QUEENSLAND RACING COMMISSION OF INQUIRY

Commissions of Inquiry Act 1950

SUBMISSIONS

Part 3

RQL Corporate Governance - Term of reference 3(c)

The adequacy and appropriateness of RQL's corporate governance arrangements, particular:

(i) **whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, acted with integrity and in accordance with RQL's constitution, in the best interests of the company and the racing industry;**

(ii) **whether RQL, its directors, the executive management team and other key management personnel, including the officer holding the position of company secretary, operated consistently with relevant applicable State and Commonwealth policies and legislation, including the *Racing Act* and the *Corporations Act* 2001 (Cth);**

(iii) **the policies, rules and procedures to identify and manage potential and actual conflicts of interests and to minimize the risks of directors and executives improperly using their position and information obtained for personal or financial gain;**

(iv) **the adequacy of employment contracts in restraining former directors and executives from seeking employment with RQL's preferred contractors and suppliers.**

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General comments in term of reference

1. The first point to note in relation to this term of reference is that it is restricted to RQL. It does not extend to any of the earlier control bodies such as QRL. If this was not clear enough from the precise terminology used in the term of reference, then Counsel Assisting made it abundantly clear in his breakdown of the terms of reference given on 15 July 2013[1] in which it is stated:

> "Racing Queensland Limited was incorporated on 25 March 2010, so that the period of relevance to this Term of Reference is 25 March 2010 until 30 April 2012
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> …
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> "There is not understood to be any limit to the acts and operations the subject of this aspect of the inquiry, other than that – because it concerns Racing Queensland Limited – the applicable date range is 25 March 2010 to 30 April 2012."

2. Therefore, while a great deal of time was taken up in the public sittings investigating the matter of the exercise of a proxy at a meeting of members of QRL in 2008 and the election of directors in QRL in 2009, those matters are irrelevant to this term of reference.

3. Insofar as subparagraphs (i) and (ii) of the term of reference are concerned, the Commission has not identified all possible provisions in the constitution of RQL or from Commonwealth policies and legislation, including the *Racing Act* and the *Corporations Act* 2001 (Cth), that may possibly be relevant to its investigations. These submissions are restricted to dealing with provisions that have been referred to in notices of potential adverse findings that have issued from the Commission.

4. It is not known why, in subparagraph (i), specific reference is made to the company secretary. No notice of potential adverse findings has been given to Ms Murray that

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1 "TERMS OF REFERENCE: DRAFT BREAK-DOWN OF ISSUES FOR INQUIRY" at http://www.racinginquiry.qld.gov.au/__data/assets/pdf_file/0004/205087/TOR-Breakdown.pdf

as company secretary of RQL she acted inappropriately, that is not otherwise addressed in response to terms of reference 3(a), 3(e) or 3(f).

5. In relation to subparagraph (iii) of the term of reference, it is also noted that the only allegations of conflict that have been raised in notices of potential adverse findings are covered in submissions that deal with other terms of reference.

6. In relation to subparagraph (iv) of the term of reference, one of the difficulties with this term of reference is that the Commission has been reluctant to provide better particularity in relation to exactly what are the maters in respect of which compliant or inquiry should address[2]. The Inquiry only ever focused on one supplier - Contour Consulting Engineers Pty Ltd ('CCE'), but the Commission was at pains to point out that CCE was not a preferred contractor or preferred supplier.

7. It is assumed subparagraph (iv) of the term of reference is aimed at Mr Tuttle and Mr Brennan who subsequently secured employment with CCE – in Mr Brennan's case immediately after leaving RQL, but in Mr Tuttle's case, only after many months and working elsewhere[3].

