QUEENSLAND RACING COMMISSION OF INQUIRY

Commissions of Inquiry Act 1950

SUBMISSIONS

Part 6

Product Co - Term of reference 3(f)

The arrangements between Queensland Race Product Co Limited and the Tatts Group (comprising Tatts Group Limited ACN 108 686 040 and each of its subsidiaries, including TattsBet Limited ACN 085 691 738), and formerly UNiTAB, concerning fees paid by the Tatts Group for Queensland Wagering on interstate races through TattsBet, in particular:

(i) how Queensland Race Product Co Limited responded to the introduction of race information fees;

(ii) whether the Boards of the relevant entities and/or Queensland Race Product Co Limited sought expert legal advice or other advice regarding the effect on fees payable by the Tatts Group to Queensland Race Product Co Limited as a consequence of race information fees being introduced and if not, why this advice was not sought;

(iii) the reasons why any expert advice sought at any time following the introduction of race information fees was or was not acted upon;

(iv) whether the directors and senior executives of both the relevant entities and Queensland Race Product Co acted in good faith and consistently with their responsibilities, duties and legal obligations and the best interests of the company at the material time race information fees were introduced, or at any other time and whether

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their actions may have been influenced by any conflict of interest in being both a director of the relevant entities and/or Queensland by a relationship with any other person, or whether they used their position/s to gain a personal advantage

1. This term of reference attracted much of the attention of the Commission of Inquiry during its public sittings, most probably so that Senior Counsel Assisting could repeatedly assert that "$500,000 per month" was being lost to the racing industry by reason of nothing being done by the directors of Product Co, or by QRL[1]; and that $91m was "lost" between 1 September 2008 and 30 April 2012[2]. Both assertions are demonstrably false.

2. This term of reference is unusually drafted. It does not make clear what 'race information fees' mean. No assistance is to be gleaned from the breakdown of issues document prepared at the outset by counsel assisting. As the Commission will appreciate, such fees are charged by each State in Australia. The introductory words of the term of reference suggest that attention should be focused on the fees charged by each State, other than Queensland, in respect of "Queensland wagering on interstate races through TattsBet".

3. However, there are two reasons why the Inquiry should not limit itself in this way. First, as was pointed out by some of the witnesses, whose evidence is referred to below, to simply look at one side (the reduction in the amount of revenue received under the Product and Program Agreement by reason of interstate fees being deducted from the fee payable under that agreement) would be quite unfair, and present a distorted picture if one were to disregard the money derived for the racing industry by reason of the introduction of race information fees in Queensland. As the evidence makes clear, the racing industry has in fact been placed in a better financial position by reason of race information fees in each Australian jurisdiction[3].

4. Secondly, in the public sittings at least[4], there has been no investigation of the position interstate, other than in respect of TattsBet as a result of the

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1 and, presumably, in the period October 2008 – 30 June 2010 by the boards of Greyhounds Queensland Limited and Queensland Harness Racing Limited

2 For example, T2-6; T3-53; T3-73.1; T3-87.30

3 Hanmer at T6-84.20; Tuttle at T10-33.39.

4 and by inference from the statements submitted to the Commission available in the database

introduction of race field fees in New South Wales. As the Commission well knows, Queenslanders can and do bet on interstate races other than in New South Wales, and other than through TattsBet.

5. These submissions are drawn on the basis that the most sensible interpretation of this term of reference is that in subparagraph (i) 'race information fees' means those the subject of enactments outside of Queensland; however, in considering the response to the introduction of those fees, one must also take into account the introduction of race information fees in Queensland.

6. Reference has been made, earlier in these submissions[5] to the failure of the Commission to take statements from important witnesses regarding this term of reference: Mr Grace and Mr McIlwain, whose documents were the subject of extensive examination, in particular of Mr Bentley, Mr Hanmer and Mr Tuttle. Reference was also made to the failure to test the evidence of witnesses who have provided statements about the subject matter of the term of reference: Mr Cooke, Mr Lambert and Mr Andrews; and witnesses who provided statements, but not about this topic: e.g. Mrs Watson and members of the boards of Greyhounds Queensland Limited and Queensland Harness Racing Limited.

