate further the matters raised in the complaint of Mr Carter QC. The CMC considered that the allegations raised by Mr Carter QC did not concern QRL's operations for the purposes of

[1] Section 136(2) of the Corporations Act.

[2] See the definition of "special resolution" in s.9 of the Corporations Act.

performing its function as a Control Body. However, we understand that the matters were then referred to ASIC for its consideration. ASIC has not, to date, made any public announcements with respect to its current consideration of the matters referred to it.

A further issue that has now arisen is whether the Minister should, on policy grounds, refuse to ratify the proposed amendments to the Constitution of QRL on the basis that removing the requirement that an independent recruitment consultant prepare a shortlist of directors will undermine the integrity of the director recruitment system.

It is with respect to these issues that we have been asked to provide our specific advice.

3.0 Ministerial Approval

As we have set out in Section 5.0 of our advice, we consider that there are several options that are available to the Minister. However, before turning to consider each of these options, we propose to address some of the general legal issues which arise in the present circumstances.

3.1 Scope of the Minister's discretion

The approval notice provides that QRL must obtain the ratification in writing of the Minister before implementing any amendment to its Constitution. However, neither the approval notice nor the Racing Act specify the relevant criteria that are to be considered by the Minister before the ratification decision is made. That is, there is no express requirement that the Minister be satisfied of certain things (e.g. that the proposed amendment will not undermine the integrity of the recruitment system) before the Minister decides whether to ratify the proposed amendments to the Constitution of QRL.

We consider that in the absence of there being any specific criteria as to how the Minister should exercise his discretion, that any person seeking to challenge the decision of the Minister would in practice need to show that the Minister's decision (in the absence of any other relevant ground of review)[3] must have been so unreasonable that no reasonable Minister could have exercised the

[3] Of course, other administrative law grounds could be raised, e.g. breach of procedural fairness or failing to properly consider all relevant considerations.

power.[4]

In this context, another issue is whether the Minister could now refuse to ratify the proposed amendments to the Constitution of QRL on the basis that the removal of the independent recruitment process would operate to undermine the integrity of QRL's director recruitment system.

Clause 17 of the Constitution of QRL currently establishes an independent procedure for the selection of directors to replace, over time, the inaugural directors of QRL. It is proposed that this independent recruitment process ought now be replaced with a simplified process.

We note that there is a genuine policy concern that altering the current selection process has the potential to undermine the integrity of the recruitment system by removing a mechanism that helps ensure a degree of independence from QRL in terms of the selection of qualified candidates for appointment to the Board of QRL.

As is discussed in more detail in Section 5.1 of this advice, we believe that it is unlikely that a legal challenge to a decision made on such policy grounds would be successful.

3.2 Defect in the processes adopted by the QCRC

The first issue relates to the alleged defects in the voting processes that were undertaken prior to QRL finally resolving to adopt the proposed amendments to its Constitution. That is, there is some legal doubt as to whether the vote cast on behalf of the QCRC at the meeting of the Class A Members was valid.

To advise on this question it is necessary to assess each of the relevant decisions made in the voting process which led to the final resolution being passed by QRL on 6 August 2008 to adopt the proposed amendments to its Constitution.

Under QRL's Constitution the company consists of both Class A Members and Class B Members. Under clause 13 of the Constitution, each class of Members is to appoint an Authorised Representative to vote at meetings of the QRL.

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[4] See ss.20(2)(e) and 23(g) of the JR Act. This ground of judicial review is referred to as the ground of

Under clause 5.1 of the Constitution, at a meeting of Members of QRL, the Class A Members have a Class A Voting Right and the Class B Members have a Class B Voting Right. The Members of each class of Members are then to determine how the class Voting Right is to be exercised on any resolution of Members.[5] With respect to voting at a general meeting of QRL, the Authorised Representative appointed by each class of Member has one vote on each resolution. However, a Member may only lawfully vote at a meeting of QRL on a resolution that has been considered by its respective class of Members.[6]

We understand that on the facts each of the Authorised Representatives of the two Member classes of QRL were validly appointed and that they both voted in favour of the resolution to amend the Constitution of QRL. This occurred after the terms of the resolution had been considered and approved by each of the relevant class of Members. Therefore, the decision of QRL to adopt the proposed amendments to the Constitution of QRL prima facie appears to be valid.

However, in light of the matters that have been raised in the referrals to both the CMC and ASIC, it is necessary to consider whether the resolution that was passed by the Class A Members at their meeting on 6 August 2008 was legally a valid resolution. We note that the motion to amend the Constitution was passed at the meeting of Class A Members by a margin of 14 votes in favour to 1 vote against. The question that then arises is whether this resolution would still be valid if one of the votes cast in favour of the motion was itself invalidly cast.

