QUEENSLAND RACING COMMISSION OF INQUIRY

Commissions of Inquiry Act 1950

SUBMISSIONS

Part 5

Executive Employment Contracts – Term of Reference 3(e)

Term of reference 3(e) – the events surrounding the renegotiation of employment contracts of four RQL senior executives, Chief Executive Officer Malcolm Tuttle, Director of Integrity Operations Jamie Orchard, Director of Product Development Paul Brennan and Senior Corporate Counsel and Company Secretary Shara Reid (nee Murray) in 2011 and resulting payouts on their voluntary termination in March 2012 under those contracts, and whether the directors and senior executives acted consistently with their responsibilities, duties and legal obligations, with reference to the key findings of the Auditor-General in his Report to Parliament, *Racing Queensland Limited: Audit by arrangement*, tabled in July 2012

1. Again, this term of reference is curiously worded. It requires investigation "with reference to" the key findings of the Auditor-General in his report to Parliament tabled in July 2012.

2. Inquiring into a matter that is the subject of a report to Parliament creates difficulties because of ss. 8 and 9 *Parliament of Queensland Act* 2001. Section 8(1) of that Act provides that:

> "The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly".

RODGERS BARNES & GREEN
Lawyers
Level 10, 300 Adelaide Street
Brisbane QLD 4000
Tel: + (61 7) 3009 9300
Fax: + (61 7) 3009 9399
Email: admin@rbglawyers.com.au
Ref: GWR:AKM:130250

3. In s. 9(2)(d) "proceedings in the Assembly" are defined to include:

> "a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry."

4. Therefore, it is not open to this Commission of Inquiry, or persons represented before it, to call into question the report of the Auditor-General, and conclusions stated in that report. One may therefore wonder why the term of reference is necessary at all.

5. Section 36 *Auditor-General Act* 2009 (Q.) empowers the Auditor-General to audit an entity that is not a public sector entity if asked by the Minister to do so. On 27 March 2012, the Deputy Premier and then Minister for Racing wrote to the Auditor-General expressing concerns about media reports describing the resignation of four senior staff of RQL, and requested an audit of RQL under the provisions of section 60 of the *Racing Act 2002*. The Auditor General decided to conduct the audit under s. 36A of the Act.

6. Section 36A of the Act provides:

> "(1) The auditor-general may conduct an audit of a matter relating to property that is, or was, held or received by a public sector entity and given to a non-public sector entity.
>
> (2) The object of conducting the audit includes deciding whether the property has been applied economically, efficiently and effectively for the purposes for which it was given to the non-public sector entity.
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> (3) If the auditor-general conducts an audit under subsection (1), the auditor-general must apply the general standards set out in the auditor-general's report mentioned in section 58."

7. "Public sector entity" is defined in the Schedule to the Act, in considerably wider terms that under the *Public Sector Ethics* Act, referred to elsewhere in these submissions. On the assumption that RQL was a public sector entity[1]; the Auditor-General had power to conduct the audit.

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[1] Which assumption cannot, apparently, be called into question

8. It can immediately be seen that s. 36A is not well suited to an audit of the payouts made to the four employees concerned. How can one ask whether the money paid to the former employees had been "applied economically, efficiently and effectively for the purposes for which it was given to them?"

9. Nevertheless, the audit investigated the circumstances in which the payments were made. The report of the Auditor-General speaks for itself, and has been usefully uploaded onto the Commission's web site. A conservative application of ss. 8 and 9 *Parliament of Queensland Act* would mean that the Commission is constrained by not only the findings of the Auditor-General, but also the commentary in his report.

10. Another difficulty is in identifying the "key findings" intended to be referred to in this Term of Reference.

11. Certain "key findings" appear at pages 8 – 9 of the Auditor-General's Report. Other "key findings" appear at page 13 of the Report. As it is not clear which "key findings" are intended to be referred to, both must be addressed.

12. The Commission has apparently taken the approach[2] that the term of reference permits a two-stage inquiry. First, a broad investigation to determine the course of events including in relation to how each employment contract came to be renegotiated, how the renegotiation progressed between the parties, what process was followed within RQL in relation to the renegotiation, and how the payouts arose to be made, were approved, and were in fact made. Secondly, a determination whether such investigation reveals adherence to various persons' responsibilities, duties and legal obligations 'including' with reference to the key findings of the Auditor-General.

13. It is respectfully submitted that the insertion of the word 'including' changes substantially by widening the scope of the term of reference, and is neither warranted nor permitted.

14. What the Term of Reference requires is a reference back to the report of the Auditor-General. As already submitted, that report, its analysis and its

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[2] reflected in the document published on the Commission's web-site "Draft break-down of issues for Inquiry, which has not been up=dated since 15 July 2013

conclusions cannot be called into question. There is no point conducting an inquiry if at the end one is bound not to disagree with the report of the Auditor-General.

15. Nevertheless, on the assumption that this Commission of Inquiry can go further (which is not conceded), these submissions address the substance of the renegotiation of the four employee's contracts of employment.

16. The contracts of employment dated 5 August 2011 are:

    a. In the case of Mr Tuttle – at Bentley 217;

    b. In the case of Mr Brennan – at Bentley 214;

    c. In the case of Mrs Reid – at Bentley 216;

    d. In the case of Mr Orchard – at Bentley 215

17. The pre-existing contracts for the four employees are to be found at Bentley 196 – 199 inclusive.

18. Each contract was for a term of 3 years: from 1 July 2010 to 30 June 2013. There was, despite some early suggestions of an extend term, ultimately no change to the term of the four contracts.

19. The contracts are in relevantly identical terms[3]. They were negotiated, effectively, as a package. They can be considered by the Commission as a package.

20. The events surrounding the renegotiation of the employment contracts are relatively straightforward, and have been examined at length during the public sittings on the Inquiry. What is immediately apparent is that the renegotiation of the contracts was not some last minute shady deal carried out in secret. The contracts were in place by 5 August 2011, and the employees remained employed until late March 2012, a period of almost eight months. Two firms of solicitors were involved in advising on the contracts. Their involvement will be discussed in more detail below.

[3] save, of course, for the specific remuneration paid to each employee

21. Again, not all relevant witnesses were called to give evidence. Mr Ryan and Mr Milner, who were both directors of RQL during the period in which the contracts were renegotiated and ultimately approved were not examined[4]. Mr Orchard and Mr Brennan, two of the employees who were parties to re-negotiated contracts were not examined[5]. Most critically, Mr Dunphy, Mr Proctor and Ms Gamble, the solicitors who were most heavily involved in drafting documents and advising were not examined, despite a request being made for them to be called, and Mr Proctor appearing on the initial list of witnesses intended to be called by the Commission.

22. That each of the four employees who were given new contracts held senior positions in RQL, were long-standing and valued employees, and were critical to the ongoing work of RQL in the period July 2011 – March 2012 does not appear to be in question.

23. Nor has there been any serious investigation into, or questioning about, the fact that the four employees were paid less than market rates for their positions leading up to the contract re-negotiation. Indeed, apart from the question of whether the increase in remuneration should have been 10% - 20% or 30%, it should be accepted that an increase in remuneration was warranted. The only statement obtained by the Commission about this[6] supports that conclusion.

24. It should also be accepted that in the period leading up to 5 July 2011 the senior employees of RQL were subjected to quite scurrilous personal attacks at an increasing rate, and were also subject to an increasing level of conjecture that if there was a change in the State Government (whenever that may occur) their employment was likely to be terminated or at least in serious jeopardy.

25. A distinction needs to be kept firmly in mind in considering this term of reference between the position of the employees, and the position of RQL, by its directors.

26. The directors of RQL owed duties to that company, which are discussed in

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[4] despite which notices of potential adverse findings have been served on their solicitors

[5] who, together with Mr Tuttle and Ms Murray, have also been served with notices of potential adverse findings

[6] Ms Nicaud

response to Term of Reference 3(c).

27. The employees also owed duties to RQL, as their employer, but those duties were quite different. The Commission, in its letters of 17 October 2013 to the solicitors for each employee asserts that the employees:

> "owed duties to act in good faith and in the interests of RQL; to ensure that RQL's resources were not wasted, abused or used improperly or extravagantly; to act with honesty and integrity; to carry out duties impartially and regardless of personal preference; to avoid situations where a reasonable person could conclude that his private interests interfere, or are likely to interfere, with a proper performance of his duties; and to resolve any conflict between personal interests and duties to RQL in favour of RQL".

28. It can be accepted that each of the employees on whose behalf these submissions are made owed a duty to act in good faith, and to act honestly in the performance of their duties of employment[7]. It can also be accepted that an employee owes a duty to avoid conflict between his own interests and that of his employer[8].

29. It can also be accepted that an employee owes a duty under ss. 182 *Corporations Act* not to make improper use of their position[9].

30. However, it is by no means clear, from the notices of potential adverse findings, nor from the Commission's letters sent in response to letters seeking clarification and further details concerning those findings, how it is said that ss. 180 or 181 *Corporations Act* apply to each of Messrs Tuttle, Brennan, Orchard and Ms Murray.

