

## Third Statement of Barry Thomas Dunphy

I, **Barry Thomas Dunphy**, Solicitor of Clayton Utz Lawyers, 71 Eagle Street Brisbane in the State of Queensland, state as follows:

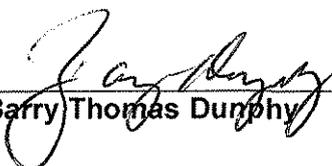
1. I have previously provided two statements to the Commission dated 5 September 2013 (**First Statement**) and 12 September 2013 (**Second Statement**).
2. I have now reviewed a number of the Statements which have been provided to the Commission which refer to actions taken by me. I would like to respond to two matters being:
  - (a) The points raised at paragraphs 46 to 49 of the Statement of Shara Reid (formerly Shara Murray) dated 26 July 2013 (**Shara Reid Statement**); and
  - (b) The comments made by Bob Bentley at paragraph 50 of his Statement dated 26 July 2013, Mr William Ludwig at paragraph 29 of his Statement dated 26 July 2013 and Mr Wayne Milner at paragraph 40 of his Statement dated 26 July 2013.
3. At paragraphs 46 to 49 of the Shara Reid Statement there is discussion about the arranging of a meeting between Norton Rose and Clayton Utz in respect of the finalisation of the amended Employment Agreements. My comments in relation to the matters discussed at these paragraphs of the Shara Reid Statement are as follows:
  - (a) I was aware that there had been discussions with Racing Queensland Limited ACN 142 786 874 (**RQL**) as early as Thursday 7 July 2011 that there should, be a meeting between Clayton Utz and the lawyers who were in due course to be appointed to work with the four Senior Executives in formulating a new employment proposal for those persons. In this regard I refer to the email sent to me by Robbie Walker on Thursday 7 July 2011 at 11.36am which is Attachment "**BTD-15**" of my First Statement.
  - (b) I do not recall the precise details of the telephone discussion that is referred to in paragraph 48 of the Shara Reid Statement. It does appear that I spoke to Ms Reid on 27 July 2011. I do recall having a telephone discussion with Ms Reid at around

  
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this time when I explained that we (being Clayton Utz) needed to get the advice right and that I would be addressing and sending the Clayton Utz advice directly to Mr Bentley as Ms Reid had a conflict of interest.

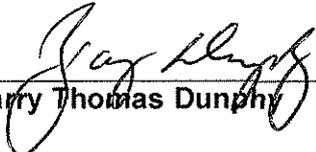
- (c) As I noted at paragraph 46 of my First Statement, we did not complete a draft of the advice that was ultimately dated 1 August 2011 until Thursday 28 July 2011. However, at that time I was still awaiting final input from our workplace relations lawyers. I received the final comments from Robbie Walker at approximately 6.25pm on Thursday 28 July 2011 and from Hedy Cray the next day being Friday 29 July 2011.
- (d) I do not recall the terms of my discussion with Ms Reid about the cancellation of any meeting with Norton Rose but from reviewing my file I suspect that the main reason is because we had not settled the final terms of our advice to RQL.
- (e) I would have told Ms Reid, if asked on 27 July 2011 what the Clayton Utz view was in respect of the Norton Rose advice, that Clayton Utz agreed with the fundamental approach outlined in that advice. Our view always was that we agreed with the basic structure of the option that was set out in the Norton Rose advice. The main difference in approach between Norton Rose and Clayton Utz in the two legal advices related to what were, in our view, fairly minor drafting points. In particular, we thought that there needed to be a cap on the termination payment entitlements of the employees and that the material adverse change triggers should not include the trigger of a change of Government at a State election.
- (f) I had previously, on 2 June 2011, explained to Ms Reid during a telephone discussion that in terms of the remuneration packages the trigger points were the central issue in terms of deciding what was reasonable or unreasonable. In this regard I refer to paragraph 20 and Attachment "BTD-8" of my First Statement.
- (g) The final Clayton Utz advice dated 1 August 2011 in so far as it dealt with the State election trigger was based on the premise that the trigger points should be limited to situations where there was a significant effect on the role and duties of the four Executives.

  
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- (h) However, it was clear from both our original draft advice of 2 June 2011 and our advice of 1 August 2011 that, in our view, ultimately it was up to the Board of RQL to make the final commercial decision as to what would, or would not be included in the final remuneration package of the four Executives.
- (i) The fact that the Clayton Utz advice dated of 2 August 2011 said "we would not recommend" the State election trigger reflected our assessment that this component of the remuneration proposal was risky or potentially contentious. We did not say that the Board could not include that trigger in the final remuneration package of the four Executives. It depended on whether the Board of RQL ultimately considered that this component was reasonable, taking into account all of the surrounding circumstances.
- (j) When I spoke to Mr Bentley on 3 August 2011 about our advice of 2 August 2011 and he advised me that consideration was being given to an amalgam of the trigger clauses from both legal advices, my immediate response was to tell him that was fine, as we understood that he (and the Board) would make the call that was in the best commercial intents of RQL. In this regard I refer to paragraph 52 and Attachment "**BTD-18**" of my First Statement.