The vote which has been called into question is the vote cast by the representative of the QCRC. The processes governing the management of the QCRC are set out in Chapter 2, Part 5 of the Racing Act. The QCRC is a statutory body that is established pursuant to s.66 of the Racing Act and comprises nine members.[7] Section 76 of the Racing Act governs the conduct of meetings of the QCRC. Section 76(1) of the Racing Act relevantly provides that a question at a meeting of the QCRC is to be decided by a majority of the votes of the members present at that meeting.

"unreasonableness": see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[5] Clause 5.2 of the Constitution.

[6] Clause 12.2(a)(ii) of the Constitution.

In relation to the meetings of the QCRC, s.76(6) of the Racing Act provides that a resolution will be validly made by the QCRC if:

- notice of the resolution is given under the procedures approved by the QCRC; and
- at least three of its members give written agreement to the resolution.

We have been instructed that a notice of the resolution was not issued to the members of the QCRC. Furthermore, we understand that written agreement of at least three members of the QCRC was not obtained. What appears to have occurred is that the representative of the QCRC spoke to a number of the members of the QCRC and received their oral approval to vote in favour of the proposed Constitutional amendments at the meeting of Class A Members. This appears to be non-compliant with the terms of s.76 of the Racing Act.

The Racing Act does not specify which matters are to be considered by the QCRC at its meetings. However, the current 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.

The question which then arises is whether this statutory non-compliance with s.76 of the Racing Act has rendered invalid the subsequent resolutions passed at both the meetings of the Class A Members and by QRL in general meeting.

3.3 Legal effect of non-compliance with the Racing Act

Based on the discussion in Section 3.2 of this advice, it appears that the relevant provisions of the Racing Act have technically not been complied with. The information to hand suggests that the process set out in the Racing Act was not strictly followed when the QCRC formulated its view on the motion to amend the Constitution of QRL.

We have researched, in the time available, the legal position under the Corporations Act with a view to deciding whether such a technical non-compliance has invalidated the ultimate resolution as passed by QRL at its general meeting.

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[7] Section 68(1) of the Racing Act.

Our review of the case law indicates that there are a large number of cases which have considered the legal effect of a non-compliance with a provision of the Corporations Act (or the former *Corporations Law*) or a provision of a company's Constitution, as regards the provision of notices of meetings, the acceptance of proxies or similar procedural failures. These cases highlight that:

- in some cases, the Courts have intervened to correct such a procedural defect;[8] and
- in other cases, the Courts have decided not to intervene.[9]

A common theme in a number of the decided cases is whether the ultimate outcome would, absent the correction of the procedural defect by the Court, have lead to a different outcome.[10] For example, in the *Shanahan* line of cases, a holder of a significant number of proxies failed to lodge at a meeting of the company the proxies held by him on a resolution to elect two directors to the Board of the company. When the error was discovered, the chairperson of the meeting declined to count those proxies with respect to that resolution. If those votes had have been counted, then one of the two directors elected at that meeting would not have been elected as another person would have received a greater number of votes. The Supreme Court of Victoria, and subsequently the Court of Appeal, held that the chairperson of the meeting had erred in excluding the proxies. The Court therefore intervened to overturn the chairperson's decision to exclude the relevant proxies held by Mr Shanahan.

We would also note that pursuant to s.1322 of the Corporations Act, if there has been a "procedural irregularity" in a proceeding under the Corporations Act, the proceeding will only be invalid if the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court.

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[8] See *Shanahan v Pivot Pty Ltd* (1998) 26 ACSR 740 which was upheld on appeal: see *Link Agricultural Pty Ltd v Shanahan* (1998) 28 ACSR 498; *Bancorp Investments Ltd v Primac Holdings Ltd* (1984) 9 ACLR 263.

[9] See *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249; *Broadway Motors Holdings Pty Ltd (In liq) and the Companies (NSW) Code* (1986) 6 NSWLR 45.

[10] See *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249 and *Re Pembury Pty Ltd* [1993] 1 Qd R 125.

3.4 Investigation by ASIC

As discussed above, we understand that the matters raised by Mr Carter QC are now being considered by ASIC. We are instructed that the Minister's current position is that he will not make any decision with respect to the proposed amendments to the Constitution of QRL until such time as ASIC has completed its review and made its position clear.