31. The content of those sections has been set out in another part of these submissions. They apply to a director or an officer of a corporation. None of the stated employees was an 'officer' as that term is defined in s. 9 *Corporations Act*, other than Ms Murray when acting in her capacity as company secretary. It cannot seriously be contended that Ms Murray was so

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7 see, for example *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 per Lord Greene MR at 174

8 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81-2

9 Mr Tuttle, the only employee to give oral evidence, accepted as much at T9-44.30

acting when seeking a re-negotiation of the terms of her employment. These submissions can be expanded upon if necessary, but it is contended that this proposition is clear. The sections do not apply.

32. Section 182 *Corporations Act* is potentially applicable. It provides:

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

33. The statutory duty reflects a corresponding duty in equity. The test as to whether the provision has been breached is objective[10]. The elements of the provision were discussed in *Chew v R*[11].

34. A breach of the provision can be established by a breach of the standard of conduct which would be expected of a person in the position of the employee, by a reasonable person with knowledge of the duties, powers and authority of the position and the circumstances of the case[12].

35. Section 184(2) creates a criminal offence. It provides that:

"A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:

(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or

(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining and advantage, or in causing detriment to the

36. Time does not permit an exhaustive analysis of the case law concerning

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10 *ASIC v Adler* (2002) 40 ACSR 80; *ASIC v Somerville* (2009) 259 ALR 574; *ASIC v Doyle* (2005) 223 ALR 218

11 (1992) 173 CLR 626

12 see, for example, *Whitehouse v Carlton Hotels Pty Ltd* (1987) 162 CLR 285

these provisions.

37. It is submitted that it would be extraordinary, and manifestly unfair, in light of the evidence and the contemporaneous documents, particularly the legal advice received from two respected firms of solicitors, if the Commission were to conclude that any of the directors or employees acted dishonestly. As stated at the outset of these submissions, no finding of criminal conduct should be made unless the Commission is satisfied to a very high standard that such conduct has occurred. By the way the Commission has chosen to conduct its investigation, with limited public testing of all relevant evidence, that state of satisfaction cannot be attained.

38. It is submitted that it would also be extraordinary to find that an employee engaged in a genuine negotiation with his or her employer about the salary or other benefits to be paid, owes that employer a duty not to ask for too much, or is precluded from accepting a generous employment package. The employer is always able to say no.

39. In the absence of a finding that the four employees colluded with the directors to put in place terms of employment that were so generous no reasonable employer would have agreed to them, no finding of inappropriate conduct can be made against either the directors or the employees.

40. It seems that counsel assisting have obtained the balance of the alleged duties owed by the employees from either the Code of Conduct[13] or from the Principles under the *Public Sector Ethics Act*, which has already discussed elsewhere in these submissions and is not applicable to RQL.

41. The relevant chronology of events surrounding the renegotiation of the employment contracts appears to be as follows. On 14 April 2011, the Remuneration and Nomination committee (comprising Mr Bentley and Mr Ludwig) agreed to recommend to the Board of RQL that existing employment agreements for nine senior employees, including the four relevant employees, be extended by 12 months, up to and including 30 June 2014, and that contracts be offered to five administrative staff.

42. At the meeting of the RQL Board on 6 May 2011, the above recommendation

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13 Tuttle 40

was unanimously accepted by the Board and it was resolved that the Chairman approve the terms relevant to the agreements and the extension of the agreements.

43. A further meeting of the RQL Board took place on 16 May 2011, but the issue was not further advanced.

44. Legal advice was called for. Mr Bentley was asked why lawyers were necessary for a negotiation between employer and employees. Mr Lette thought that was normal practice. It was appropriate for lawyers to become involved. Indeed, if legal advice had not been taken, the directors, at least, would have been strongly criticized for not doing so.

45. On 26 May 2011 Ms Murray sent an email to Mr Dunphy at Clayton Utz[14]. Clayton Utz were the solicitors for RQL and advised it concerning the employment contracts. The firm should also be found to have advised, or undertaken to advise, the directors of RQL, in particular whether their actions were appropriate, and in accordance with their duties owed to the company. That Clayton Utz was so retained has been argued extensively in correspondence with the Commission in connection with a dispute as to legal professional privilege. The four directors on whose behalf these submissions are made rely on such correspondence and the legal authorities referred to therein. It is not proposed to repeat what has already been said.

46. If the Commission finds that the directors acted inappropriately, and in contravention of the *Corporations Act*, they did so on the advice and with the imprimatur of their lawyers.

47. Ms Murray's email referred to a discussion on the previous day concerning amended executive employment agreements. It provided Mr Dunphy with a copy of the Board resolution of 6 May 2011. It enclosed an amended employment agreement for consideration and review. It stated "It is the Board's intention that this Agreement be 'in favour' of the RQL employee". It also stated that Mr Bentley had been authorized by the Board to approve the terms of the draft agreement.

48. The phrase 'in favour of' the employee was also referred to in the notes of

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[14] Bentley 201

Norton Rose. During Mr Bentley's examination this phrase was described by Senor Counsel Assisting as 'amazing'[15]. As Mr Bentley explained it meant no more than that the company did not want any disputes with its senior executive employees and wanted to come to a mutually acceptable agreement with them. There is nothing amazing about that.

49. Clayton Utz provided 'draft' advice on 2 June 2011[16]. That advice, although never finalized, cautioned against the proposal to offer new contracts to 14 staff. RQL followed that advice, and what was proposed in the board minutes of 6 May 2011 was abandoned. However, it is worth noting that in this advice Clayton Utz did say:

> "We confirm that, in our opinion, RQL is fully justified in seeking to restructure its employment and remuneration policy to gain the maximum advantage for the company and to preserve its business continuity and corporate knowledge throughout this critical period . . . "

50. The critical period referred to was that during which the infrastructure plan was to be implemented and business cases developed to enable the release of government funding for infrastructure projects. That activity occurred until March 2012, when the new government was elected.

51. Clayton Utz continued to represent RQL. It was suggested to Mr Bentley[17] that RQL initially had Clayton Utz, then went to Norton Rose, then went back to Clayton Utz, as if the board was fishing around for advice that it wanted to hear. It was further suggested that the Board of RQL did not like the Clayton Utz advice so they went to another firm of solicitors[18]. Both suggestions were quite misleading and wrong. As will be discussed below, Norton Rose was retained to advise the four employees. Clayton Utz at all times remained the solicitors for RQL.

52. There was some discussion about whether the Clayton Utz draft advice was given to the Board of RQL. Mr Bentley thought that he had given the draft advice to the Board[19]. Apparently he told ASIC that he had done so[20]. It

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15 T5-48.19
16 Bentley 202
17 T5-9.30
18 T5-45.5; T5-57.1
19 T5-50.20
20 T5-37

should be accepted that he probably did so. Ultimately the advice is only of marginal relevance as it concerned a proposal that was abandoned.

53. It was also suggested that it was inappropriate for Ms Murray and/or Mr Tuttle to meet with Clayton Utz, as they (Tuttle and Murray) were effectively the 'other party' to the negotiations about the employment contracts. Two points can be made about this assertion. First, there is no evidence that Ms Murray and Mr Tuttle acted in any way improperly in conveying instructions to or receiving information from Clayton Utz. Mr Bentley was asked a number of questions about this but never said that his instructions were not faithfully passed on. No one else was examined about this. It was certainly not put to Mr Tuttle that he acted in his own interests by not passing on instructions to Clayton Utz, or by withholding relevant information.

54. Secondly, and perhaps more importantly, at no time did anyone from Clayton Utz tell either the employees, or the Board, that it was inappropriate for them to be instructed as they were, or that they wished to speak to one or more of the directors personally. It is evident that Mr Bentley had telephone contact with Mr Dunphy during the course of the negotiations, and as recently as 3 August 2011.

55. On 6 June 2011 Mr Tuttle asked Ms Murray to arrange a meeting with Mr Bentley so that they could discuss the Clayton Utz draft advice. Mr Bentley was obviously aware of it. An RQL Board meeting on 7 June 2011 did not advance the issue any further.

56. Ms Murray and Mr Tuttle apparently attended a meeting with Mr Dunphy on 14 June 2011. Again, Mr Dunphy has never said that this meeting was inappropriate, nor that he wished to take instructions from somebody else. The reason this meeting is mentioned is because Mr Dunphy's file note contains the following:

> "The board wants a poison pill if there is a change of government".

57. Senior Counsel Assisting was prepared[21] to proceed on the assumption that this was a statement conveyed to Mr Dunphy by either Mr Tuttle or Ms Murray. Mr Tuttle emphatically denied making such a statement. On closer

[21] without Mr Dunphy having said so in any of his statements

examination, the file note does not record if the extracted sentence was a statement made to Mr Dunphy, or his own note. Of course, the Commission has refused to examine Mr Dunphy about this, amongst other matters. Parts of the file note contain a notation where a statement is attributed to someone at the meeting. The extracted sentence does not have such an annotation.

58. Mr Bentley was asked about this file note, even though he was not at the meeting[22]. Mr Bentley, not a witness predisposed to emotional outbursts, described the suggestion that the board wanted to achieve a 'poison pill' as 'preposterous' and denied it emphatically.