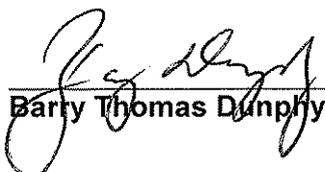
- 4. The Statements of Mr Bentley, Mr Ludwig and Mr Milner at the paragraphs described in paragraph 2(b) of this Statement, suggest that at the meeting of the RQL Board held on Monday 16 April 2012 that in addition to explaining the basis upon which the Government proposed a transition in the Board membership of RQL that I also passed on a message to the RQL Board members, on behalf of the Government, that unless they co-operated the Government would send in the Auditor- General to undertake further audits (**Second Issue**).
- 5. In my view, the recollections of Mr Bentley, Mr Ludwig and Mr Milner on the Second Issue are simply not accurate. I did attend the RQL Board meeting on 16 July 2012 and I did outline the proposed RQL Board transitional steps that had been discussed with representatives of the Government late on Friday 13 July 2012. I also provided at this meeting my oral advice to the Board of RQL about the risks if RQL rejected the Government's proposed Board transition plan and my advice included that there was a likelihood that the current level of investigation

  
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into the past operations of RQL would escalate. I was never asked by anyone in the new Government to pass on any information to RQL or the RQL Board other than the timetable which was set out in the Government's proposed Board transition plan.

6. It is appropriate in the circumstances that I set out in some detail the relevant background facts and explain the legal advice that I provided in writing to Mr Bentley on the evening of Friday 13 July 2012 which advice I then used as the basis for my oral advice to the RQL Board at its meeting held early on Monday 16 July 2012.
7. By way of background RQL was unique in the way that it had been legally established. It was a public company limited by guarantee established under the *Corporations Act 2001* (Cth) (**Corporations Act**). However, the only legal purpose or object of RQL was to act as the control body for the racing industry in Queensland.
8. RQL acquired the legal authority to act as the control body for all three codes of racing under *Racing Act 2002* (Qld) (**Racing Act**) by virtue of s.428 of the Racing Act (which was introduced by the *Racing and Other Legislation Amendment Act 2010* (Qld) as from 1 July 2010).
9. Section 428 of the Racing Act cancelled, as from midnight on 30 June 2010, the approvals that had previously been given to Queensland Racing Limited, Greyhounds Queensland Limited and Queensland Harness Racing Limited to act as control bodies under the Racing Act and further provided that on 1 July 2010 the Minister was to give an approval to RQL to be the new control body for the three codes of racing being thoroughbred racing, harness racing and greyhound racing.
10. Under the constitution of RQL it was clear that RQL was established with a view to taking on the role of being the control body for all three codes of racing under the Racing Act (or any Act passed in substitution to the Racing Act). The constitution of RQL (**RQL Constitution**) relevantly provided:
  - (a) In clause 3.1 that in addition to the powers conferred by the Corporations Act, that the object of the company was to exercise the powers and perform the functions of a Control Body. The term "Control Body" was then defined in clause 1.1 of the RQL

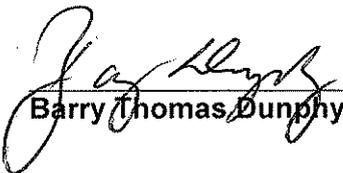
  
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Constitution as meaning a Control Body under the Racing Act (or a similar body under any Act passed in substitution for the Racing Act); and

- (b) Clause 24.2 of the RQL Constitution stated that if RQL ceased to be a Control Body under the Racing Act (or substitute Act) that the Board will call a general meeting of members to resolve to wind up the company and deal with the assets of RQL in accordance with clause 24.1 of the Constitution. Clause 24.1 of the RQL Constitution provided that any assets would then go to a Control Body or Bodies approved by the Minister at the time of dissolution or, if no such approval was given, to a similar institution or institutions having similar objects to RQL as determined by a Judge of the Supreme Court.

11. In this context I had, through my previous work at Crown Law, extensive experience in dealing with post-election transitional issues. In 1989 I had as Crown Counsel been involved in assisting the then Solicitor-General provide advice to the Goss Government on a range of transitional issues, in 1996 as Acting Crown Solicitor for some months I was the key legal advisor to the Borbidge Government on transitional issues and in 1998 as Crown Solicitor I had undertaken a similar role in relation to the transition of the Beattie Government. I had also during my career at Crown Law given a range of legal advices on the appointment and removal of persons appointed to statutory offices and to the Boards of statutory bodies and Government Owned Corporations.
12. In my experience, following a change of Government at the State Election it was not unusual for there to be, as part of the new Government's transition plan, changes in the membership of the controlling boards of various State statutory bodies or government owned corporations. Often, it seemed to me, that these changes were primarily motivated by the new Government wanting to appoint persons who they believed would then be better placed to implement the new Government's policies.
13. The making of changes to the Boards of statutory bodies was usually straight forward as most of the governing legislation would had vested in the Minister or the Governor in Council the power to appoint the relevant Board members. By virtue of s.25 of the *Acts Interpretation Act 1954* (Qld), if an Act authorises a person or body to appoint a person to an office, the power of

  
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appointment includes the power to then remove or suspend, at any time, a person appointed to the office. It was also technically possible for persons to be removed from office using s.24AA of the *Acts Interpretation Act 1954* (Qld) which states that if an Act authorises or requires the making of an instrument or decision, the power includes the power to amend or repeal the instrument or decision, provided that the power to amend or repeal is exercised in the same way, and subject to the same conditions, as the original power to make the instrument or decision.