There is a possibility that ASIC will not proceed with a detailed investigation into the matters that have been brought to its attention. As a regulator, ASIC may only be interested in investigating and pursuing those matters that raise issues of significant public concern and which relate to breaches of the Corporations Act that are of some significance.

We confirm that in our view, generally it would be appropriate for the Minister to decide not to determine the application from QRL on the proposed amendments to its Constitution until the outcome of the ASIC review is known. Otherwise, the Minister might be seen as pre-empting or pre-judging the outcome of the ASIC investigation. Of course, the Minister may be required to act if ASIC unduly delays in conducting their review or investigation.

4.0 Exposure of Minister's decision to Judicial Review

A decision by the Minister to ratify, or not ratify, the proposed amendments to the Constitution of QRL, would be a decision that would, in our view, be potentially subject to challenge by judicial review proceedings. Judicial review may be sought under Part 3 and/or Part 5 of the JR Act, or indirectly by invoking the general and inherent jurisdiction of the Supreme Court by way of declaratory proceedings.[11] We will consider each of these potential actions separately.

4.1 Statutory order of review – Part 3 of the JR Act

Part 3 of the JR Act enables a person "aggrieved by a decision" to apply for a statutory order of review of "a decision of an administrative character made under an enactment".[12] Decisions not of this character may still be reviewable under Part 5 of the JR Act which effectively replaced the older prerogative writs with a simplified prerogative order regime. Part 5 of the JR Act will apply

[11] See s.10(2) of the JR Act.

[12] See s.20(1) of the JR Act.

if the decision is not made under an enactment or under a relevant non-statutory scheme or program.

The ratification in writing by the Minister of the proposed amendments to the Constitution of QRL (or the Minister's refusal to ratify) will in our view amount to a decision. On this basis, the next issue in relation to the reviewability of the decision is whether the decision ought to be characterised as being administrative in character.

An often cited passage that seeks to distinguish between the exercise of administrative or Executive power on the one hand and legislative power on the other is that of Latham CJ in *Commonwealth v Grunseit*:[13]

> "The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in a particular case."

Hence, a legislative decision will create a new rule of general application, whilst an administrative decision applies those rules in particular cases.

The ratification of the proposed amendments to the Constitution of QRL (or a refusal to do so) is not legislative in nature. In our view, the decision is clearly administrative in character.

To be reviewable under Part 3 of the JR Act, the ratification of the amendments would need to satisfy the other requirement of Part 3, namely, that decision be made either under an enactment,[14] or under a non-statutory scheme or program.[15] We note that an enactment is defined by s.3 of the JR Act to mean an Act or statutory instrument. The approval notice dated 22 December 2005 given by the Minister to QRL will be a statutory instrument if it is either:[16]

- a notification of a public nature; or

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[13] (1943) 67 CLR 58, 82.

[14] See s.4(a) of the JR Act.

[15] See s.4(b) of the JR Act.

[16] See the definition of "statutory instrument" in s.7 of the *Statutory Instruments Act 1992* (Qld).

- another instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability of another entity.

In this regard, we would note that the approval notice was published in the Queensland Government Gazette on 13 January 2006.[17] Therefore, because of its public nature, the approval notice is likely to be considered to be a Statutory Instrument.

The test for whether a decision is made under an enactment is that given in *Griffith University v Tang*,[18] namely, whether the decision is expressly or impliedly required or authorised by the enactment, and the decision must confer, alter or otherwise affect legal rights or obligations.

This test, when applied on the current facts, means that it be established that a statutory provision is the express or implied source of the Minister's power to make the decision to ratify (or refuse to ratify) the proposed amendments to the Constitution of QRL. The statutory provision must give force and effect to the decision and the decision must affect legal rights and obligations.

The source of power to make the decision to ratify the proposed Constitutional amendments (or to refuse to approve) is contained in the approval notice, which, because it is a Statutory Instrument, is itself "an enactment". Therefore, the decision of the Minister, being made under an enactment will expressly or impliedly be required by the statute.

Therefore, any decision by the Minister is likely to be one that is characterised as having been made under an enactment. This means that a person aggrieved by the decision of the Minister to ratify the proposed amendments to the Constitution of QRL could seek to obtain a statutory order of review under Part 3 of the JR Act. However, the aggrieved party will need to highlight some specific administrative law defect in the decision making process adopted by the Minister.

4.2 Prerogative order – Part 5 of the JR Act

In addition to seeking a statutory order for review under Part 3 of the JR Act, the Minister's decision will also, in our view, be reviewable under Part 5 of the JR Act. Essentially, the

[17] Queensland Government Gazette, No. 9, 13 January 2006, p. 120.