8. It is submitted that there is nothing wrong with having employment contracts that do not contain restrictions preventing staff from later joining a supplier or contractor. Mr Milner said[4]:

> "Whilst on the subject of corporate governance, I note in the terms of reference that a query is raised as to whether there were in place terms of employment contracts restraining former directors and executives from seeking employment with Racing Queensland Limited's contractors and suppliers. I find such a suggestion unusual. Rather, it is quite often the case in the business community that employees of companies may leave a company and go to work for a contractor or a supplier. I can understand that it would often be appropriate to seek restraints from employees going to work for competitors but I have not seen similar restraints placed upon employees seeking employment from contractors or suppliers. For example, in the finance industry it is commonly the case that employees of banks may leave the bank and go to work for a finance broker and thereby would continue to deal with banks in a commercial setting. Further, it can

2 As to which see Part 1 of these submissions

3 Tuttle statement 26 July 13, para 39

4 Milner statement 26 July 2013, para. 32

often be an advantage to a company where an employee leaves a company and commences work with a client or customer of that company."

9. Employees, in the absence of an express or implied contractual term to the contrary, may be able to work for rival companies[5]. In any event, in this case, Messrs Tuttle and Brennan did not go to work for rival companies so the issue does not even arise.

10. It is noted that the Commission has not pursued any allegation in connection with subparagraph (iv) of this term of reference. Given the experienced and logical view expressed by Mr Milner, it is submitted that it is not open to raise any issue of complaint in relation to that subparagraph of the term of reference.

Observations on the extent of duties

11. In dealing with subparagraphs (i), (ii) and (iii) of this term of reference, it is useful to make some observations as to the responsibilities of directors in relation to the company and the extent of the applicable law in this area. The submissions made about such duties on behalf of Mr Lette[6] are respectfully adopted.

12. The directors have vested in them collectively the power to manage the company and this power is theirs alone to exercise[7].

13. It is accepted that directors owe fiduciary duties to the company and duties imposed by the *Corporations Act*, which to some extent overlap the common law position. They must exercise their powers *bona fide* in the best interests of the company and not for themselves. In ascertaining the actual fiduciary duties of directors, it is necessary to consider not only the nature of the company's business but also the manner in which the business of the company is distributed[8].

14. The business judgment rule which relates to the duty of care and diligence will have effect on the statutory and equivalent common law duties[9].

15. The directors are vested with the right and duty of deciding where the company's interests lie and how they are to be served, and their judgment, if exercised in good

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5 *Hivac Pty Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169

6 particularly at paragraphs 48 - 59

7 Halsbury [120-7380] citing s. 198A *Corporations Act*

8 Re City Equitable Fire Insurance Company Ltd [1925] Ch 407 at 427; Western Areas Exploration Pty Ltd v Streeter (No. 3) (2009) 73 ACSR 494 at [59]

9 see, particularly, s. 180(2) *Corporations Act*

faith and not for irrelevant purposes, is not open to review in the courts. The test, therefore to determine whether a director has acted bona fide is subjective[10] . Acts done consciously and deliberately in the knowledge that they were not in the interests of the company may be sufficient[11] to establish a breach of duty. However, that is not the case with the directors of RQL.

16. The duty to the company does not extend to the interests of the employees. Although in many cases the interests coincide, directors are not entitled to provide for employees without regard to the consequences and potential benefits for the company[12].

17. Directors cannot exercise their powers to obtain some private advantage or for any purpose foreign to their powers. In determining whether the duty not to act for an improper purpose has been breached, a two step process is taken[13]. First, one must consider the nature of the relevant power by defining the limits within which it may be exercised. Secondly, one should examine the substantial purpose for which the power was exercised. The issue is not whether a management decision was good or bad; it is whether the directors acted in breach of their fiduciary duties, or in breach of the legislation[14]. Credit is given to the bona fide opinion of the directors. An examination of the objective commercial justification for a course of action taken or to be taken is relevant but only to assess the credibility of assertions by the directors as to their motivation.

18. It is a director's obligation not to enter into engagements in which the director has a personal interest conflicting, or which may possibly conflict with the interests of those whom they are bound to protect[15]. The prohibition is not against the making of a profit but the avoidance of conflict of duties. A director must refrain from pursuing, retaining or obtaining for himself any collateral advantage without appropriate informed consent.