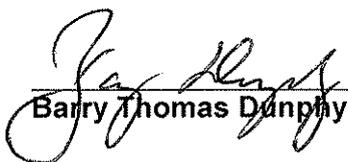
14. In my experience what often happened in practice was that if the new incoming Government wished to change the membership within the Board of a statutory body that the Minister or their representative would consult with the Chairperson of the relevant Board about the proposed changes. Almost inevitably, as a result of those discussions the members who the Government wished to replace, would resign and there would be an orderly transition. On some occasions, the new Minister or the new Government did move unilaterally to replace particular Board Members without notice but that, in my experience, was not the usual practice.
15. In relation to RQL, I had also in mid to late 2011 provided to RQL, through Mr Bentley a very detailed legal advice about the position of RQL and the capacity of a new State Government to restructure the current arrangements involving RQL under the Racing Act. So Mr Bentley (and I presume the remainder of the Board of RQL) should have been aware of the legal issues relating to the Board transitional issues.
16. On 10 April 2012 a meeting was held at 9.15am between Mr Bentley, Adam Carter, Peter McDonald and myself. At that meeting a number of matters were discussed. One of the outcomes of that meeting was that I was instructed by Mr Bentley on behalf of RQL to telephone Mike Kelly of the Office of Racing and put forward a proposition about the filling the vacant directorships on the Board of RQL.
17. I subsequently on 10 August 2012 spoke to Mr Kelly who advised me that within the Department the issue had been raised whether there should be an agreed plan with RQL to facilitate the desired changes in the membership of the RQL Board but, the issue had not

  
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gained too much traction. Mr Kelly indicated to me that the Government was likely to legislate but he said that RQL could put forward any proposal that it wished.

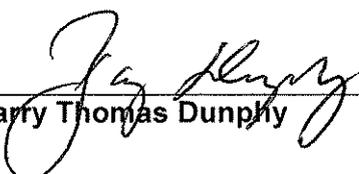
18. I then reported the details of my conversation with My Kelly to Mr Bentley by an email sent at 12.55pm on Tuesday 10 April 2012. Subsequently, on Tuesday 10 April 2012 there were further discussions between Mr Bentley and Mr McDonald and/or myself about these Board transitional issues.
19. On 10 April 2012 the issue had also been raised whether all of the Board members of RQL could legally resign at the one time. It was agreed that Clayton Utz would consider that legal question and we would also prepare a draft letter by RQL to the Department of National Parks, Recreation, Sport and Racing (**Department**) putting forward a proposal for the transition/changes in the membership of the RQL Board.
20. There were then further discussions between myself and Mr Bentley on Thursday 12 April 2012 and at 3.14 pm I sent an email to Mr Bentley which attached a draft of a letter by RQL to the Department together with our legal advice on whether it was legally permissible for all of the Board directors to resign at once.
21. On Friday 13 April 2012 at approximately 9.09 am, Mr Bentley had a telephone conference with Mr McDonald and myself. Mr Bentley explained that he had received a call from Mr Kelly of the Office of Racing and Mr Bentley had been invited to meet with Mr John Glaister the Acting Director-General of the Department at 3.00pm that afternoon to discuss the RQL Board transition issue.
22. Mr Bentley then came to the Offices of Clayton Utz and met with Mr McDonald and myself at 2.00 pm on Friday 13 April 2012. Mr Bentley and myself then met at 3.00pm with Mr John Glaister the Acting Director-General of the Department and Mr Kelly, the Executive Director of the Office of Racing.
23. Subsequently, after that meeting I received a telephone call from Mr Kelly when he set out a proposed timetable for changing the membership within the RQL Board that would be acceptable to the Government. By email on Friday 13 April 2012 at 6.56 pm I provided to Mr Bentley details of the information that I had received from Mr Kelly of the Department. In

  
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this email I also provided my legal advice to RQL and the Board on the proposed Board transition plan that had been put forward by the Government. I also enclosed with this email three versions of a possible letter of response by RQL to the Government for the Board of RQL to review. The legal advice that I set out in the email to Mr Bentley on the evening of Friday 13 April 2012 was then used by me as the basis for my briefing of the Board of RQL on the following Monday morning being 16 April 2012. Attachment "BTD-24" is a copy of the email and letters sent by me to Mr Bentley at 6.56pm on 13 April 2012. [RQL.128.009.0614]