59. In the absence of any evidence from Mr Dunphy, no finding can be made about what was said at this meeting, or who said it.

60. A particularly unsettling media article appeared under the hand of Mr Mark Oberhardt on 4 July 2011. That led to consternation for Mr Tuttle, Ms Reid and Mr Brennan who met on 4 July. Mr Orchard was also upset by his treatment by the industry and he media.

61. These matters are all dealt with in the statements provided to the Inquiry, and it is not proposed to reiterate those matters in these submissions.

62. The Commission should accept that each of the four employees were unhappy with their treatment by the industry and by the media. It should also accept, certainly in the case of Mr Orchard and Mr Brennan, that those employees were on the verge of leaving their employment. Mr Tuttle and Ms Reid were also considering their positions. They made their feelings known to Mr Bentley. As Mr Tuttle explained he felt that, out of loyalty, he (and presumably the other employees) was prepared to see what the Board of RQL and Mr Bentley could do for the employees before actually resigning.

63. Mr Tuttle, the only one of the four employees called to give evidence, when asked[23] about whether he was going to leave, gave the following evidence:

> "Okay. Thank you. Were you realistically going to leave?--- I'd spoken to the – the chairman at or about this time. It may have been at this meeting

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22 T5-94.24 – T5-94.35

23 T9-48.1

> or it may have been the day prior. And I had personally outlined to him that – in not so many words that I was leaving but that I was not going to stick around and risk the prospect of either being removed from office or face a level of retribution in the event that there's going to be a change of control body or a change of government. I couldn't have been clearer with him, at least from my own personal point of view, that I had – I was getting pretty close to the end of my tether, and he would've understood that.

64. Later he said[24]:

> "Yeah. But you're telling the chairman that you're going to leave and that's not really the case?---I'm – I'm not sure how you form that view."

65. He also said[25]:

> "Well, I'm asking you - - -?---What you're saying is that I need to apply for a job to demonstrate that I'm going to leave, that I can't tell the chairman that look, I've had enough. I'm not going to hang around. I mean it was fairly plain – plain, the language I used with him."

66. To suggest that each of these employees lied to Mr Bentley and to RQL to secure some advantage for themselves is not only insulting, but is made without any evidentiary basis. It was put that it was a 'confection' that Mr Tuttle was going to leave[26]. In letters to each of the employees a potential finding is notified (in inadequately particularised terms) that each made false representations that they intended leaving to induce RQL to agree to the amendments they were seeking to their contracts of employment[27]. The employees' statements speak for themselves. The Commission will have no difficulty in concluding that the employees did not make false representations as alleged. Simply because a person has not made definite enquiries or secured alternative employment does not mean that they cannot have the intention of leaving their present employment. Yet that is the basis on which the notices of potential adverse findings are premised.

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24 T9-50.45
25 T9-51.1
26 T9-97.39
27 Letters to Brennan and Tuttle para 3(c); letter to Orchard para 1(c) and letter to Reid para 6(c)

67. On 5 July 2011 each of Messrs Tuttle, Brennan, Orchard and Mrs Reid signed a letter addressed to Mr Bentley. It was drafted by Mr Tuttle[28]. The letter states, after the introductory paragraphs concerning the likely timing of the State election:

> "The media speculation, including an article under the hand of Mark Oberhardt in yesterday's Courier Mail, points to a changing of the guard at Racing Queensland Limited should the Liberal National Party be successful in the upcoming State election. Mark Oberhardt states, "Huge tip that a country racing legend would replace Bob Bentley as RQ chief if the LNP wins power. And a former race club chairman is tipped as the likely new chief executive."
>
> The website, Letsgohorseracing.com.au, has signaled that it will publish a list of new RQL officers on its website tomorrow.
>
> Our staff are regularly reminded at race meetings by Race Club directors that our time is up.
>
> . . .
>
> The speculation that senior executive staff will be removed post the State election is taking its toll and you would have gathered at yesterday's meeting it is now having the effect of destabilizing senior management, and our broader staff.
>
> You heard first-hand yesterday from Jamie Orchard, Paul Brennan, Shara Murray and myself in relation to the impact this is having on our work with Racing Queensland Limited and indeed on our personal lives . . . We are not of a mind to take unreasonable risks with our future and gamble on a reformed company or new Board retaining our services beyond the State election. In fact, it is more likely than not, that given the seniority associated with each of our positions, we will be removed from office.
>
> As such, we request that you give urgent consideration to retaining the services of key people in the organization and also consider putting in place a framework that provides us with the necessary security both

[28] T9-46.45

leading up to and subsequent to the upcoming State election.

. . . "

68. This letter was written at the request of Mr Bentley, who had asked the employees to set out their concerns in writing so that he could take the matter to the Board. It was obviously the intent of the letter[29] to say to the board that if something was not done to assist the employees they would be leaving.

69. Ms Murray continued to liaise with Mr Dunphy on 5 and 6 July. On the latter date she asked if Mr Dunphy wanted Mr Bentley to be available. Mr Dunphy did not. This reinforces the point made earlier that Clayton Utz did not consider it inappropriate to be taking instructions from Ms Murray or Mr Tuttle.

70. A decision was made by Mr Bentley that the four employees should take their own legal advice[30]. Mr Orchard made contact with Mr Proctor at Norton Rose. A meeting was arranged for 7 July.

71. On 7 July Ms Murray prepared and sent a "Brief" to Mr Procter[31]. It includes extracts of media commentary and set out the type of work that the four employees had been involved and were required to do over the ensuing six months.

72. Later on 7 July the executives (other than Mr Brennan) met with Mr Procter and Ms Kristin Gamble. Ms Gamble's note of this meeting is instructive[32]. It is quite evident that she thought her instructions were coming from, and advice was required to be given to, the four executives. The note includes:

    a. "Provide advice to senior executive"

    b. "Board using Clutz"

    c. Why do they stay for the next 12 months; what benefits do they get on termination

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29 as Mr Tuttle acknowledged at T9-47.20
30 T5-28.10; T5-56.12
31 Tuttle 42
32 Tuttle 43

d. Looking for financial benefits up front and on termination

e. Clutz suggesting 20-30% increase

f. Made it clear didn't want to expose the Board to risk of breaching Corps Act or an ASIC investigation

g. Trigger point – change of government

h. Under the heading "Strategy" under point 3 – it was the lawyers' idea to put in a material adverse change clause triggered by the employee. Written in favour of the executive – this is part of the normal course of things

i. Executive to trigger – this will be the safety net

73. At the end of the note appears "RQL as client at this stage". This is explicable because RQL was going to be paying the bill.

74. There is nothing in the note about Norton Rose advising RQL or the board.

75. Mr Tuttle gave evidence that the purpose of the executives going to Norton Rose was because they were looking to explore what benefits they could achieve as executives[33]. Mr Tuttle said[34]:

> "The view I held was that Norton Rose was engaged to advise the executives, and that Racing Queensland Limited had offered to pay the costs associated with the advice."

76. The following exchange took place during Mr Tuttle's evidence[35]:

> "So it's true, isn't it, that Norton Rose is acting in the position of, really, considering both sets of interests?---Yes, but arguably separate. The interest of the board in terms of its duties, but, in my mind, it was very clear with Norton Rose that they were advising and acting in relation to additional benefits for the executives, and they were providing that advice

33 T9-55.45
34 T9-59.6
35 T9-59.20

to us as the executives."[36]

77. The questions posed by counsel assisting fly in the face of the disallowance by the Commission of the claim to legal professional privilege in respect of the Norton Rose file and advices, on the grounds that it was advising only RQL[37]. Earlier, it had been put to Mr Bentley[38] that he had recommended that Norton Rose be engaged for the employees. These questions, presumably carefully considered, and the evidence viewed fairly, demonstrates that the disallowance of the claim to privilege was wrongly made, and unfair use has been made by the Commission of privileged material.

78. The way that Norton Rose subsequently addressed its advices has only served to confuse matters. Further, the attempt by Mr Proctor, who was not called to give evidence, to explain why RQL was the client invites further confusion.

79. In his statement, Mr Procter says[39]:

> "I made this suggestion because I did not consider that Norton Rose should act against RQL given that it had acted for RQL in the past and remained a client of the firm. Norton Rose could, however, advise RQL on possible retention strategies for the executives and that would be consistent with the work we were being asked to perform as described to me at the meeting. Shara, Jamie and Malcolm agreed in this meeting to Norton Rose acting on this basis. This is reflected by the notation in my attendance note[40] to 'advice to Board'. By the end of the meeting, it was clearly agreed that I would be advising RQL and its board of directors on possible retention strategies for the Executives. I was not instructed by RQL to advise the Executives and I was not engaged by the Executives."

80. With respect to Mr Proctor, that conclusion is plainly wrong. Norton Rose were engaged by the four executives. RQL was to pay the bill. That is why a retainer agreement was made with RQL. Norton Rose made no enquiries as

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36 At T9-59.32 it was suggested by counsel assisting that Norton Rose were advising and considering the position for both sides of the negotiation; see also 9-69.40 and 9-70.11

37 See letters from Commission to RBG dated 9 August and 9 September 2013 respectively

38 T5-54.24

39 at paras 21-23

40 at page 72 of the annexures to the statement

to whether the executives they were speaking to had the authority to commit the company to a contract for legal services.