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10 Halsbury [120-7385]; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483

11 *Feil v Commissioner for Corporate Affairs* (1981) 9 ACLC 811 at 817; *ASIC v Maxwell* (2006) 59 ACSR 373; ASIC v Sydney Investment House Equities Pty Ltd (2008) 69 ACSR 1 at [43]

12 Parke v Daily News Ltd (1962) Ch 927 at 963

13 Halsbury [120-7395]; *Howard Smith v Ampol Petroleum* [1974] 1 NSWLR 68; [1974] AC 821

14 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 at 218, 14 ACSR 109; *ASIC v Doyle* (2001) 38 ACSR 606

15 Halsbury 120-7410

19. Given the nature of their fiduciary relationship with the company, directors are subject to the general equitable obligation not to take advantage of information or property acquired by virtue of their position[16].

20. There is no prima facie restriction on a director being able to be a director of multiple companies, even rival companies[17].

21. Directors need to apply their minds to considering the overall position of the company and cannot hide behind ignorance of the company's affairs which is of their own making or which has been contributed to by their failure to make necessary inquiries.

22. The standard of care is that of an ordinary prudent person acting on their own behalf[18]. The question whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question[19]. To that extent examining events with the benefit of hindsight has its disadvantages, as the conduct of the directors must be examined by having regard to the situation that confronted them at the time the examined decision was made.

23. While the duties of company directors and officers are to be found scattered throughout the *Corporations Act* there are four major provisions which contain the general civil duties: ss. 180 – 184. The duties are in addition to and not in derogation of the general or common law duties. They are all civil penalty provisions[20].

24. A director or other officer of a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose[21]. The duty embodies a concept analogous to constructive fraud[22], a species of dishonesty which does not involve moral turpitude. It may be possible to breach this provision without being reckless or intentionally dishonest. More recent authority

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16 *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238; *On the Street Pty Ltd v Cott* (1990) 3 ACSR 54; *Western Areas Exploration Pty Ltd v Streeter* (no 3) (2009) 73 ACSR 494

17 *Bell v Lever Bros Ltd* [1932] AC 161 at 195

18 *Overend & Gurney Co v Gibb* (1872) LR 5 HL 480 ay 487; *Vrisakis v ASIC* (1993) 11 ACSR 162 at 212

19 Halsbury [120-7430]; *Vrisakis*

20 s 1317E

21 *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109; *Australian Securities and Investments Commission v Doyle* (2001) 38 ACSR 606; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373

22 *Australian Growth Resources Corp Pty Ltd (recs and mgrs apptd) v Van Reesema* (1988) 13 ACLR 261 at 272

has adopted the position that s. 181 is contravened only where a director engages deliberately in conduct knowing that it is not in the interests of the company[23].

25. A director, secretary, other officer or employee of a corporation must not improperly use their position to gain an advantage for themselves or someone else, or cause detriment to the corporation[24]. Further, a person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to gain an advantage for themselves or someone else, or cause detriment to the corporation[25].

26. The provisions will be interpreted with a purposive meaning rather than a causative meaning. That is, an officer or employee will be in breach of these duties where they engage in the conduct with the purpose of obtaining a benefit for anyone or causing a detriment to the company, regardless of what actually occurs in fact[26]. The intention must be to bring about one of those specific results[27].

27. A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they[28]:

> (1) were a director or officer of a corporation in the corporation's circumstances; and
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> (2) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer

28. It is also mandatory to have regard to the business judgment rule: s 180(2), 180(3). The business judgment rule provides a defence in a case where the impugned

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23 *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373; 24 ACLC 1308; [2006] NSWSC 1052; BC200608176 at [109] per Brereton J (applied *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623; 25 ACLC 1589; [2007] FCA 973; BC200705499; *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; 71 ACSR 368; [2009] NSWSC 287; BC200903649).