24. To give further context to my advice of 13 April 2012 and to the oral briefing that I provided to the Board of RQL on Monday 16 April 2012, it should be understood that the alternative legislative solution would in all likelihood have involved the Government urgently developing and passing special legislation to:
- (a) Legislatively remove RQL as the control body under the Racing Act;
  - (b) Create in the special legislation a new statutory body and then appoint that new statutory body as the substitute control body under the Racing Act; and
  - (c) Transfer all the assets, liabilities and staff of RQL to the new statutory body.
25. The effect of such special legislation would have left RQL as a mere corporate shell with no assets or liabilities and the Directors of RQL under clause 24.2 of the RQL Constitution would then have been legally obliged to call a general meeting of RQL to wind up the company.
26. The passing of the special legislation would also have resulted in a wide range of practical and regulatory/compliance issues including:
- (a) The new control body would have needed to obtain all necessary income tax, GST and other regulatory approvals under State and Commonwealth laws to lawfully commence its business operations;
  - (b) The new control body would in all likelihood have needed to access the existing payroll system of RQL to continue to pay the wages and entitlements of the transferred RQL staff. This may not have been able to done immediately so some

  
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form of service level arrangement would have been required to be put in place between RQL and the new control body for a period of time;

- (c) That changing the control body under the Racing Act during a financial year would have meant that both the new control body and RQL would have been obliged to prepare financial accounts and financial statements (and have them audited);
- (d) Insurances for the new control body would need to have been checked and confirmed with the insurers; and
- (e) A range of other flow on practical implementation issues would need to have been dealt with to make the statutory transfer of assets and liabilities fully effective. The Board of the new Control Body may also have required that a due diligence review be undertaken to ensure that they were also discharging their legal duties moving forward.

27. Furthermore, all of the steps set out above would have been required to be implemented in a business environment where RQL had, approximately a week before, lost four of its most senior executives and where the new control body would in all likelihood have had a new set of Board members.

28. In light of:

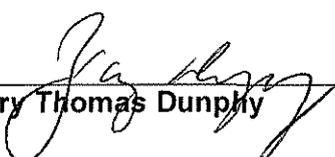
- (a) My previous knowledge of the accepted way that post-election statutory body Board transitions had occurred in Queensland; and
- (b) The likely cost to the public purse and to the racing industry of urgently transitioning the control body status under the Racing Act from RQL to a new statutory body,

I personally was very concerned about the negative impact of the special legislation solution on RQL as a corporate entity (as it would be stripped of its control body status and assets and would then be required to be wound up); the RQL staff who would unnecessarily and unexpectedly be moved to the new control body and on the racing industry as a whole. As far as I could see the urgent special legislation solution did not appear to be in the public interest.

  
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29. As a result the advice I provided to both Mr Bentley on Friday 13 April 2012 and to the Board of RQL on 16 April 2012 was therefore very frank. I advised that:
- (a) It was only because of the unusual structure of RQL that the new Government could not itself change the composition of the Board of RQL;
  - (b) That the Government had come back to RQL with a reasonable Board transition proposal;
  - (c) The Government would ultimately have its way and that the special legislation could be prepared and ready for introduction by the first sittings of Parliament which were then expected to be between the 15th and 18th of May 2012. If the Government was forced to pass special legislation that this would create a range of administrative issues that would not be in the best interests of RQL or the racing industry;
  - (d) In my view the key thing was for the RQL Board to act in a statesman like manner. I advised that since the State election in my view the RQL Board had behaved and responded to the demands from the new Government in that way;
  - (e) In my opinion the Government was unlikely to agree to any further timing changes to their proposed Board transition plan and if RQL did not agree, that the Government would be likely to disengage and prepare the special legislation;
  - (f) It was likely that if RQL and the RQL Board did not accept the Government's proposed Board transition plan that the audit or reviews which the Government had already commenced would escalate. The point being that the outgoing Board members might well find themselves tied up for several months whilst those audits and reviews continued; and
  - (g) At the end of the day I was only RQL's advisor, that I had called the issues as I saw them and that it was now for the RQL Board members to decide what they would do.

  
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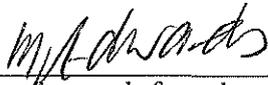
  
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30. In so far as either my email advice dated 13 April 2012 to Mr Bentley (which forms Attachment "BTD-24" to this my Third Statement) or my oral advice given at the RQL Board meeting held on 16 April 2012 referred to the possibility of there being an escalation in the audits/investigations or reviews if the Government's Board transition proposal was not accepted by RQL, all of those comments were my own personal comments and formed part of the legal advice that I was providing to RQL and the RQL Board about the relevant risks that would flow if the Government's Board transition plan was not accepted.
31. Ultimately, a negotiated Board transition plan was agreed to by RQL and the Government and the special legislation option was not pursued.

I make this statement conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act 1867 (Qld).

**Dated 18 September 2013**

**Signed and declared** by Barry Thomas Dunphy at  
Brisbane in the State of Queensland  
this 18th day of September 2013  
Before me:



\_\_\_\_\_  
Signature of person before whom the declaration is  
made



\_\_\_\_\_  
Signature of declarant

Matthew Glen Edwards - Solicitor  
Full name and qualification of person before whom the  
declaration is made

**McDonald, Peter**

**From:** Dunphy, Barry  
**Sent:** Friday, 13 April 2012 6:58 PM  
**To:** 'Bob Bentley'; 'crossmore13@yahoo.co.uk'  
**Subject:** Advice from the Department

**Attachments:** Version A - Ltr to Dept National Parks.DOC; Version B - Ltr to Dept National Parks - 11.4.12.DOC; Version C - Ltr to Dept National Parks.DOC



Version A - Ltr to  
Dept Nation...