81. The Auditor-General accepted that Norton Rose advised the four executives:

> "Legal advice provided to the four executives, paid for by RQL, formed the basis of the contract variations."

82. That conclusion cannot be called into question[41].

83. Even if, by some strange piece of logic, it could be concluded that Norton Rose were advising RQL, it is plain they were also advising the executives. In his email to Ms Murray dated 14 July 2011[42] Mr Proctor accepts that his advice will go to and be read by the four executives. The way in which emails passed between Ms Murray and Mr Proctor and Ms Gamble, and the way in which documents were amended and discussed with Ms Murray, supports the conclusion that Norton Rose was acting for the four executives.

84. The difficulty with the conclusion that Norton Rose was advising RQL or the Board is that, like Clayton Utz, they never disapproved of the way in which Ms Murray was giving them instructions. They never sought to speak to any member of the Board to confirm that what they were being told was accurate. The solicitors plainly owed duties to the four executives.

85. A board paper was prepared for the board meeting of RQL on 8 July 2011[43]. A large amount of this board paper was taken from the briefing paper to Mr Procter. From this it could reasonably be inferred that Ms Murray either prepared the board paper or prepared a draft of it[44]. As to the RQL board resolution of 6 May 2011 it states:

> "In discussions with Clayton Utz, concerns were raised in relation to the number of personnel being offered extended employment agreements and also the fact that executive support staff were to be included with those being offered fixed-term employment agreements.

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41 see also page 16 of the Audit Report
42 annexures to Proctor statement page 214
43 Tuttle 44
44 Tuttle at T9-61.10

> Myself[45], Malcolm Tuttle and Shara Murray have continued to have discussions with Clayton Utz in relation to this matter.
>
> . . .
>
> Clearly the landscape has changed since the Board resolution of May 6, 2011, and it is my firm view that we need to reconsider our position as a Board in relation to our key executives. Those executives that are most at risk are also those that will play a vital role over the next 6 months. [Tuttle, Brennan, Orchard and Murray are then named] and it is for this reason I recommend to the Board an approach that provides these key executives with certainty prior to the election."

86. The letters of potential adverse findings[46] assert that the employees failed to disclose to the Board the draft advice of Clayton Utz dated 2 June 2011. If it is accepted, as it should be, that Mr Bentley provided the advice to the board, then that finding cannot be made.

87. However, if that evidence is not accepted, it is plain from the minutes of 8 July that the board had notice that it had been taking advice from Clayton Utz. Nothing was hidden from the board. If any board member wanted to see and read that advice it would have been made available to them.

88. Mr Bentley made a number of recommendations that were ultimately not implemented.

89. The minutes of the RQL board meeting on 8 July 2011[47], state at clause 2.4:

> "The chairman updated the board on significant issues that have arisen from the recent publication in newspapers and websites of proposed changes to RQL Board and management structures.
>
> The Board expressed their concern that this type of editorial has had a destabilizing effect on executive staff and RQL would ensure that employees of RQL are aware of their rights.

---

45 Obviously intended to mean Bob Bentley

46 Reid at para 6(d); Orchard at 1(d); Tuttle and Brennan each at 3(d)

47 Bentley 205

> The Board to instruct to (sic) Mr Tuttle and Ms Murray to engage independent advice on their contractual rights. The cost of this advice was to be paid by RQL.
>
> As chairman, I have engaged to the services of Norton Rose Lawyers to act on behalf of RQL in respect of providing advice to RQL's four key executives (setting out their names) . . . Scope of advice – in relation to their rights and entitlements"

90. If anything further was needed to find that Norton Rose were acting on behalf of the four executives, the minutes provide that evidence.

91. The minutes also refer to Clayton Utz finalizing the D & O policy, a matter that was raised with Mr Bentley concerning what happened on 5 August 2011, and which is referred to below. It is relevant to note that the matter did not arise for the first time on 5 August and in fact had been referred to considerably before even 8 July.

92. On 15 July 2011 Mr Proctor sent a draft of his advice to Ms Murray. His email supports the conclusion that he was advising the executives. The advice was provided in draft to Ms Murray "to gauge your views on the approach of the Board".

93. Before considering this draft it may be useful to bear in mind what the extant contracts of employment of the four executives contained, before the proposed changes are examined.

94. In the example of Mr Tuttle's contract[48]:

    a. The term of his contract of employment was from 1 July 2010 to 30 June 2013;

    b. Clause 1.2 stated:

> This document sets out the complete terms of the contract of employment that is being offered to you . . .

48 Tuttle 40

c. Clause 5.7 stated that remuneration arrangements would be reviewed annually, but there was no guarantee of an increase;

d. Clause 8 set out employee obligations including:

> "(f) observe and comply with all policies, procedures, and operational manuals as amended by RQL from time to time and all reasonable directions given by RQL. "

e. A similar obligation was imposed by clause 10.1. That clause said that the contents of policies and procedures do not form terms and conditions of your employment contract with RQL unless expressly referred to in this Agreement;

f. clause 9 was headed "Conflict of Interest". It stated:

   i. in clause 9.1 "You are being appointed as a senior executive. This means that you are required to always act in good faith in RQL's best interests and to ensure that you are not placed in a situation where your duties to RQL are in conflict with your personal interests. This extends to ensuring that you are not in a situation where there could be a reasonably perceived conflict between your duties to RQL and your personal interests;

   ii. clause 9.5 provided:

   > "You agree that you will not enter into or be involved in any other employment or business activity that could conflict with, be detrimental to or interfere with RQL's interests or the performance of the responsibilities of your position with RQL"

g. Clause 10.4 provided that it was a term of the employment contract that he comply with the RQL Code of Conduct, as amended from time to time;

h. Clause 15.3 provided:

> "Should RQL cease to be the approved Control Body, RQL will provide you the opportunity to take redundancy. The redundancy

will be at least equivalent to the TRY you would have been entitled to receive had you remained employed for the period of the term of the contract"

i. Clause 15.4 provided:

"If RQL terminates your employment for any reason other than those referred to in clauses 15.2, 15.3 and 15.7, then you will be given six weeks' written notice of termination and will be paid on termination a payment equivalent to the TRV you would have been entitled to receive had you remained employed for the period of the contract"

j. Clause 15.6 provided:

"During any period of notice you will continue to be employed by RQL and you must not engage or prepare to engage in any business activity that is the same or similar to the duties you were performing for RQL. . . .

k. Clause 16 was an entire agreement clause.

95. As was pointed out during the public sittings of the Commission, under their existing contracts each of the four executives were entitled to be paid out the remainder of their contract term if RQL ceased to be the control body. If RQL remained the control body, the best that the employees could expect would be a payment under clause 15.4. Otherwise they would be paid only the period of their notice, if terminated under other clauses of the agreement.

96. The four executives were fearful that an incoming board would exact revenge and dismiss them in circumstances either where they were not entitled to a payout of their contracts, or where they would be forced to litigate to recover such payment.

97. The 15 July Norton Rose draft advice[49] although addressed to the Chairman of RQL was sent c/o Ms Murray. The advice commences "we have been instructed to advise the Board of Directors of Racing Queensland Limited

[49] Bentley 207

(Board) in relation to a retention strategy for the following executives of Racing Queensland Limited (RQL)"

98. The Commission will, it is submitted, have no difficulty in concluding that the imperative driving the directors of RQL, and Mr Bentley in particular, was the retention of the staff so that work could continue on the infrastructure plan. This was of the utmost importance to Mr Bentley. Similar evidence was given by Mr Lette[50] and Mr Hanmer[51] in their oral evidence.

99. The draft advice continued:

> "The Board has instructed us to advise on options available to it to address the ongoing need to retain and reward high performing executives in an environment of uncertainty, taking into account the legal obligations imposed on the Board in determining an appropriate level of remuneration and benefits."

100. Norton Rose had in fact received no instruction from the board. As earlier outlined, Mr Proctor had taken it upon himself, to say that he was acting for RQL when in reality he was advising the four executives. Nevertheless, the draft advice says that Norton Rose had considered the general obligations imposed on the Board under the *Corporations Act*, and considered the specific requirements to avoid breaching the Act in relation to any benefits to be provided.

101. Of course, if the Inquiry concludes that Norton Rose was acting for and advising the Board, and concludes[52] that the directors have or have likely breached provisions of the *Corporations Act*, then the solicitors may well be liable for the consequences of their advice.

102. At clause 2.3 of the draft advice it was stated:

> "Our suggestion of appropriate benefits that are not disproportionate and that would be in the interests of RQL is as follows:

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50 referred to in his submissions at paragraph 38

51 T7-115.24, T7-116.1

52 consistent with its notices of potential adverse findings delivered to the directors

(1) an increase to the total remuneration value (TRV) of each Executive of between 10% and 20%;

(2) . . .

(3) a notice period for termination of the Executive Employment Agreement by either party without cause, which should be an amount (to be decided by the Board and agreed with the Executive) of no more than 12 months;

(4) . . .