24 S. 182(1)

25 183(1)

26 *R v Byrnes* (1995) 130 ALR 529; 69 ALJR 710; 17 ACSR 551

27 *Chew v R* (1992) 173 CLR 626

28 s. 180(1)

conduct goes beyond a mere error of judgment, and would contravene the statutory standard but for the defence[29].

29. To be so protected the director or other officer must:

a. make their judgment in good faith for a proper purpose;

b. not have a material personal interest in the subject matter of the judgment;

c. inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

d. rationally believe that the judgment is in the best interests of the corporation.

30. This refers to a rational belief unless that belief is one that no reasonable person in their position would hold[30]. A belief may be rational if there is some reason or reasoning process that underpins it[31]. Section 180(2)(d) 'is satisfied if the evidence shows that the defendant believed that his or her judgment was in the best interests of the corporation, and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief, as defined, whether or not the reasoning process is objectively a convincing one'[32].

General comments as to conduct of board affairs

31. Mr Milner, an experienced businessman, joined the board of QRL in 2009, and remained a director of RQL until the end of July 2012. He has been on the boards of many companies and states[33]:

> "When I went onto the board of Queensland Racing Limited, I was impressed at how disciplined the procedures for the management of company business was in this organisation. There were detailed board papers prepared and circulated, extensive minutes were prepared and circulated in a timely manner for checking

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29 *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7242] per Austin J

30 S. 182(2)

31 *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7289], [7290] per Austin J

32 *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229; BC200910410 at [7289], [7290] per Austin J

33 Milner statement 26 July 2013, para. 7

after meetings and in-house counsel for the company was in attendance at meetings to assist."

32. Mr Milner further says[34]:

"Discussions at board level were often quite robust. No member of the board, in my experience, was reluctant to express an opinion, no matter how controversial the opinion was or whether that opinion may not have been widely held. There was often disagreement during board discussions but the position that we all took was that once we reached a decision at board level, we would support it and be consistent in our approach. I can remember Bob Bentley who was Chair of the board making it quite clear in discussions when I first went onto the board that we were free to express our views at the board meeting but that once the board decided upon a matter then the board should consistently support the decision that was made. We did not want more than one message going out. For consistency, the Chairman of the board would be the spokesperson."

33. Mr Lette, a commercial lawyer, is also an experienced company chair[35]. He said[36]:

"In respect of corporate governance arrangements for Racing Queensland Limited in the relevant period, I considered these arrangements were quite appropriate. Board papers were properly prepared as well as financial statements and financial reports.

Certainly the Risk and Audit Committee structure was an important feature in corporate governance arrangements. All these measures appeared to me to be proper and appropriate.

…

My general observation was that Racing Queensland Limited and its officers operated in accordance with the company's Constitution."

34. Mr Ryan, a chartered accountant, is an experienced company director[37]. He said:

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34 Milner statement para. 9

35 Lette statement (30 July 2013) para 4

36 Lette statement (30 July 2013) para 5 to 7

"It was my opinion that the corporate governance arrangements for Racing Queensland in the relevant period were fully appropriate."[38]

"The Board in making various decisions was always mindful of its obligations under the *Racing Act 2000* and the *Corporations Act 2001.*"[39]

35. It is submitted that in light of those general observations by experienced directors, any adverse findings that are drawn from specific instances should be limited to the specific instances and not extrapolated to try to justify some general criticism of the entire corporate governance arrangements of RQL.

Conflict of interest procedures

36. While there were processes in place in relation to handling conflicts of interest of staff, there was no policy of RQL dealing with the directors. The Commission notified Mr Orchard (and indirectly Mr Bentley) of a possible adverse finding based on an alleged conflict policy that was alleged to deal with directors[40]. It was based on a document that was used in examining Mr Bentley but the origins or authenticity of the document was never explored in public sittings.

37. Mr Orchard comprehensively discredited the allegation in his statement of 28 October 2013. The document that was put to him as a conflict policy applying to directors was never adopted by the board of RQL[41] and that should have been apparent to the Commission, given that it had extracted all of the board minutes of RQL and loaded them into its on line data room for ease of searching.