Version B - Ltr to  
Dept Nation...



Version C - Ltr to  
Dept Nation...

Bob,

Following on from the meeting this afternoon, I have been informed by Mike Kelly that John Glaister the Director-General of the Department, has sought instructions from within the Government and their updated proposition is as follows:

- That next Monday two State nominees be appointed to the Board of Racing Queensland Limited. The Government will only provide the names of the two State nominees once the transition package is agreed between the Board and the Government;
- That next Monday that both Bill Ludwig and yourself will resign as Directors effective as from 30 April 2012. It is also intended that you will resign as Chairman effective on Monday next week. I suspect that one of the new Government nominees would then become the new Chairman; and
- That the next Board meeting will then occur on 1 May 2012 when another two State nominated Directors would be appointed to Racing Queensland Limited. The Board would then consist of 7 persons being 4 Government nominated Directors and 3 of the current Directors.

I raised what would happen if any of the three current Directors then wanted to resign after 1 May 2012. Mike did not think that would be a problem as the Board would then just appoint further Government nominees to the Board.

So, Bob I think the position is this:

- The Government has moved from its position on Monday of not entertaining any form of managed transition to coming around to the view that a managed replacement of Board members is the best option. I appreciate that you and the other Board members will not like aspects of the latest proposal. However, as I have explained to you the only reason why the Government hasn't been able to act unilaterally to date is because Racing Queensland Limited is legislatively unusual because it is an independent Corporations Act company that it holds a key statutory appointment. If Racing Queensland Limited had been a statutory authority or even a Government Owned Corporation, the Board could have moved to replace the Board on the first day after the election.
- I think that the officers of the Department have, in the past few days, worked hard internally to obtain concessions from Government and in particular, to allow your resignation and Bill Ludwig's resignation not to be immediate. I have personally suggested to you that I thought that the resignation timing issue would be non-negotiable from their point of view, i.e. that the Government would want your and one other director's immediate resignation on Monday. Surprisingly to me, they have given ground on that point but the concession is only for two weeks (until 30 April 2012) and not the ten weeks that the Board was hoping for (30 June 2012).
- At the end of the day, the Government will have its way. It looks as though the first sittings of Parliament will now be on the 15 to 18th of May 2012. I am certain that by this time, the Government will have interim legislation ready to remove Racing Queensland Limited as the control body and to transfer all of its assets and liabilities to some other entity. Yourself and the Board members will then be left as Directors of a mere corporate shell with no assets or liabilities. You will then have to wind up the company. The passing of such interim legislation will create a range of administrative issues that will not be in the best interests of the company or the racing industry.
- I have explained to you that the key thing here is for the Board to act in a "statesman like" manner. In my view, since the election, that is exactly how the Board has behaved despite some clear provocation from the Government in the last two weeks. I genuinely believe that the Board should try to negotiate a solution with the Government and not "dig in". I think there are several important benefits for the Board and for Racing Queensland Limited. Primarily, if the current Board agrees to a transition plan with the Government and does not force the Government to legislate at the first sittings of Parliament, there is a real prospect that a lot of the current

investigations etc will be rendered unnecessary and will fall away. A number of those investigations have only been put in place with a view to the Government trying to uncover some evidence that Racing Queensland Limited is not fit to hold its current appointment as control body. The Auditor-General will no doubt finish his review, but I note that you and the Board are confident that there is nothing of concern in that regard. If the Board forces the Government to legislate, then I think it is equally certain that the Government will probably then significantly increase the current level of historical review of the actions of the Board and it may throw the full resources of the Department into that exercise. These in-depth investigations and reviews could go on for many months.

- It might be possible, over the weekend, for me to go back on behalf of the Board to the Department to put an alternative proposition. Stepping back, the only sticking point really is the timing of the relevant resignations. The Board would prefer 30 June 2012 and the Government now accepts 30 April 2012. We have tested the water with the Department on 30 May 2012. I don't think that date will fly because if that timeline is the Board's final position then the Government will I suspect disengage from the negotiations and will just legislate somewhere during the 15th and 18th of May 2012 to obtain control of the racing control body.
- So, the key question that each Board member really needs to focus on is - are the potential downsides to forcing the Government to pass special legislation worth the securing of four more weeks tenure for Bill Ludwig and yourself as Directors. In my personal view, it won't be worth it. I have acted almost exclusively for Government now for 30 years and I believe, based on my own experience that if you can't cut a deal over the weekend and the Board in effect forces special legislation with all the associated disruption, that the Government will then throw everything at reviewing every action of each Board member over their full tenure as a director. That is every decision and every expenditure invoice or voucher will be looked at. What has happened in the last two weeks will be nothing to what may happen in the next two to six months. There will then be the practical complication as to how the current Board members will then fund their participation in these ongoing inquiries etc when you hold office in a mere legal shell with no assets. I know some directors believe that this will happen even if the Board negotiates a voluntary transfer of power with the Government. That might be right. However, I am sure that the risk of there being full blown investigations into the actions of the current Board members will be far more likely to happen if the Government is pushed to pass special legislation at the very first session of the new Parliament.