7. When Mr Bentley suggested that certain questions should be put to Mr Lette and Mrs Watson[6], Senior Counsel Assisting said, "I will. Don't worry." Mrs Watson was not asked any questions. Mr Lette was only called after requests were made that that occur.

8. Apparently, on 18 October 2013, the Commission notified TattsBet Limited that while the Commission had no power to resolve the issue of the effect of the Product and Program Agreement dated 1 June 1999, as it is not asked to do so by the Terms of Reference and does not propose to do so, "the Commissioner's report may contain observations to the effect that there is a compelling argument that Mr Grace's advice of 18 November 2008 concerning the deductibility of NSW race information fees as Third Party Charges under the Agreement was correct"[7]. The Commission had earlier

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5 Part 1, paragraph 78

6 T3-53.9

7 as was stated by Senior Counsel Assisting at T2-6.30

advised TattsBet Limited that it was not minded to make findings on the correctness of the Grace advice[8]. This change of position has resulted in submissions being made on behalf of TattsBet.

9. The persons on whose behalf these submissions are made concur with TattsBet that any commentary on the correctness or otherwise of the Grace advice is outside the Terms of Reference. To make observations on the correctness or otherwise of the Grace advice is to necessarily comment on the proper interpretation of the Product and Program Agreement. Given that TattsBet Limited intends to apply to the Supreme Court of Queensland for declaratory relief as to the correct interpretation of the Product and Program Agreement[9], the approach foreshadowed by the Commission is improper.

10. Indeed, unless the legal position is so clear (which, it is submitted it is not) that Grace's view was the only one open, the Commission should proceed on the basis that Grace's view was one view, but that there were, or could well have been, others as to the proper interpretation of the Product and Program Agreement. As Senior Counsel Assisting observed[10], the question whether the Grace advice was correct can only be finally determined by a Court.

11. The terms of the Product and Program Agreement[11] will be dealt with in more detail below, but it should be noted at the outset that it was entered into at the time of the privatization of the TAB Queensland. At that time, what has been referred to as the "Gentlemen's Agreement" applied such that the control bodies for the three racing codes in each State did not charge each other for the provision of race information. However, as Mr Hanmer explained in his evidence[12], the continuity of the "Gentlemen's Agreement" was not assured for the duration of the Product and Program Agreement.

12. Also, in the years leading up to 2008, the emergence of betting exchanges and corporate bookmakers, often operating out of the Northern Territory, caused concern to control bodies, because those operators did not pay fees

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8 Submissions on behalf of TattsBet 25 October 2013 at paragraph 2

9 Announcement to Australian Stock Exchange 16 October 2013

10 T2-6.25

11 to be found, inter alia, at Bentley 175

12 For example, at T6-80

to participate in wagering operations. An attempt to make betting exchanges illegal failed[13].

13. On 1 July 2008 the *Racing Legislation Amendment Act* 2008 (NSW) and the *Legislation Racing Administration (Publication of Race Fields) Regulation* 2008 (NSW) commenced operation. Similar legislation had already been enacted in Victoria and Western Australia.

14. Section 33 of the NSW Act made it an offence to 'publish' a NSW race field[14] unless the person held an approval to do so, or was authorized to do so by Regulation. Section 33A provided for the granting of an approval to publish such information. The word 'publish' was later replaced with the word 'use' as a result of litigation[15].

15. Betfair Pty Ltd challenged the validity of the New South Wales legislation. That litigation was not finally decided until 30 March 2012[16].

16. The enactment of legislation such as the amendments to the NSW *Racing Administration Act* sounded the death-knell of the Gentlemen's Agreement.

17. Mr Tuttle gave evidence[17] that the breakdown of the Gentlemen's Agreement was probably some of the most significant wagering reform that the industry has experienced.

18. By their participation in RISA[18] and the Australian Racing Board, a number of people at QRL[19] learnt of the proposed introduction of race field fees, and had to decide how to respond to it. To those involved in the industry, if the Gentlemen's Agreement broke down, and race fields legislation was introduced Australia wide, it was important to know whether a particular State was a net exporter or importer of racing product. This was because if a State was a net exporter (as was Queensland) the introduction of race field fees,

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13 *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418

14 a defined term in s. 27 of the NSW Act

15 *Tom & Bill Waterhouse Pty Ltd v Racing New South Wales* (2008) 72 NSWLR 577, decided on 29 September 2008

16 *Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221; [2012] HCA 12

17 T10-17.30

18 Racing Information Services Australia

19 and presumably at the Greyhound and Harness Racing control bodies as well

provided they were more or less uniform nationally, would lead to a financial benefit. Conversely, if the State was a net importer.