38. The procedures for disclosing and managing conflicts of interest were much the same as one would expect in any company board. As Mr Lette explained[42]:

"In the relevant period there were in place policies, rules and procedures within Racing Queensland Limited to identify and manage conflicts of interest. In at respect there was a conflicts of interest register. There was an

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37 Ryan statement (25 July 2013) para 5

38 Ryan statement (25 July 2013) para 40

39 Ryan statement (25 July 2013) para 45

40 Letter from Commission to RBG dated 23 October 2013

41 Orchard statement (28 October 2013), para 10

42 Lette statement (30 July 2013) para 8

agenda item in each meeting noting any potential conflicts of interest but there were also standing conflicts of interest."

39. The numerous board minutes of RQL that have been extracted by the Commission clearly show a rigid procedure whereby:

a. At the start of every board meeting, a register of conflicts was considered and the register appended to the minutes[43];

b. When business arose at a board meeting in respect of which a director may have a potential conflict, then either the director offered to vacate the room and left it to the other directors to decide whether he could stay, or left the room altogether. Numerous instances of such conduct can be found in the evidence and in the documents that have been seen by the Commission[44];

c. Mr Bentley did not attend meetings dealing with Race Information Fees and approvals of authorities[45].

40. Numerous witnesses gave evidence that they did not consider that there was anything wrong in the manner in which any conflicts of interest were handled. For example (and this is not an exhaustive list):

a. Mr Ryan said[46]:

> "In the relevant period there were in place policies, rules and procedures within Racing Queensland to identify and manage conflicts of interest. There was a conflicts register and I was aware of everyone's involvement in other directorships or activities which presented conflict for them."

b. Mr Lette said[47]:

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43 For example, see RQL board minutes of 1 July 2010, 6 August 2010, 3 September 2010

44 For example, see RQL board minutes 6 May 2011. See also Lette statement (30 July 2013) para 1.10(c)

45 For example, see minutes of RQL meetings 16 April 2011, 23.09.11, 19 December 2011.

46 Ryan statement 25 July 2013, para 46

47 Lette statement 30 July 2013, para 12

> "My observation of the policies and procedures in place to identify and deal with conflicts of interest was that they operated effectively within Racing Queensland Limited. In my experience these policies and procedures were not different to any other public company of which I have been a director".

c. Mr Lette also said, in response to the suggestion from Senior Counsel Assisting that Mr Bentley attended meetings he should not have[48]:

> "In my recollection, I can honestly say I – Mr Bentley and I – our relationship probably over the years has been cordial to – is probably putting it mildly. So I would recall if Mr Bentley attended a formal board meeting where he was not supposed to be there, and I don't recall him being there".

41. In the face of such clear evidence, it is submitted that no finding can be made criticizing the parties on whose behalf these submissions are made concerning the treatment of conflicts of interests in RQL.

Watson

42. Despite the fact that the dispute between Ms Kerry Watson and other members of the board of RQL has been resolved and that Ms Watson was never called to give evidence or be tested as to her conduct that led to her dismissal from the board, Counsel Assisting has seen fit to only examine Mr Bentley, Mr Ludwig and Mr Hanmer in relation to the matter. Mr Lette was called in the public sittings but Senior Counsel Assisting did not ask any questions of him in relation to the matter. Mr Ryan and Mr Milner were not called at all. In the circumstances, it is difficult to see how the Commission can make any findings in relation to the matter other than as set out in the unchallenged evidence of Mr Milner (see below).

43. Senior Counsel Assisting approached the issue with a preconceived theory that the sole reason for Ms Watson being dismissed from the board was because she copied

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48 T15-11.12

her letter that she sent to Mr Bentley to the Minister and the Office of Racing[49]. As Senior Counsel Assisting often commented[50]:

> "But the point I'm asking you is what's wrong with her writing to Mr Bentley and complaining about the fact?"