I am sorry to have to be as blunt as I am being but the Government at the end of the day will have its way. That is what I advised the Board several months ago. The advice that we gave about the limitations on the Government's power to act against Racing Queensland Limited and how they would seek to take control over the racing industry is playing out virtually as we predicted.

At the end of the day, I am only your adviser and I am calling it as I see it. However, each Board member has to decide what they will do.

On the timing issue, I really need to go back to the Department during the weekend and advise whether the Board is accepting their proposition, putting a counter proposal or seeking more time e.g. to advise that the Board needs to meet and discuss this on Monday at their scheduled meeting.

As requested, we have prepared three letters for yourself and the Board to review being:

- Version A - This is the updated version of the letter you have seen with the 30 June 2012 resignation date for yourself and one other director;
- Version B - This is the updated version of the letter you have seen with the 30 May 2012 resignation date for yourself and one other director; and
- Version C - Which is a short acceptance of the Government's offer as outlined above.

I await your further instructions.

Regards

Barry

**Barry Dunphy | Partner | Government Services Group  
Clayton Utz**

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[www.claytonutz.com](http://www.claytonutz.com)

VERSION A

[TO BE PLACED ON RACING QUEENSLAND LIMITED LETTERHEAD  
ON MONDAY 16 APRIL 2012]

Mr John Glaister  
Director-General  
Department of National Parks, Recreation, Sport & Racing  
Locked Bag 180  
CITY EAST QLD 4002

Dear Mr Glaister

**Transitional Proposal - Changes to the Board of Directors of Racing Queensland Limited (Racing Queensland)**

As you would be aware, I recently received a letter from the Deputy Premier dated 29 March 2012, asking that I take no action to fill any vacancy that may exist on the Board of Racing Queensland until the outcome of a review of the governance structures that currently exist within the Queensland racing industry has been completed.

I replied to the Minister, confirming in effect, that the Board of Racing Queensland would not appoint a replacement director to fill the vacancy on the Board following the resignation of Mr Bob Lette provided that there remained sufficient Board members to still form a valid quorum of directors. Under clause 17.5 of the Constitution of Racing Queensland the minimum number of directors to lawfully constitute a quorum is three directors.

Of course, it is a clear and mandatory statutory requirement under section 201A(2) of the Corporations Act, that a public company such as Racing Queensland must at all times have at least 3 directors. It is an offence under the Corporations Act for the company not to have the this minimum number of directors. The decided case law also indicates that a Director whose actions render the company to be in breach of this provision under the Corporations Act can also be personally exposed as a party to any relevant criminal offence for a breach of section 201A(2) of the Corporations Act<sup>1</sup>.

In addition it is a clear requirement of the Constitution of Racing Queensland that:

*"12.1 The Board will consist of seven Directors."*

The Constitution of the company then sets out in clause 12.12 a power for the remaining directors to fill any casual vacancy that occurs on the Board. Under section 140 of the Corporations Act, a company's Constitution has legal effect as a contract between the company and each director, under which each director agrees to observe and perform the Constitution as far it applies to that director.

Taking into account the above provisions and the clear interest of the Government in having its nominees take control of the racing industry sooner than later, the Board of Racing Queensland has resolved to put forward a plan to the Government that will enable the company and the current directors to properly discharge their statutory duties and responsibilities during this transitional period while at the same time allowing the Government to commence the implementation of its stated objective to restructure the broader racing industry in Queensland.

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<sup>1</sup> *Claremont Petroleum N.L. v Indosuez Nominees Pty. Limited* (1987) 1 Qd. R. 1 and see RP Austin and IM Ramsay Ford's Principles of Corporation Law 14th Edition, 2010, at paragraph 7.220.

The Board's proposal is as follows:

- (a) The Department (on behalf of the State) will nominate 2 persons that will then immediately be appointed to the Board of Directors of Racing Queensland to fill the current two vacancies on the Board;
- (b) The existing members of the Board of Racing Queensland will then immediately move later this week at a special meeting of the Board to appoint the two State nominees as directors using the power in clause 12.12 of the Constitution of Racing Queensland. This will then regularise the position of the company in terms of complying with the terms of its own Constitution;
- (c) At the special meeting of the Board, I together with one other director would then submit our resignations as directors under clause 12.11(h) of the Constitution of the company. Such resignations will be stated to take effect on and from 30 June 2012; and
- (d) At a Board meeting on 30 June 2012, the five remaining directors of Racing Queensland will then move to appoint 2 further directors (as also nominated by the Department on behalf of the State) to fill the additional two vacancies on the Board. This will then give the State nominees absolute control of the Board of Racing Queensland. If other director vacancies then occur on the Board of Racing Queensland the four State nominated directors can then proceed to fill any further casual vacancies on the Board.