(5) the inclusion of a material adverse change clause with a trigger that includes RQL ceasing to be a control body for the purposes of the *Racing Act* 2002 (Qld), a change to either the make up of the RQL Board, reporting lines for the Executive or an organizational restructure, or a reasonable expectation by the Executive of any of these triggers occurring, entitling Executive to payment of:

a. a fixed amount equivalent to 12 months of each Executive's TRV as a material adverse change severance payment;

b. . . . "

103. Thus, it was the solicitors' idea to introduce a material adverse change clause into the advice.

104. It was not explained why Norton Rose adopted an increase in remuneration of 10-20% in this initial draft advice when the handwritten notes earlier referred to contained a reference to 20-30%. The failure to call either solicitor leaves this unexplained.

105. The advice stated at clause 3.1:

> "We are instructed that without implementing a reasonable executive retention strategy, RQL considers it faces a real risk of the resignation of one or more of the Executives. Not only would a resignation of the Executives have serious implications for the ongoing operations of RQL, but it would also places (sic) at risk a smooth transition to an alternate structure if one was implemented as a result of a change in the State Government."

106. At clause 3.18 it was stated:

> "In this context, it would be prudent of any organization to put in place appropriate measures to ensure the ongoing retention of their senor executives, in our view."

107. The advice addressed ss. 181 and 182 and Part 2D.2 *Corporations Act.*

108. The advice stated, at clause 6.1:

> "The industry speculation in relation to the ongoing engagement of the Executives would, in our view, justify an increase to the Executive's remuneration to partially address the Executive's concerns".

109. The substantial amendments to the employment contracts, that were refined over the ensuing weeks, were plainly given the imprimatur of Norton Rose as being appropriate for RQL, and its directors, to agree to.

110. A question arose as to whether this draft advice was ever given to Mr Bentley or to the Board. Mr Bentley initially thought that he had read it[53] but when he was taken through it realized that he had not previously seen that first draft advice[54]. He recalls having read two advices from Norton Rose[55]. It should be found that Mr Bentley was not given the draft advice of 15 July.

111. Nothing sinister turns on such a finding. Each of the employees, it should be found, honestly believed that Norton Rose was acting for them. When the draft advice was received for their consideration, they were under no compulsion to provide it to their employer.

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53 T5-55.1
54 T5-64.20
55 T5-64.20

112. The suggestion that thereafter the employees liaised with Norton Rose to have removed from the advice any parts which alerted the directors of RQL to potential dangers in proceeding with the renegotiated contracts, and which gave the board warnings of pitfalls is, with the greatest respect, fanciful.

113. If Norton Rose were advising RQL, it is a most serious allegation to make that those solicitors acquiesced in altering their advice, at the request of an employee, in the interests of the employees and adversely to their own client. Such a contention should be rejected.

114. It should be found that the 15 July advice from Norton Rose was a draft to the employees for their consideration, and nothing more.

115. On 17 July Mr Tuttle provided his comments about the draft in an email[56] and circulates them, and proposed a meeting of the four staff.

116. Mr Tuttle prepared an email dated 18 July 2011[57] which was hand delivered at meeting with Norton Rose on 18 July 2011 setting out what he considered to be key outcomes:

a. 30% TRV increase from July 1, 2011

b. Contract until June 30, 2013;

c. Renegotiate before December 31, 2012

d. In the event of a change of Government, LNP policy (back to 3 codes) triggers material change and redundancy payment in favour of employee for balance of term and entitlements

e. Other material changes to include change of board member, change of board

117. As Mr Tuttle explained[58] the four employees met and considered the draft advice. They decided what changes they wanted and went back to Norton Rose. That is why the draft advice was amended. Mr Tuttle agreed that as

56 Tuttle 47
57 Part of Tuttle 47
58 T9-76.5

the matter progressed the employees shifted their focus from remaining indefinitely at RQL to remaining only until the next election[59]. He said, and it should be accepted, that before the employees went back to Norton Rose they updated Mr Bentley on what was happening[60].

118. It was suggested to Mr Tuttle[61] that by he and Ms Murray (and presumably the other two employees) receiving draft advice which was aimed at trying to protect the board, they placed themselves in a position of potential conflict. There are two fundamental fallacies in that proposition. First, Tuttle and Reid were not advising the board. They were acting in their own interests, albeit in a manner by which they did not want to expose the board to any potential adverse outcomes. The board was taking its own legal advice. Secondly, as already stated, if Tuttle and Murray honestly believed that the advice was given to them, they had no obligation to provide it to the board.

119. For the same reasons the proposition put to Mr Tuttle[62] about he and Ms Murray 'filtering' the advice that the board was receiving should be rejected.

120. On 18 July 2011 Mr Procter and Ms Gamble met with Mr Tuttle and Ms Murray. A file note of this meeting[63]

a. records that the employees met with the chairman that morning;

b. noted a 30% increase to TRV with contracts through to 2013 and material adverse change clause with redundancy payment as being the outcome the employees would like to achieve

c. Trigger – election result – available to resign on the next morning ie Sunday

d. Transitional period – would like to avoid this if possible

e. Contained the note: 'Trim current advice to deliver their outcomes'

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59 T9-79.43
60 T9-77.32
61 T9-80.40
62 at T9-82.15
63 annexures to Proctor's statement pages 295-6

121. It is evident from the email from Mr Procter to Ms Murray dated 19 July 2011[64] that the draft advices being sent through to Shara Murray were not being sent on to the board. It says:

> "Please let me know if you are ready for us to send you the final version to provide to the Board".

122. Counsel assisting has divined from this email[65]:

> "Again, it's all about giving it to the Board"

123. With respect, the documents cannot be construed in that way at all. Certainly the final advice was going to be shown to the Board. There is no evidence that the draft advices were to be given to the Board.

124. Mr Tuttle was asked a number of questions about the phrase "trim the advice". Neither of the solicitors was called to explain their own notes. Mr Tuttle said that in his view this meant that the employees wanted a concise set of outcomes contained in the advice, i.e. that the employee's claims were simplified[66]. This explanation makes sense.

125. The suggestion[67] that what was being trimmed were the sections which were warnings to the board is devoid of any evidentiary basis. When Mr Tuttle suggested that the lawyers should be asked what they meant in their own note he was met with:

> "Norton Rose is not here answering questions . . . "[68]

126. That is precisely the complaint. They were not required to give evidence.

127. Mr Tuttle said[69] that it would 'draw a long bow to suggest that he was sitting there with a lawyer and saying "look, drop all this stuff out because the board doesn't need to see all of this". He said that was not right at all.

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64 Statement of Murray Procter, attachments, page 275
65 T9-93.10
66 T9-89.30
67 at 9-90.25
68 T9-91.30
69 at T9-90.7

128. He continued[70]:

> "You're saying you definitely did not ask Norton Rose to trim the advice so as to remove the negative parts which might cause the board some alarm and to emphasise the positives?---We would not have provided that advice to Norton Rose. I mean, it's – it's – it's a fallacy to suggest that executives are going to be sitting there with a lawyer, telling the lawyer to drop out important stuff for the board.
>
> Well, what was happening if that wasn't happening? You were telling them to drop it out, but for what reason if it wasn't - - -?---We – we weren't telling them to drop out that advice. I mean, I reject that completely."

129. Mr Tuttle's evidence should be accepted. It accords with common sense.

130. The second draft advice of 19 July made changes to clause 2.3 that are tracked in the attachment to Mr Procter's Statement[71]. Significantly:

a. In clause 2.3(1) the increase to the TRV of each executive was increased to 30%;

b. The previous clause 2.3(3) was deleted;

c. In what became clause 2.3(4) a change in State Government was added to the material adverse change clause;

d. The 12 month cap on the payment under the material adverse change clause was deleted;

e. Clause 3.1 was re-worded to read:

> "We are instructed that without implementing a reasonable executive retention strategy, RQL considers it faces a real risk of the resignation of one or more of the Executives. A resignation of the Executives would have serious implications for the ongoing operations of RQL."

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70 T9-90.35

71 pages 276-284

131. The final Norton Rose advice dated 20 July 2011[72] that went to the Board of RQL:

a. Maintained the figure of 30% in clause 2.3(1);

b. Included the revised form of clause 2.3(4);

c. Removed what were previously clauses 4.12 – 4.14, and thereby concluded in clause 4.11:

> Accordingly, Part 2D.2 of the Act does not apply to the Executives"

d. Removed the section dealing with incentive payments and notice of termination without cause;

e. Maintained the same discussion of a material adverse change clause.

132. It was wrongly put to Mr Bentley[73] that this was the 'final advice'. There was subsequent advice from Clayton Utz on 1 August and from Norton Rose on 3 August.

133. A board paper was prepared for the 20 July board meeting of RQL[74]. It included:

> "There is no doubt in my mind that an LNP government will seek so called retribution not only against the Board but against senior executive staff … Clearly the landscape has changed since the Board resolution of May 6, 2011, and it is my firm view that we need to reconsider our position as a Board in relation to our key executives. Those executives that are most at risk are also those that will play a vital role over the next 6 months.

134. The board paper recommended a 30% increase to the employees' TRV, the inclusion of a material adverse change clause with a trigger that includes a change in State Government and so forth.