19. In a memorandum dated 28 April 2008[20] Mr Tuttle reported on attempts to garner detailed information on the breakdown of wagering within the various jurisdictions in Australia, and arrive at an indicative position regarding the import and export of Queensland thoroughbred product. He also explained in this memorandum that the Product and Product Agreement, and the obligation of Product Co. to supply the Australian Racing Product to TABQ was built on the "Gentlemen's Agreement". He also expressed the opinion that if Product Co. could not supply the Australian Racing Product to UNIiTAB[21], and it (UNiTAB) incurred a fee in obtaining that from elsewhere it may incur a Third Party Charge, and reduce the fee payable under the Product and Program Agreement.

20. To understand the point Mr Tuttle was making, it is necessary to refer to the terms of the Product and Program Agreement[22]. In overview, that agreement provides for the exclusive supply by Product Co.[23] of information to Tatts, for use in its race wagering business, in return for a fee.

21. So much is made clear by Recital B of the PPA:

> "Product Co has agreed to supply the Australian Racing Product, Queensland Racing Calendar and Queensland Racing Program **for use by** TABQ in its Race Wagering Business" (emphasis added)

22. Clauses 9 and 10 of the PPA deal more fully with the obligation to supply, and the obligation to pay.

23. "Australian Racing Product" is defined to mean 'Australian Racing Information' in the format specified by Tatts to Product Co in accordance with clause 9.3 of the PPA. "Australian Racing Information" is defined to mean all

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20 Bentley 35; Tuttle 3

21 The Product and Program Agreement, initially, was entered into by the Totalisator Administration Board of Queensland. On its privatization, that body became TAB Queensland Limited. On 2 December 2002, that company changed its name to UNiTAB Limited. On 24 February 2012, that company changed its name to TattsBet Limited. The latter two entities are wholly owned subsidiaries of Tatts Group Limited. These details are taken from the statement of Robert Cooke, the CEO of Tattsbet Limited. For convenience each of these parties are referred to as Tatts.

22 For convenience, hereafter referred to as the PPA

23 Queensland Race Product Co Limited

the information relating to Racing in Australia that is necessary for the efficient and effective conduct of Race Wagering on Racing in Australia and includes information of the nature set out in Schedule One of the Agreement.

24. It will be immediately apparent that the PPA deals with considerably more than the mere provision of information. It provides for the supply of information in a certain format, and which is capable of being used to conduct a wagering business. The Australian Racing Information is of no use to Tatts unless it can use that information in the conduct of its business.

25. The simplistic dichotomy drawn by Mr Grace, whose advice is referred to below, between supply and use is inapt in the case of the proper construction of the PPA.

26. "Queensland Racing Calendar" and "Queensland Racing Program" are also defined terms in the PPA.

27. "Third Party Charge", a term that drew considerable attention by the Commission, is defined in the PPA to mean:

> "the amount of any fee payable or other consideration given by TABQ to obtain the equivalent of the Australian Racing Product and the costs and expenses incurred by TABQ in procuring the equivalent of the Australian Racing Product from a source other than Product Co"

28. Bearing in mind that Australian Racing Product is defined in the PPA in a way that presupposes that the information supplied by Product Co[24] can, without more, be **used** in Tatts' wagering business; if Tatts has to pay a fee "in procuring the equivalent of the Australian Racing Product from a source other than Product Co." it is entitled to treat that fee as a Third Party Charge. A race field fee such as that imposed by Racing NSW is a fee to be permitted to use (or publish) a race field. The only reason Tatts would want to use a race field would be in its wagering business. Under the PPA, and before the breakdown of the Gentlemen's Agreement, that information was supplied by Product Co. After the introduction of the NSW legislation, it could no longer be supplied by Product Co **for use** in Tatts' wagering business under the PPA, because Tatts had to pay a fee under the NSW legislation to be entitled

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24 including information obtained under the Gentlemen's Agreement

to use it. This fee, paid in NSW, was to procure the equivalent of part of the Australian Racing Product (i.e. that part that was created by Racing NSW) namely information and the right to use it in Tatts' wagering business.