44. Senior Counsel Assisting seemed very reluctant to accept that Ms Watson did more than that. Mr Ludwig, whose evidence was quite frank to say the least, said:

> "Well, the difference is if that had have got into the press before we'd have got the government's go-ahead, we would've got a lot of complaints, like we got as soon as Ms Watson went and seen her Greyhound people. They come back with all the complaints in the world because it didn't suit them."[51]

> "And as I understand it then, there was – she must have discussed it with some other people because the greyhound people came out and complained that they weren't – it wasn't what – the result that they wanted."[52]

45. Senior Counsel Assisting pursued the same theory when examining Mr Bentley, but he was met with the same fact that it was Ms Watson's talking to people outside the government that was the real concern.

> "and she spoke to stakeholders outside"[53].

> "Okay. Now, the point about it being strictly confidential – you see, insofar as she wrote a letter to the minister and wrote it to you and wrote it to Kelly, there was nothing wrong with her doing that so far as confidentiality was concerned, was there? The key was that she had problems with it?---Yes. And she was talking to stakeholders outside about the plan"[54]

> "But I think that's been - - -?---The fact she sent it to the government was the issue, not the letter.

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49 The letter is at Bentley 141

50 T8-24.1

51 T8-23.1

52 T8-23.20

53 T4-61.38

54 T4-62.1

Why is that? It was one - - -?---Well, if you're getting a hundred – if you're looking, searching, for 110, 120 million from the bank, I mean the – it's a kiss of death. I mean, if you've got a board that's squabbling on the outside.
I've got it. Now, let me ask you this then: I thought you were going to say if a board member went to the government with her individual view on something, that'd be bad?---Under the circumstances, I considered it to be bad. I mean, she – there's a – she had every – ample opportunity. She could have come back to the board if she – made a decision. She could have come back to the board, and I can absolutely assure you that the whole thing would have been reconsidered. It didn't need to go into the 40 public arena of what she wanted to do and what she was saying, and that was the issue: it's gone into the public arena."[55]

"And what she got removed from the board for was disclosing confidential information to people who already knew what the information was?---No. I don't think – I don't think that's correct"[56]

46. Senior Counsel Assisting was also confronted with the same facts when he tried to put his preconceived theory to Mr Hanmer:

"I haven't seen this letter, but also she spoke to other people out – I think at least one other person outside of the – the minister, I seem to recall."[57]

47. The clearest evidence as to exactly what happened is set out in Mr Milner's first statement[58] and in his supplementary statement.[59].

48. Mr Milner, in his first statement said[60]:

"However, shortly after the board had voted in favour of proceeding with the plan, I learned that Kerry Watson was actively trying to white ant the plan. I received a call from Steven Hawkins, the race caller at the Gold Coast (who is now on the greyhound racing board). He rang me and said, "You need to speak to Paul Felgate". Mr Hawkins indicated to me that Ms Watson had contacted Mr Felgate and was attempting to white ant the plan. I then spoke to Mr Felgate by telephone

55 T4-71.27
56 T4-82.34
57 T7-123.34
58 Milner statement 26 July 2013
59 Milner statement 19 October 2013, paras 8 to 11.
60 Milner statement 26 July 2013, paras 25, 27, 30

> on 4 November 2010. I was informed by Mr Felgate that Ms Watson was seeking support for greyhound training to lobby the Minister to reject the infrastructure plan
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> . . .
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> While I thought that was quite serious misconduct, the issue of Ms Watson going to people outside the board and government and seeking to actively work against the decision of the board to proceed with the infrastructure plan was inexcusable.
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> . . .
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> In my view, it was proper corporate governance to seek the removal of a director who had breached confidentiality and was actively working against the decisions that had been made by the company."

49. His first statement was prepared at a time without recourse to some relevant documentation. His account set out in his supplementary statement, supported by documentation that is annexed to his statement, only serves to confirm and reinforce his prior evidence. That evidence shows that appropriate governance procedures were followed and that there was nothing inappropriate in the way the board conducted itself.