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72 Statement of Murray Procter, attachments, pages 316-322
73 T5-90.45; see also T5-91.1
74 Bentley 209

135. The board paper continued:

> "In summary, the general effect of these benefits is that in circumstances of a termination or cessation due to a material adverse change, an Executive would become entitled to resign and trigger a payment equivalent to the amount each Executive would have received to the end of the term and a redundancy payment. This will provide the Executives with the protection they are seeking and satisfy RQL's desire to maintain the Executives' employment."

136. The board paper set out at pages 13-14 the activities that have to be undertaken over the following six months by the employees. It also attached:

a. The letter dated 5 July signed by the four employees;

b. An estimate of the cost of severance/redundancy for the four employees

c. The Norton Rose advice dated 20 July 2011

137. It is evident that there was particular concern that the employees be retained for at least the following six months. The board was aware how much that could potentially cost.

138. The 20 July 2011 RQL board minutes[75] state, at clause 2.1:

> "The board discussed 'in camera' at length the papers that were distributed for consideration.
>
> The Board requested Ms Shara Murray to obtain salary ranges of comparable positions in both Racing NSW and RVL. The Board recognized that only ranges would be available, as confidentiality clauses would apply.
>
> The Board noted advice from Norton Rose and unanimously supported the intent of the advice received, Board members considered it appropriate that Clayton Utz review Norton Roses' advice.

[75] Bentley 210

Following the tabling of the advice received from Norton Rose the Board requested Ms Murray to send the advice to Clayton Utz for their review and opinion. Following dispatch of the advice the Chairman advised that he would meet with both Clayton Utz and Norton Rose to resolve the matter.

The Board to resolve this matter of Senior Executive Staff at the next Board meeting of 5 August 2011."

139. As is evident from these minutes, the board wished the Norton Rose advice to be checked by the company's own solicitors. They did not simply accede to what was in the Norton Rose advice, although they supported its intent.

140. Mr Bentley endeavoured to arrange a meeting between Norton Rose and Clayton Utz to sort out any remaining areas of disagreement, or any problems, but this did not eventuate.

141. On 1 August 2011 Mr Dunphy sent an email[76] to Mr Bentley and Ms Murray stating that he had carefully reviewed the terms of the Norton Rose advice. He stated "we think that most of the suggestions that have been made would not be unreasonable to adopt. There are only three areas where we think some form of variation is needed" and then sets out:

a. in relation to the expanded trigger points, he suggested that these all be limited to matters that significantly affect the role and duties of the relevant executives. We therefore do not think that a change in the State Government alone should be included as one of the triggers in clause 15.3 of the employment contracts

b. there is a potential complication if an early State election were to be called, say, in the next two months. . . we have therefore suggested that the termination payment provided under clause 15.3 should have some form of cap to mitigate that risk. This is a matter for the Board to consider balancing all of the commercial considerations but if one is having regard to the uplifted salary level (which includes the 30% increase) then a cap of 12 – 14 months might be considered by the Board

[76] Bentley 211

c. suggested some other minor changes to the drafting of the additional trigger factors

142. Mr Dunphy concluded that:

> "As you will see from the above three points, two are drafting issues and the third point is necessary because of the possibility that a very early election might be held."

143. On 1 August 2011 Clayton Utz sent a further letter of advice[77]. It repeated, in more detail, the matters listed above. In its letter Clayton Utz stated:

> "Since we first considered this issue, there has been a most unfortunate escalation in the public discussion about the future of Racing Queensland . . . All of this public discussion has clearly and understandably unsettled the four key senior executives . . .
>
> So the Board now has a serious dilemma in that four of the key members of its senior management team and now both unsettled and distracted by the recent public discussion. At the same time, Racing Queensland has a very significant workload with which to cope over the next two to three years and the Board believes that keeping the four senior executives is critical to the future success of Racing Queensland. Unless the Board now takes some clear mitigating steps, there is a risk that one or more of those executives will commence looking for alternative employment to avoid the ignominy of the termination of their employment being played out in the public arena if there is a change in Government. The only countervailing factor seems to be that under their respective employment contracts, the four senior executives are required on resignation to give either six or seven months notice . . .
>
> . . .
>
> We would not recommend a trigger that is activated by a change in the State Government alone as that event may or may not have implications for the employment of the four senior executives"

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77 Bentley 212

144. Mr Bentley was strongly challenged on the reasonableness of agreeing to the terms of the new employment contracts when an election could be called within a matter of weeks. However, there was evidence that the likely election date was discussed at board level. Clayton Utz themselves advised that even having regard to the possible earliest and latest dates of an election a cap of 12-14 months was appropriate.

145. The board acted on this advice and chose to impose a cap of 14 months.

146. Mr Bentley said[78], it is submitted correctly, that the board had to make a decision at a particular point in time, based on their considered view of what was likely to happen. He, and the rest of the board, genuinely believed that unless the employees were offered a material adverse change clause they would look for other employment[79]. He said that RQL needed the employees to remain to finish their work on the infrastructure plan[80].

147. The Commission has access to all of the documents relating to the business cases and the infrastructure plan, and would therefore be aware of the enormity of the work that was carried out between 5 August 2011 and 26 March 2012.

148. Norton Rose were asked to comment on the concerns expressed by Clayton Utz. They prepared a further advice dated 3 August 2011[81].

149. For some reason that is not immediately apparent, this advice was not shown to Mr Bentley during his examination.

150. Norton Rose were asked to respond to the matters raised by Clayton Utz in their letter dated 1 August 2011:

    i. That an early State Government election may have the effect that the termination payments under the proposed material adverse change clause are unreasonable; and

78 T5-10.10; T5-47.18
79 T5-13.28; T5-15.44; see also T5-78.10
80 T5-15.39
81 Tuttle 54

ii. That a change in the State Government alone may not be sufficient to act as a trigger in relation to a material adverse change clause

151. Norton Rose advised, inter alia, that if the executives agreed to the inclusion of a cap on the termination payment under the material adverse change clause, then this would satisfy RQL's commercial need to retain the executives[82]. They also advised that in order to adequately address the current concerns of the executives, it is necessary to include, effectively a change in State Government as a trigger in the proposed material adverse change clause[83]. At paragraphs 3.9 – 3.10 of their advice Norton Rose stated:

> "3.9 If you are able to reach a commercial agreement with the executives to continue their employment with a cap in place then we consider that this will increase the defensibility of changes to their employment arrangements (particularly in response to negative publicity)
>
> 3.10 However, we consider that in circumstances where RQL faces potentially losing its senior Executives, and where these Executives would be difficult to replace due to industry speculation regarding a restructure to RQL, the increase to the termination payment is defensible without the cap."

152. At paragraph 4.3 Norton Rose stated:

> "In our view, unless the effect of the LNP taking control of the Queensland Legislative Assembly is included as a trigger in the proposed material adverse change clause, the Executives' concerns will not be adequately addressed. Therefore, we recommend that this be maintained in the proposed material adverse change clause."

153. Mr Bentley contacted Mr Dunphy after seeing this advice, and discussed it with him. Mr Bentley said[84] that he spoke to Mr Dunphy and told him they were thinking of adopting the Norton Rose 'trigger clause' and he didn't say don't do it. Mr Dunphy's account of this discussion does not disagree with

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82 Norton Rose advice para 2.2
83 Norton Rose advice 3 August 2011 at para 2.4
84 T5-89.20

that of Mr Bentley. Mr Dunphy has disclosed his file note of the discussion and has stated[85]:

> "Subsequently, on 3 August 2011 I received a call from Mr Bentley. He told me that he was going to adopt our recommendation on the cap issue. He noted that both the Clayton Utz and Norton Rose advices seemed to basically agree but the Board might want an amalgam of the trigger clauses from both advices. I said to Bob that that was fine, that he had both legal advices and we understood that they would make the call that was in the best interests of the company."

154. Mr Bentley maintained[86] that if Clayton Utz had advised against what was proposed to be done or flagged "a red light" RQL would not have agreed to the changes to the employment contracts. That evidence should be accepted. When Clayton Utz advised against what had been proposed on 6 May, that proposal was abandoned. When Clayton Utz adviced to impose a cap on the termination payment, that was done. RQL acted on the advice that it was given.

155. The material adverse change clause that was eventually agreed upon picked up the Clayton Utz advice that a change in State government should not be the only trigger. Clause 15.2 of each revised employment agreement was in the following terms:

> "Within 14 days of a Material Adverse Change, you may resign from your employment by giving seven days' written notice. This notice period may be waived by the Chairman of the Board of directors of RQL at the Chairman's discretion. If you resign by reason of a Material Adverse Change, you will be entitled to:
>
> a. a payment of a sum equivalent to the TRV you would have been entitled to receive had you remained employed until the end of the term referred to in clause 2.4 of this contract, however not exceeding a sum equivalent to 14 months of your TRV;
>
> b. . . .

85 Statement of B Dunphy dated 5 September 2013, paragraph 52
86 T5-79.40; T5-88.40

For the purpose of this clause **Material Adverse Change** means a change in the Queensland State Government, RQL ceasing to be the approved Control Body under the *Racing Act* 2002 (Qld), a material adverse change in the make-up of the RQL Board of directors, or your reporting lines, or an organizational restructure that materially impacts on your role at RQL in a manner adverse to you."