29. This construction is, it is submitted, supported by clause 9.4 PPA.

30. Whilst, as submitted above, the Commission is exhorted not to make any finding as to the proper interpretation of the PPA, it is strongly submitted that there was an alternative construction of the relevant terms of the PPA, which led to a conclusion that Tatts was entitled to deduct as a "third party charge" the fees it was required to pay Racing NSW[25].

31. That is certainly the view that was held by Mr Bentley, Mr Hanmer[26], Mr Tuttle, Mr Lambert, Mr Godber and Mr Lette before Mr Grace's advice of 18 November 2008 became available. It is also a view that accords with the commercial intent of the PPA.

32. TattsBet make the further point[27] that the Grace advice and the approach taken by the Commission fail to identify that RISA would not provide the Australian Racing Product to TattsBet without Tattsbet holding the required Race Field Licences. As such the Australian Product Information could not be provided to Tatts without the licence fees being paid.

33. There is another aspect to the introduction of legislation in Queensland that has been apparently ignored by the Commission. It relates to the fees received by the Queensland racing control bodies after the introduction of the Queensland legislation[28].

34. Evidence has been given that in fact Queensland has collected more in race field fees under its legislation than Tatts has deducted as a result of fees paid by it in other jurisdictions. Mr Robert Cooke, in his statement to the Commission states[29]:

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25 and other jurisdictions

26 T7-20.44

27 Submissions, paragraph 10(c)

28 On 11 December 2008 the *Revenue and Other Legislation Amendment Act (No. 2)* 2008 was enacted by the Queensland Parliament

29 statement, paragraph 25

> ". . . since the introduction of Race Fields Legislation in Queensland, Queensland Racing has collected fees from interstate wagering operators in excess of the deductions made by TattsBet pursuant to the Agreement."

35. Mr Cooke says that this is demonstrated in the Annual Reports of QRL and RQL, copies of which are available to the Commission.

36. This evidence allies with that given by Mr Tuttle, referred to below.

37. What the Commission has apparently not investigated[30] is whether Product Co. is and was permitted, by the terms of the PPA, to retain those fees charged under the Queensland legislation, or whether it is contractually obliged to remit them to Tatts. As the evidence discussed below reveals, it was through the efforts of Mr Bentley and Mr Tuttle (and Mr Grace) that an arrangement was made with Tatts that allowed Product Co. to retain these fees, to the benefit of the Queensland racing industry.

38. If the construction of 'third party charge' so vigorously promoted by counsel assisting the Commission was to prevail, but Tatts could claw back monies it has allowed Product Co. to retain, collected under the Queensland legislation, then Queensland racing will be much worse off. As a result of the conduct of the Commission, the solicitors for Tatts have now reserved the right to seek recovery of those monies.

39. In this context, clause 7.5 of the PPA is important. Clauses 7.1 and 7.2 provide for the determination of the Queensland Racing Calendar and the Queensland Racing Program. Clause 7.5 then provides:

> "Exclusivity of Supply of Queensland Racing Calendar and Queensland Racing Program
>
> (a) Product Co will be the exclusive supplier to TABQ for the Race Wagering Business of the Queensland Racing Calendar and the Queensland Racing Program.
>
> (b) Subject to sub clause (c), Product Co and the Queensland

30 inferentially by the way it has conducted its examination of witnesses

Control Bodies will not (and will ensure that each Queensland Racing Entity does not) supply the Queensland Racing Calendar or the Queensland Racing Program to any other person for any use directly or indirectly relating to wagering on Racing without the prior written consent of TABQ, which consent shall not be unreasonably withheld where no amount is payable or other consideration of benefit is directly or indirectly received for or in respect of such supply (other than reciprocal supply of Australia Racing Information to any Interstate Racing Entities where no amount is payable or other consideration or benefit is directly or indirectly received) and where it is considered by TABQ acting reasonably, beneficial to the Race Wagering Business