50. It is also open to conclude, on the evidence available to the Commission, that Ms Watson in fact breached clause 3.2 of RQL's Code of Conduct which states that "*A Board Member shall act independently and not in the interests of any sectional interests*."[61]

51. The details of the basis upon which the matter was ultimately resolved between RQL and Ms Watson are not before the Commission so, unfortunately, the Commission cannot be called upon to make any findings as to whether was appropriate for RQL to later reach any settlement with Ms Watson.

52. Otherwise, the submissions made on behalf of Mr Ryan at paragraphs 27 – 31 are respectfully adopted.

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61 Milner statement 19 October 2013 para 11

Application of Public Sector Ethics Act 1984 (Q.)

53. It is noted that in letters setting out potential adverse findings, reference is made to section 18 of the *Public Sector Ethics Act* 1994. That section provides:

"A public official of a public sector entity must comply with the standards of conduct stated in the entity's code of conduct that apply to the official".

54. Obviously, to be applicable, Queensland Racing Limited, and Racing Queensland Limited would have to be a 'public sector entity'. The definition of that term changed during the course of the relevant period with which this Inquiry is concerned. Only one of the potential definitions could be applicable to QRL or RQL. Initially, the terms was defined to include:

> (f) a commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorisation for a public, State or local government purpose.

55. Subsequently, that part of the definition became:

> (d) an entity established under an Act or under State or local government authorisation for a public, State or local government purpose.

56. Neither QRL nor RQL were "established" under the *Racing Act* 2002, or indeed under any Act. Each is or was a corporation registered under the *Corporations Act* 2001 (Cwth). That is recognized, in part, by s. 8(a) *Racing Act*.

57. By s. 57A *Corporations Act*, the term 'corporation' is defined to include a 'company'. That term is in turn defined in s. 9 to mean a company registered under the Act. Nowhere in the *Corporations Act* is reference made to the 'establishment' of companies, or corporations.

58. These submissions are supported by the decision of Applegarth J in *Davis v City North Infrastructure Pty Ltd*[62].

59. The Public *Sector Ethics Act* is directed at statutory corporations. Neither QRL nor RQL was a statutory corporation. The *Public Sector Ethics Act* has no application.

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62 [2012] 2 Qd R 103

60. Therefore, no finding can be made that any of the recipients of the potential adverse findings notices, failed to act in accordance with the *Public Sector Ethics Act*.

61. The inapplicability of the *Public Sector Ethics Act* also casts doubt on the way in which the Code of Conduct of RQL should be dealt with. That Code was clearly drafted (probably in reliance on earlier documents when the Act may well have applied) on the assumption that the Act applied. If the Act did not apply, the Code of Conduct should be read against that background.

Responses to potential adverse findings

62. Much of what has been raised by the Commission in relation to potential adverse findings, so far as they may fall within this term of reference, has been answered in the supplementary statements of Mr Bentley, Mr Milner, Mr Orchard, Mr Tuttle and Mr Brennan[63] or in other parts of these submissions (dealing with more specific issues in other terms of reference). It is not proposed to extract sections of those statements into these submissions. Rather, the entirety of the statements is relied upon.

63. It is submitted that the Commission cannot make any adverse findings based on any alleged breach of fiduciary or statutory duties or any other basis related to corporate governance by any the parties on whose behalf these submissions are made in relation to the following:

a. The dismissal of Ms Watson from the Board[64];

b. Any suggestion that any member of the board of either QRL, RQL or Product Co acted in ignorance of any conflict of interest, or that any conflict of interest was not appropriately disclosed or managed, or that any board member acted under any influence by Mr Bentley[65];

c. Voting in favour of the variation of the executives' employment contracts in August 2011 or the approval of the termination payments to those executives in March 2012[66].

63 Statements lodged in October 2013

64 See submissions above in this Part

65 See submissions in this Part and in Part 6

66 See submissions in this Part and in Part 5