It is submitted that this proposal has a number of benefits both for the Government and the company being:

- (a) The proposal will ensure that the current Directors and the company are clearly acting in accordance with the Constitution of the company. The proposal will also reduce the risk of the company and/or any of the current Directors inadvertently committing an offence under s.201A(2) of the Corporations Act;
- (b) It will regularise the position so that the company is also acting strictly in accordance with its own Constitution;
- (c) It will provide an immediate opportunity for the Government to have its nominees appointed to the Board of Racing Queensland;
- (d) The Government will also be able to announce this week that it has secured the resignation of myself and one other director;
- (e) The proposal will also ensure that the nominees of the State will then have control of the Board of Racing Queensland immediately from 30 June 2012;
- (f) This proposal will also enable the Government to immediately involve through the proposed nomination process individuals who it intends will be occupying senior positions in terms of the future operation and control of the racing industry in Queensland. The proposal also provides a workable transition so that the new Directors can have a short transition period working with current Directors of Racing Queensland to become fully aware of the range of issues that need to be addressed in the short to medium term within the racing industry;
- (g) That even if a longer term legislative solution to restructure the racing industry is then to be implemented by the State that:

- (i) This proposal will permit the Department and the Parliament to work through the revised legislative model with proper and due consideration; and
- (ii) Will allow Racing Queensland, because it is a Corporations Act company, to be formally wound up in accordance with the Corporations Act. The reality is that even if Racing Queensland is no longer a control body and has all of its assets and liabilities transferred to new statutory entities, that it will take several months to formally wind up Racing Queensland. During this winding up phase, Racing Queensland will require an operating Board of Directors to oversee the implementation of the various winding up steps;
- (h) The proposal also allows the current Directors to act in accordance with their legal duties and responsibilities that are imposed on them both under the Corporations Act and the common law;
- (i) The proposal will also provide greater security to the current staff of Racing Queensland and to relevant industry stakeholders. This is important to ensure a high level of continuing public confidence in the racing industry as the structural reforms that are proposed by the Government are implemented. In particular, the above transition plan will ensure the smooth supervision of the conduct of the Winter Racing Carnival which is about to commence; and
- (j) The proposal avoids there being a "big bang" series of changes which will otherwise occur if steps are taken to legislatively remove Racing Queensland as a control body and to, in one step, then transfer its assets and liabilities to other statutory entity or entities. Such a move will be administratively burdensome and is a far less attractive option than keeping Racing Queensland in place until the Government's full legislative reform package for the racing industry can be developed and implemented.

The Board would be pleased to receive the Government's response to the proposal as soon as is reasonably possible.

Yours sincerely

R Bentley  
Chairman

VERSION B

[TO BE PLACED ON RACING QUEENSLAND LIMITED LETTERHEAD  
ON MONDAY 16 APRIL 2012]

Mr John Glaister  
Director-General  
Department of National Parks, Recreation, Sport & Racing  
Locked Bag 180  
CITY EAST QLD 4002

Dear Mr Glaister

**Transitional Proposal - Changes to the Board of Directors of Racing Queensland Limited (Racing Queensland)**

As you would be aware, I recently received a letter from the Deputy Premier dated 29 March 2012, asking that I take no action to fill any vacancy that may exist on the Board of Racing Queensland until the outcome of a review of the governance structures that currently exist within the Queensland racing industry has been completed.

I replied to the Minister, confirming in effect, that the Board of Racing Queensland would not appoint a replacement director to fill the vacancy on the Board following the resignation of Mr Bob Lette provided that there remained sufficient Board members to still form a valid quorum of directors. Under clause 17.5 of the Constitution of Racing Queensland the minimum number of directors to lawfully constitute a quorum is three directors.

Of course, it is a clear and mandatory statutory requirement under section 201A(2) of the Corporations Act, that a public company such as Racing Queensland must at all times have at least 3 directors. It is an offence under the Corporations Act for the company not to have the this minimum number of directors. The decided case law also indicates that a Director whose actions render the company to be in breach of this provision under the Corporations Act can also be personally exposed as a party to any relevant criminal offence for a breach of section 201A(2) of the Corporations Act<sup>1</sup>.

In addition it is a clear requirement of the Constitution of Racing Queensland that:

*"12.1 The Board will consist of seven Directors."*

The Constitution of the company then sets out in clause 12.12 a power for the remaining directors to fill any casual vacancy that occurs on the Board. Under section 140 of the Corporations Act, a company's Constitution has legal effect as a contract between the company and each director, under which each director agrees to observe and perform the Constitution as far it applies to that director.

Taking into account the above provisions and the clear interest of the Government in having its nominees take control of the racing industry sooner than later, the Board of Racing Queensland has resolved to put forward a plan to the Government that will enable the company and the current directors to properly discharge their statutory duties and responsibilities during this transitional period while at the same time allowing the Government to commence the implementation of its stated objective to restructure the broader racing industry in Queensland.

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<sup>1</sup> *Claremont Petroleum N.L. v Indosuez Nominees Pty. Limited* (1987) 1 Qd. R. 1 and see RP Austin and IM Ramsay Ford's Principles of Corporation Law 14th Edition, 2010, at paragraph 7.220.