[18] (2005) 221 CLR 99.

potential grounds of challenge under Part 5 of the JR Act are the same as those that identified as grounds of review under Part 3 of the JR Act.

4.3 Injunctive relief

Injunctive relief might also be available by a party invoking the inherent jurisdiction of the Supreme Court in appropriate circumstances. The Supreme Court has jurisdiction to grant injunctive or declaratory relief where an aggrieved party can prove some interference with their legal rights. That is, the decision of the Minister to ratify, or not ratify, the amendments to the Constitution of QRL has in some way impinged upon the legal or equitable rights of that party.

5.0 Potential Scenarios, Risks and Way forward

In light of the matters discussed above, it is useful to now consider the potential scenarios and the relevant risks for the Minister when deciding on his final option.

To some extent, the final stance adopted by ASIC will be critical. For example, if ASIC were to find that the special resolution passed at the general meeting of QRL was legally invalid as it did not comply with the Corporations Act, this would make the Minister's decision very easy. Under that scenario, the Minister would not have before him an application in respect of a legally valid special resolution and he should then immediately, after reviewing the detailed ASIC decision, reject the current application on the basis that it is not compliant with the Corporations Act.

Alternatively, there is a likelihood that ASIC could review the complaints received by it and then form a view that they are not significantly relevant to their core regulatory responsibilities to justify ASIC undertaking a detailed review and investigation. If ASIC were to take this approach then it may be that the ASIC position, once publicly known, will not clarify any of the legal issues in terms of the potential validity, or invalidity, of the special resolution passed at the general meeting of QRL.

Another possibility is that ASIC might take an exceedingly long time to formulate their final view. If the delay is considerable then the Minister may need to take action without waiting for the outcome of ASIC's investigation. On the facts, we think this is probably unlikely but it is a possibility that should be factored in at this stage. In either case, if ASIC's review and investigation is inconclusive or is not of assistance in clarifying the legal position in terms of the

validity of the special resolution passed at the general meeting of QRL, then it seems to us that the Minister will have three options being:

(a) to refuse to ratify the proposed amendments to the Constitution of QRL on the basis that there are sound policy reasons for rejecting the application. As noted above, one policy reason that might justify this approach is the concern about the removal of the independent recruitment system which may well be seen as undermining the integrity of the current process for recruitment of directors of QRL;

(b) to refuse to ratify the proposed amendments to the Constitution of QRL on the basis that the underlying non-compliance with the provisions of the Racing Act in terms of the way the securing of QCRC representative vote raises issues of such sufficient regulatory concern to result in the Minister not approving the current application made by QRL; or

(c) to ratify the proposed amendments to the Constitution of QRL. Under this option, the Minister would effectively be saying that he is satisfied that the resolutions passed by QRL at its general meeting are both in a legal and policy sense, appropriately secured.

We will consider each of the above options in the following Sections of this advice.

5.1 Rejection on policy grounds

In light of our earlier discussions, we believe that even though the relevant discretion given to the Minister (which is created as a condition in the approval notice) does not set out specific criteria, a Court would, in our view, give to the Minister significant latitude when reviewing this discretion. The Minister is responsible for the administration of the Racing Act as a whole and provided that the relevant criteria the Minister adopts are consistent with the overall objectives and purpose of the Racing Act, he will be acting within power. In our view, if the Minister genuinely believes that there is a significant policy concern with the terms of the proposed amendments to the Constitution of QRL, then he clearly would be entitled to decide to not ratify those proposed amendments. This is no doubt, the very reason why the condition was originally inserted into the approval notice, i.e. to allow the Minister to over time exercise a level of regulatory and policy control over changes to the Constitution of QRL that might, over time, be made by the members of that control body. Under this option, we believe that the Minister's

decision, if based on genuine and real policy concerns, would be a valid one and that the risk of such a decision being overturned in any judicial review proceeding would be low.

5.2 Refuse to ratify based on non-compliance with the Racing Act

Under this option, we have assumed that the final position adopted by ASIC is of no assistance in helping the Minister determine his final position. This might be because ASIC decides to not pursue a full review and investigation of the current complaints made to it, or because ASIC simply takes too long to deal with the matter and the Minister is then forced to make his own decision without the assistance of ASIC's final view or position.

The question which then arises is what matters should the Minister consider if this option is to be examined. In our opinion, there are two aspects that the Minister would need to consider, being:

(a) whether there is any doubt in relation to the legal validity of the final resolution made by QRL at its general meeting; and

(b) whether there are any aspects of that approval process which give rise to concerns in terms of compliance with the Racing Act.