(c) Product Co, the Queensland Control Bodies and the Queensland Racing Entities are permitted to provide the Queensland Racing Calendar and the Queensland Racing Program to those persons specified in Schedule 4 (but only such part of such information and at such times and for the purposes it is provided as at 20 May 1999) provided however that the Product Fee, in accordance with clause 10.2(d), reduces by such amounts payable or other consideration or benefit, directly or indirectly received (which does not include reciprocal supply of Australian Racing Information where no amount is payable or other consideration or benefit is directly or indirectly received) by any Queensland Racing Entity, any Queensland Control Body or Product Co.;

(d) Product Co and the Queensland Control Bodies shall provide to TABQ on request of TABQ information concerning the provision of the Queensland Racing Calendar to any other persons including all terms of any relevant arrangements."

40. Therefore, it is plain that Product Co is not permitted to supply for use the Queensland Racing Calendar or the Queensland Racing Program to anyone other than Tatts, and receive payment for it. A fee paid under the Queensland legislation would be indirectly received for the supply and use of this product. One might be forgiven for thinking that the draftsman of the PPA inserted this clause with an eye to the demise of the Gentlemen's Agreement.

41. There is, as some witnesses explained, a 'carve out' for the supply, again without fee, to entities such as interstate control bodies, and those persons mentioned in Schedule 4. However, the supply to corporate bookmakers, betting exchanges, or interstate totalisator organizations is not part of this carve out.

42. Clause 9.4(b) of the PPA provides:

> "Subject to clause 7.5(b) Product Co and the Queensland Control Bodies will not (and will ensure that each Queensland Racing Entity does not) supply or grant any rights in relation to Australian Racing Product, Australian Racing Information, Audiovisual Television Coverage or the Marketing Rights to any other person for any use directly or indirectly relating to wagering on Racing without the written consent of TABQ."

43. If there be need to do so, this strengthens the argument under clauses 7.5(b) and (c) of the PPA.

44. Clause 9.5 PPA deals with the position where there is an inability by Product Co to supply Australian Racing Product. It provides:

> "If Product Co cannot procure the Australian Racing Product it is required to supply to TABQ or cannot comply with the requirements of TABQ in relation to the format in which TABQ requires Australian Racing Information pursuant to clause 9.3 then for the period TABQ reasonably believes, after consultation with Product Co, Product Co will not be able to procure Australian Racing Product, TABQ may procure the equivalent of the Australian racing product from any other source and incur a Third Party Charge."

45. Clause 9.5(c) then provides:

> "TABQ may pay any Third Party Charge incurred pursuant to clause 9.5(a) and the Product Fee, in accordance with clause 10.2(c), will correspondingly be reduced by the amount of that Third Party Charge"

46. By clause 10.2 of the PPA Tatts is irrevocably authorized to deduct and set off from the fee payable pursuant to clause 10.1 of the agreement:

(c) the Third Party Charge;

(d) the amount calculated in accordance with clause 7.5(c).

47. Whilst there is nothing in clause 10 regarding a deduction for monies received in contravention of clause 7.5(b), it seems clear that Tatts would be entitled to claim compensation for such receipts under clause 12.5 PPA.

48. The enactment of the amendments to the Queensland legislation in December 2008 does not seem to constitute a force majeure under clause 15 of the PPA. Therefore, it is certainly strongly arguable that any monies collected by Product Co (or any other control body) under the Queensland legislation would, in the absence of Tatts agreeing to the contrary, have to be remitted to Tatts.

49. The dealings that occurred between Tatts and Product Co or QRL, and between directors of Product Co or QRL[31] need to be looked at against the whole of the background and the PPA, and not with a focus on one or two clauses, as the Commission has apparently done.

50. Mr Tuttle's belief, in his April memorandum, is that Tatts would be entitled to deduct any fee paid by it to Racing NSW under the NSW legislation.

51. Mr Bentley said that his understanding of the PPA was the same[32], and T2-64 to T2.65 referring to Tuttle's memo 28 April 2008 and he didn't think that anyone else laboured under any different impression. Tatts certainly considered that it had a right to deduct NSW race field fees[33]

52. Mr Lambert certainly held the same view. He said[34]:

> "Can you say whether, at the time the Product and Program Agreement was drafted, that consideration was given to what would occur if the gentleman's agreement broke down?--- I believe that was considered, and I believe the basis on why there was a statement in

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31 and perhaps between directors of the other codes, although they have been largely ignored by the Commission in the public hearings

32 T2-64, 65

33 Bentley 43

34 T9-22.30

the agreement that if the TAB had to pay fees to a third party, there could be an offset. That was the broad intention."