The Board's proposal is as follows:

- (a) The Department (on behalf of the State) will nominate 2 persons that will then immediately be appointed to the Board of Directors of Racing Queensland to fill the current two vacancies on the Board;
- (b) The existing members of the Board of Racing Queensland will then immediately move later this week at a special meeting of the Board to appoint the two State nominees as directors using the power in clause 12.12 of the Constitution of Racing Queensland. This will then regularise the position of the company in terms of complying with the terms of its own Constitution;
- (c) At the special meeting of the Board, I together with one other director would then submit our resignations as directors under clause 12.11(h) of the Constitution of the company. Such resignations will be stated to take effect on and from the next meeting of the Board which will be scheduled for 30 May 2012; and
- (d) At the Board meeting on 30 May 2012, the five remaining directors of Racing Queensland will then move to appoint 2 further directors (as also nominated by the Department on behalf of the State) to fill the additional two vacancies on the Board. This will then give the State nominees absolute control of the Board of Racing Queensland. If other director vacancies then occur on the Board of Racing Queensland the four State nominated directors can then proceed to fill any further casual vacancies on the Board.

It is submitted that this proposal has a number of benefits both for the Government and the company being:

- (a) The proposal will ensure that the current Directors and the company are clearly acting in accordance with the Constitution of the company. The proposal will also reduce the risk of the company and/or any of the current Directors inadvertently committing an offence under s.201A(2) of the Corporations Act;
- (b) It will regularise the position so that the company is also acting strictly in accordance with its own Constitution;
- (c) It will provide an immediate opportunity for the Government to have its nominees appointed to the Board of Racing Queensland;
- (d) The Government will also be able to announce this week that it has secured the resignation of myself and one other director;
- (e) The proposal will also ensure that the nominees of the State will then have control of the Board of Racing Queensland immediately from 30 May 2012;
- (f) This proposal will also enable the Government to immediately involve through the proposed nomination process individuals who it intends will be occupying senior positions in terms of the future operation and control of the racing industry in Queensland. The proposal also provides a workable transition so that the new Directors can have a short transition period working with current Directors of Racing Queensland to become fully aware of the range of issues that need to be addressed in the short to medium term within the racing industry;
- (g) That even if a longer term legislative solution to restructure the racing industry is then to be implemented by the State that:

- (i) This proposal will permit the Department and the Parliament to work through the revised legislative model with proper and due consideration; and
- (ii) Will allow Racing Queensland, because it is a Corporations Act company, to be formally wound up in accordance with the Corporations Act. The reality is that even if Racing Queensland is no longer a control body and has all of its assets and liabilities transferred to new statutory entities, that it will take several months to formally wind up Racing Queensland. During this winding up phase, Racing Queensland will require an operating Board of Directors to oversee the implementation of the various winding up steps;
- (h) The proposal also allows the current Directors to act in accordance with their legal duties and responsibilities that are imposed on them both under the Corporations Act and the common law;
- (i) The proposal will also provide greater security to the current staff of Racing Queensland and to relevant industry stakeholders. This is important to ensure a high level of continuing public confidence in the racing industry as the structural reforms that are proposed by the Government are implemented. In particular, the above transition plan will ensure the smooth supervision of the conduct of the Winter Racing Carnival which is about to commence; and
- (j) The proposal avoids there being a "big bang" series of changes which will otherwise occur if steps are taken to legislatively remove Racing Queensland as a control body and to, in one step, then transfer its assets and liabilities to other statutory entity or entities. Such a move will be administratively burdensome and is a far less attractive option than keeping Racing Queensland in place until the Government's full legislative reform package for the racing industry can be developed and implemented.

The Board would be pleased to receive the Government's response to the proposal as soon as is reasonably possible.

Yours sincerely

R Bentley  
Chairman

VERSION C

[TO BE PLACED ON RACING QUEENSLAND LIMITED LETTERHEAD  
ON MONDAY 16 APRIL 2012]

Mr John Glaister  
Director-General  
Department of National Parks, Recreation, Sport & Racing  
Locked Bag 180  
CITY EAST QLD 4002

Dear Mr Glaister

**Transitional Proposal - Changes to the Board of Directors of Racing Queensland Limited (Racing Queensland)**

I refer to the recent discussions between the Department and the legal representatives of Racing Queensland Limited.

I wish to advise that the Board is prepared to propose to the Government that changes in the composition of the Board of Racing Queensland Limited be voluntarily given effect to by the undertaking of the following steps being:

- That on Monday 16 April 2012 two State nominees will be appointed to the Board of Racing Queensland Limited. I look forward to advice from the Government on the names of the two State nominees to the Board of Racing Queensland Limited.
- That on Monday 16 April 2012 that both Bill Ludwig and myself will resign as Directors of Racing Queensland Limited effective as from 30 April 2012. I will also resign as Chairman of Racing Queensland Limited effective as from Monday 16 April 2012.
- That the next Board meeting of Racing Queensland Limited will be held on 1 May 2012 when another two State nominated Directors will be appointed to Racing Queensland Limited. The Board would then consist of 7 persons being 4 Government nominated Directors and 3 of the current Directors.

I look forward to your confirmation that the above processes are acceptable and should now be progressed.

Yours sincerely

R Bentley  
Chairman