156. On 4 August 2011 Ms Gamble sent an email to Ms Murray[87]. In it she says:

"We refer to our discussion earlier today and confirm the Board's instruction to:

- Amend the relevant executive employment contracts to include the option for the Chairman of the Board to waive the requirement for the executives to provide 7 days' written notice of termination under clause 15.2; and

- Prepare draft waivers to be completed by the Chairman in the event that he elects to waive the notice period

. . . "

157. There does not appear to have been any record of a board resolution to the effect just stated, but it is most likely that Mr Bentley spoke to Ms Murray and authorized this communication. Mr Tuttle said[88]:

"The likely – the most likely scenario is that she had at least spoken to Mr Bentley about this? --- I believe that's fair. I don't believe Shara would represent a position of the board unless that position had been identified by the board, but as I said earlier it could have been the case that the chairman may commit a board's position on a particular matter and then subsequently have that confirmed. That will have occurred over the relevant period."

158. On 5 August 2011 the Board of RQL unanimously resolved to offer the new contracts of employment to the four senior staff[89].

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87 Tuttle 58

88 T9-112.40

159. It was suggested to Mr Bentley that on 5 August 2011 he executed a Deed of Indemnity on the same day as the employment contracts were executed. No doubt the underlying imputation is that Bentley knew he was doing something wrong[90]. However it is evident that there were previous deeds of indemnity for the directors. Further, it is clear that the process of reviewing the directors' deeds of indemnity was already well underway, as it is noted in the board minutes of 7 June 2011[91]:

> "Ms Murray informed the Board that Clayton Utz is working on Director's Indemnities. This was transferred from Cooper Grace Ward to Clayton Utz. There have been changes, challenges and decisions since the indemnities were last reviewed e.g. Riche v PWC."

160. Similarly Mr Bentley was chasing up the D & O insurance policy that had been outstanding for some time. Mr Bentley accepted that the new employment contracts were likely to be contentious, and said that is why RQL wanted to make sure that they did it right[92] because he suspected there would be an investigation if there was a change of government.

161. It was put to Mr Bentley[93] that it was not his duty to make an agreement that was in the best interests of both parties. That was, with respect, wrong. Provided it was in the best interests of the company, the fact that it was also in the best interests of the employees is not inconsistent. They are not mutually exclusive concepts. Mr Bentley was criticized on a fallacious basis. Mr Bentley said it was not the intention of the Board to favour the employees, but rather to reach a fair and balanced agreement[94]. That was entirely appropriate.

162. Mr Bentley was criticized because no benchmarking was done. Mr Bentley said he did investigate comparative salaries[95]. The board on 20 July also asked Ms Murray to get comparable rates in NSW and Victoria.

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89 Part of Tuttle 59
90 T2-15.25 - 35
91 RQL board minutes 7 June 2011 (document reference RQL.104.004.0400 at 0042)
92 T5-87.15
93 T5-48.37
94 T5-49.40
95 T5-84.19

163. Mr Bentley in his oral evidence was asked what justified the new employment contracts[96]. He said the staff were underpaid, and there was a need to retain staff to have the infrastructure plan done. He said the staff were essential to the $110 million to make sure that RQL presented a suitable organization, and it got through all the work that needed to be done. Mr Bentley thought RQL was making a reasonable investment to "keep the crew intact".

164. Later he refined this to[97]:

> "The purpose as far as I was concerned was to retain the executives to get those plans through"

165. Mr Hanmer said[98]:

> "I am aware that the four senior executives were working under considerable stress and significant workload at the time. Leaving aside the actual workload, the emotional stress that they were working under due to constant attacks in the media, in Parliament and by direct communications from some people that they would come into contact with, I could understand it if any of them wanted to leave."

166. Mr Milner said[99]:

> "I was also aware (as everyone was who was involved in Racing Queensland was aware) that it was not only the members of the board but also the senior executive team who were under immense attack by the media and some sections of the industry. The attacks were relentless. Frequently articles would appear in the Courier Mail openly criticising the work being done by Racing Queensland and its officers. Hate mail was regularly received at the office. Some sections of the media and the industry made it quite clear that if the government changed from Labour to LNP then they would be out of a job. Given the significant work that was required to be undertaken by the control body, I admired the members of the senior executive team who continued to carry out their duties in the face of such hostility. I was also cognisant of the hardship

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96 T5-8.35
97 T5-67.37; see also T5-77.25
98 Hanmer first statement para 18
99 Milner statement 26 July 2013 para 35

that these senior members of staff would face if they had to leave the control body after a change of government. Given my first hand observations of the hostility that they were facing, I can understand their concern as to whether or not they should have stayed with the control body.

. . .

Secondly, we were concerned that we had to keep these senior staff members and if it meant giving them "golden handshake" in the terms of employment so as to keep them working in the coming months then that was justified. Given that the hostility surrounding anyone who has worked with the old board would be such that they would find it very difficult to work in the industry after a change of government (and the fact that it was quite certain at that time, from all of the press releases and political agitation that a change in government would inevitably lead to their sacking), the offer of voluntary redundancy in the event of a change of government was justified."

167. Following the change of State government on 26 March 2012, each of the four employees resigned on the following Monday. They were paid their entitlements under their employment contracts. There is no suggestion that those amounts were not properly calculated.

168. Mr Bentley was asked why he exercised his discretion to waive the seven day notice period. He said that if the employees' "minds had left the building" and they did not want to keep working at RQL they were better off out of the place. As the Commission would be aware it was not uncommon for notice periods to be waived when employment is terminated. The four executives in fact agreed, in writing, to assist RQL as may be required.

169. It is correct to observe that the Board's rationale for offering new contracts of employment to the four senior executives was to retain them for as long as possible to the next State election, so that they could continue to work on the business cases under the Infrastructure Plan.

170. The Commission will be able to ascertain how much money was derived from these business cases between 5 August 2011 and 28 March 2012. It was

certainly a lot more than was paid to the four employees on the termination of their employment.

171. The Commission will also be able to ascertain how much money Ms Murray was able to collect from bookmakers and others under the race fields legislation.

172. It cannot therefore be reasonably concluded that the retention of the staff for the almost eight months that they remained did not result in considerable benefits to RQL.

173. Indeed, it would be fair to conclude that retaining those employees for that period was in the best interests of RQL.

174. One must also be careful not to elide the increase in remuneration for the four employees with their termination payments. There is no evidence that termination payments were other than reasonable and warranted.

175. Each of the directors who have provided statements explain why they considered it was appropriate to offer the contracts to the four senior employees. Each obviously considered the matter carefully. It is an arid exercise to say that all of the deliberations on these matters were not recorded in the company minutes. It is doubted whether any company's minutes would descend to such detail.

176. Turning to the key findings of the Auditor-General, summarized on page 13 of his report, they are summarized as follows:

- Introduction of a material adverse event clause in four executive contracts was inconsistent with the Board's intention to retain the services of those executives.

- Four executives' TRV was increased by 30 per cent with no documented evidence of independent benchmarking undertaken of the reasonableness of this increase.

- Retention payments for the four executives were not linked to the achievement of specific performance targets.

- Contract variations for the four executives were based predominantly on legal advice obtained on their behalf by RQL.

- Board minutes do not adequately demonstrate that alternative strategies identified by RQL's legal advisers were considered by the Board.

- The Board did not engage a remuneration consultant to help assess the reasonableness of contract variation.

- Not all matters raised by RQL's legal advisers had evidence of board consideration or action.

177. The clause that was introduced, in clause 15.2 of each contract, was required by each employee as a condition of them remaining in their employment. Without the protection that clause offered them, it should be accepted that each of the four employees would have started looking for other employment or left their employment with RQL. It was the board's intention to retain the employees until the next election. The clause achieved that purpose.

178. It must be accepted that there is no documentation of benchmarking, however Mr Bentley said that he did so. Mr Lette also gave evidence of enquiring what interstate senior executives were paid. The Commission has disclosed no evidence that the increases in the executives' remuneration were excessive. They have plainly spoken to a recruitment specialist.

179. The third and fifth dot points are accepted.

180. The alternative strategies suggested by Clayton Utz are not better identified. As the above submissions demonstrate, whenever Clayton Utz advised RQL to do something, it acted upon that advice.

181. Similarly, the last dot point does not identify those matters that were not considered by the board. Accordingly, it is not possible to respond further to that finding.

182. It is inevitable that the four employees would have lost their employment after the election of the LNP government. The Auditor-General has calculated that if the employees were dismissed without cause they would have been entitled

to $1.276 million under their un-amended contracts. Of course if an increase in remuneration had been agreed to, with no change to clause 15, this figure would have been proportionately higher. It is submitted that is the figure against which the actual payouts should be measured.

183. Turning to the notices of potential adverse findings, the submissions made on behalf of Mr Lette[100] and Mr Ryan concerning directors' duties and also those concerning s. 200AA *Corporations Act*[101] are respectfully adopted.