Dealing with the above issues, we believe that there is some considerable uncertainty on the case law as to how a Court would view the validity of the overall approval process that preceded the decision by QRL as reflected in its special resolution. However, on balance, we expect that a Court, if it closely examined the entire factual and legal context would be more likely to hold that the resolution of the QRL, made in respect of the proposed amendments, is valid. This is because even if the vote cast by the representative of the QCRC was not properly and lawfully obtained, the effect of that vote in terms of the making of the resolution at the meeting of Class A Members did not have any significant outcome on the practical effect of the resolution. In short, even if the QCRC vote at the meeting of Class A Members is disregarded, it is clear that there would still have been clear and overwhelming support at that meeting for the proposed amendments to the Constitution of QRL. That is not to say that a Court may not be critical of the process that was undertaken in relation to the QCRC voting issue, but at the end of the day a Court is more likely than not, in our view, to find that this irregularity did not then flow through to totally undermine the actions taken by the members of QRL in general meeting when approving the proposed amendments to the QRL Constitution.

However, even if that issue is resolved in favour of upholding the special resolution passed at the general meeting of QRL, in a sense that is not the end of the issue for the Minister. The Minister is responsible for the operation of the Racing Act and the very power that he is exercising in this case is a condition that was inserted into the approval notice to ensure that he could maintain a continuing oversight of QRL as the respective control body. The amendments to the Constitution of QRL are, therefore, of significant public importance because QRL is the control body of the thoroughbred racing industry in Queensland. In our opinion, even if it is accepted that the special resolution passed at the general meeting of QRL is valid both under the Corporations Act and under the general law, it would still be open in our view for the Minister to decide to not ratify the process on the basis that the evidence before him indicates that there has been a real and significant non-compliance with the terms of the Racing Act. In our view, if the Minister were to ratify the current application, he may well be open to criticism that he has then endorsed this non-compliance by allowing the current application to proceed.

In our opinion, we believe that the Minister could regard, in this case, as a relevant consideration, when exercising his current discretion to ratify or not ratify the proposed amendments, whether there is any clear evidence of non-compliance with the provisions of the Racing Act. We believe that this is a valid, appropriate and relevant consideration for the Minister to consider and that he could validly refuse to ratify the proposed resolution passed by the general meeting of QRL on the basis of his concerns in respect of the preliminary and underlying steps taken, in relation to the vote exercised on behalf of the QCRC at the meeting of the Class A Members. In our opinion, such a decision made by the Minister would be capable of being defended in the event of a judicial review proceeding being brought and the risk to the Minister's decision would be low.

5.3 Approve the proposed amendments to the Constitution of QRL

Under this scenario, we anticipate that the likely facts would be either that ASIC has come out and stated that the QRL resolution is, from the point of view of the Corporations Act and general law, valid or that on balance, the Minister decides that there are insufficient policy grounds either in terms of the wording of the proposed resolutions or in terms of any non-compliance with the Racing Act to justify not ratifying the relevant proposed changes to the Constitution of QRL.

Under this scenario, we consider that the Minister's position may well be quite vulnerable. We believe, under this option, that there is a real possibility that the QCRC, or any one of its members

might, in judicial review proceedings challenge the Minister's decision to ratify the proposed changes to the Constitution of QRL on the basis that:

(a) he acted unreasonably in that, as the responsible Minister for the Racing Act, he endorsed a process which relied upon an outcome where there was a clear non-compliance with the Racing Act; or

(b) he failed to give weight to a sufficient relevant consideration, i.e. that in giving his approval under the approval notice, he should have afforded proper and due weight to ensuring that all related processes were compliant with the Racing Act.

Obviously, if the Minister were to take this option, he could seek to rely either upon the decision of ASIC and/or legal advice to the effect that under the Corporations Act and the general law the final resolution made by QRL in general meeting was valid and that disregarding the QCRC vote, the outcome at the meeting of Class A Members would not have been any different. We would stress that that is a reasonable position that could be adopted but we believe that it is one that may well be open to a successful challenge by way of judicial review and/or declaratory relief by an aggrieved party. In our opinion, a judicial review proceeding would have reasonable to good prospects of success. In this regard, we are not saying that the Minister's decision could not be defended but we consider that there is at least a 50 percent chance that the Supreme Court might hold that the Minister has either acted unreasonably or failed to properly discharge his administrative decision making authority and/or has failed to give due weight to relevant considerations. Because of this risk, based on the material before us, we really cannot advise the Minister to pursue this option in all the current circumstances.

Should you have any questions in relation to this advice do not hesitate to contact Clayton Utz.

Yours faithfully

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