184. As to the letter sent to Mr Bentley:

a. The recommendations made to the Board of RQL on 20 July and 5 August 2011, which were supported by legal advice, were in the best interests of RQL because they ensured the retention of the four employees for what turned out to be almost eight months, at a time when those employees' services were desperately required (paragraph 3(k)(i));

b. There is insufficient evidence to enable the Commission to conclude that Mr Bentley failed to disclose the Clayton Utz advice dated 2 June 2011 to the Board. The evidence that does exist, from Mr Bentley given to ASIC and to the Commission is that he did provide the draft advice to the board. The board was certainly aware, by reading the board papers, that Clayton Utz were involved. The weight of the evidence is that Mr Bentley did not receive the Norton Rose advice of 15 July 2011, therefore it cannot be found that he failed to disclose it to the Board (paragraph 3(k)(ii));

c. It is accepted that on 5 August 2011 Mr Bentley voted in favour of the new employment contracts (paragraph 3(k)(iii));

d. Paragraphs 3(k)(iv) – (vi) are accepted;

e. Mr Bentley acted with integrity, in good faith, in the best interests of RQL, consistently with his fiduciary duties to that company, consistently with RQL's Code of Conduct and with ss. 180 and 181 *Corporations Act* (paragraph 4) in ensuring that the four senior employees were retained

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100 at paragraphs 48 - 59
101 at paragraphs 61 - 62

for as long as was possible, which was until the next State election;

f. Mr Bentley did not act inconsistently with s. 182 or in contravention of s. 184 *Corporations Act* (paragraph 5);

g. It is not specified, in paragraph 6(a) how it is asserted that Mr Bentley did not act consistently with his duties as Chairman of the Remuneration and Nomination Committee (paragraph 6(a)), so no specific response can be given to that suggestion.

185. Paragraph 6(b) of the letter is inelegantly drafted. Nothing in paragraph 3(k) of the letter, other than the payment s in March 2012 attracts the potential operation of Division 2 of Part 2D.2 *Corporations Act.*

186. It is accepted that Messrs Tuttle and Brennan and Ms Murray were directors of related entities for the purposes of s. 200AA(3)(b) *Corporations* Act.

187. There is no prohibition, and no illegality, in relation to the entering into an agreement that provides for a termination payment that may later be subject to Part 2D.2: *Silver v Dome Resources NL*[102]:

> [82] The interpretation of these provisions is of considerable importance in this case. The defendants contended that, upon the proper construction of s 200B in the context of the other provisions, not only is the payment of the agreed benefit forbidden but the agreement to make the payment was itself forbidden, so that the agreement is illegal. . .
>
> [84] I am of the view that what is forbidden where the benefit is in the form of a payment is the making of the payment. The agreement to make the payment is not forbidden, nor does the prohibition arise at any time before the payment actually comes to be made. This flows in my view from the fact that s 200B(1) in terms operates by reference to the giving of a benefit without member approval. It is reinforced by the matter as to interpretation contained in s 200A(1)(b), which emphasises that the occurrence of the giving of the benefit is at the time of the making of a payment or the transferring of an interest in property, if the benefit is an

[102] [2007] NSWSC 455 at paragraphs [82] to [87]

> interest in property. Equally, the offence created in relation to a person entitled to a prohibited benefit is committed upon receipt of the benefit and not earlier: s 200D(1).
>
> [85] These matters were dealt with by Walton J in the Industrial Commission of NSW in *Fox v GIO Australia Ltd* (2002) 56 NSWLR 512. I follow his Honour's decision not only out of respect for the decision of a Judge of equivalent status to a Judge of this Court, but because I am convinced that the conclusion and His Honour's reasoning are correct. I agree with Walton J's conclusion that "it is not until a company actually makes a payment (or otherwise gives a benefit) that any transgression occurs": see *Fox* at [76]–[78]. That approach appears to have been recently approved in the Supreme Court of Victoria in *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1 by Habersberger J at [660], [661]. Habersberger J also found support for the approach in the judgments of Ormiston J in *Sali* at 1524 and of Einstein J in *Whitlam v Insurance Australia Group Ltd* (2005) 52 ACSR 470 at [239].
>
> [86] In my view, the prohibition is ambulatory and operates only to prohibit payment without members' approval at any time at which such a payment actually comes to be made. There is no express prohibition of the contract being entered into, nor is any such prohibition to be implied or inferred.

188. For the reasons articulated in the submissions of Mr Lette there has been no failure by either Mr Bentley or RQL to operate consistently with s. 200B(1) *Corporations Act* because there has in fact been member approval. The meeting on 28 March 2012 satisfied all the requirements of a meeting of members.

189. If any shortcoming in process is held as not constituting a properly convened members meeting for the purposes of section 200E, then any procedural requirements (which includes any requirements as to form or substance of notice) do not invalidate the meeting and the resolutions passed at that meeting[103].

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[103] s. 1322 *Corporations Act* which emphasises substance over form. See *Weinstock v Beck* [2013] HCA 14

190. Walton J made clear in *Fox v GIO Australia Ltd*[104] that "... what is required to authorise such a payment is [the members'] informed consent". That was plainly present with the termination payments made to the four employees.

191. A Court would undoubtedly make an order under s. 1322 *Corporations Act* to remedy the substantial injustice that would occur if it was found that by reason of some procedural irregularity the meeting that approved the payments was improperly described as a directors' rather than a members' meeting.

192. As Byrne J said in *Re Pembury Pty Ltd*[105]:

> "On the preferable interpretation of s. 1322, the resolutions for Creevey's removal and the appointment of other directors are valid unless Creevey and East demonstrate that either of the irregularities ''has caused or may cause substantial injustice that cannot be remedied by any order of the Court'' and obtain a declaration that the proceeding in question is invalid: cf. *Re Broadway Motors Holdings Pty Ltd (in liquidation)* (1986) 6 N.S.W.L.R. 45, 57; *Australian Hydrocarbons NL v. Green* (1985) 10 A.C.L.R. 72, 83. It is, therefore, necessary to decide whether either of the irregularities has caused or may cause ''substantial injustice''. The burden Creevey and East bear is to show that one or other of the irregularities occasions a ''substantial injustice'': not that the ''proceeding'' (the meeting and its resolutions) caused or may yet cause substantial injustice: see *Bell Resources Limited v. Turnbridge Pty Ltd & Ors (No. 2)* (1988) 13 A.C.L.R. 762, 766; cf. *Broadway Motors Holdings* at 58 where Powell J. said, ''It must be shown that there is a nexus between the procedural irregularity which has occurred and the matters of prejudice relied upon as constituting the injustice.''

193. There clearly is no scope for criminal liability on the part of the executives Tuttle, Brennan and Reid, for receiving the payments because they have the defences open to them under sections 6.1, 9.5 and 10.1 of the Criminal Code (Cth).

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104 [2002] NSWIRComm 318 at [57]
105 [1993] 1 Qd 125 at 127

194. Norton Rose was alive to Part 2D.2 *Corporations Act*. It is referred to in the draft advice of 15 July. The solicitors do not seem to have made any enquiry of the four executives as to whether any of them were directors of related entities. If Norton Rose was acting for RQL they made no enquiry of the company as to whether any of the executives were directors of related entities. In either case, by failing to make appropriate enquiries, and in failing to properly advice about the potential impact of Part 2D.2, the solicitors were remiss.

195. Similarly, Clayton Utz do not appear to have considered Part 2D.2 *Corporations Act* at all. Their advice of 1 August 2011 to provide for a cap of 12-14 months demonstrates this. They were also remiss in not properly considering the potential liability of RQL under this Part of the *Corporations Act*.

196. Further, at no time was any advice given to any of the four senior executives that the proposed amendments to the terms of their contracts of employment could expose them to any breach of the *Corporations Act*, in particular, ss. 182, 184 and Part 2.2D.

197. Mr Hanmer, Mr Ludwig and Mr Milner were only involved at board meetings, and voted to approve the amendments to the employment terms of the four executives, and to make the payments on their resignation. They acted appropriately in doing so, and in accordance with the legal advice they were given. They did not breach any provision of the *Corporations Act* in acting as they did. They certainly did not likely commit any criminal offence by intentionally acting dishonestly.

198. The same submissions are made for these three former directors in relation to Part 2D.2, including as to the solicitors' conduct, as are made on behalf of Mr Bentley.

199. Mr Orchard had (with Mr Brennan) the least involvement in the renegotiation of the employment contracts. Apart from arranging the initial meeting with Norton Rose, and signing the employees' letter of 5 July, he did not actively participate in the matter. He did not make any false representations. He did not breach his duties as an employee. He had no conflict between his rights as an employee to negotiate better terms of employment, and his duties as

an employee of RQL. He did not fail to disclose the draft Clayton Utz advice of 2 June 2011, because there is no evidence that he ever had a copy. He had no obligation to disclose the draft Norton Rose advice of 15 July 2011, if he ever had a copy of it.

200. The same submissions are made on behalf of Mr Brennan as are made on behalf of Mr Orchard. Mr Brennan was not even interviewed by the auditor general.[106] He also relies on the submissions made above concerning Part 2D.2 *Corporations Act*.

201. Neither Ms Murray nor Mr Tuttle acted inappropriately, nor made false representations. They rely on the above submissions.

[106] Neither was Mr Tuttle