53. In his oral evidence Mr Lambert accepted that if Product Co. derived a fee from the provision of information to others (apart from Tatts) that is deducted off the fee Tatts has to pay[35]. He was an advisor to the Government on the privatization of the TAB, and thought that the PPA was drafted bearing in mind the Gentlemen's Agreement.

54. Mr Andrews had the same understanding, and believed that so did the other directors of Product Co.[36]

55. On 1 July 2008, Mr Lambert circulated a paper that he had prepared[37] analyzing the potential implications of the New South Wales legislation for a board meeting of QRL on 4 July 2008.

56. In his paper, Mr Lambert:

    a. Noted that in each jurisdiction TABs have been the prime source of funding each jurisdiction's racing industry with the funding in the form of a product and program fee set at a given percentage of wagering turnover;

    b. Noted that in the case of Queensland, the fee is set on wagering turnover by Queensland residents on UNiTAB on all Australian and overseas racing;

    c. Recites his understanding of the "Gentlemen's Agreement';

    d. Says that the UNiTAB agreement with Queensland states that the fee paid to QRL covers turnover on all racing product by Queensland residents, regardless of the location of racing and that in the event that any jurisdiction seeks to impose a fee on their racing product then UNiTAB will net off that fee against the fee payable to QRL;

35 T9-22.10

36 T9-5.25

37 Bentley 38; Tuttle 4

e. Sets out his understanding that the purpose of the NSW legislation was to allow each of the NSW control bodies to impose a fee on the use of NSW racing information for wagering purposes;

f. Sets out his understanding of the way the NSW legislation works;

g. Says that a 'first round' effect of the imposition of a fee by NSW Racing will be that UNiTAB will deduct from its fee payable to the racing control body in (relevantly) Queensland the amount paid by it to Racing NSW.

57. Mr Lambert's memorandum was presented to the board of QRL at its meeting on 4 July 2008[38]. Mr Bentley obviously received a copy. It is recorded that the board agreed with Mr Lambert's interpretation of the NSW legislation.

58. Discussions were obviously taking place at this time between the relevant participants in the Australian racing industry.

59. By letter dated 24 July 2008[39] UNiTAB wrote to Mr Tuttle and, after referring to correspondence with Racing NSW, and its intention to impose a fee to publish NSW thoroughbred race fields, said:

> "Clauses 9.5 and 10.2 of the Product and Program Agreement relevantly provide that should Product Co be unable to procure the supply of Australian Racing Product as required by UNiTAB, UNiTAB may reduce the product fee payable to Product Co by any amount required to be paid by UNiTAB to procure the Australian Race Product for use in its race wagering business . . .
>
> Please accept this letter as written notification that should UNiTAB be required to pay the NSW Race Fields Fee or any similar fee to Racing NSW, UNiTAB will off-set this amount against the product fee payable to Product Co.
>
> . . .

38 The minutes of which are Bentley 39

39 Bentley 44; Tuttle 5

> In the event that you come to the view that Racing NSW wishes to remain intransigent on this matter, you may like to consider whether an approach to the Queensland Government to introduce like legislation will assist you in compensating for some or all of the losses incurred as a result of the NSW legislation."

60. Mr Tuttle believes that he probably told Mr Bentley about this letter[40]

61. Mr Bentley immediately wrote to Mr Fraser, the Queensland Treasurer, about introducing Queensland legislation[41]. He had previously discussed the topic with him. That is not the actions of a man who has been accused of acting against the interests of Queensland racing. He was immediately trying to put in place a way for Queensland racing control bodies to collect revenue, which he knew would likely exceed the amount that could be deducted by Tatts.

62. Mr Bentley initially denied that he played any role in relation to Queensland race fields legislation[42] although he qualified this by saying that he made the government aware of the problem[43]. There was nothing inappropriate in Mr Bentley raising, as a matter of concern with government, the need to introduce race fields legislation. In doing so, he was plainly acting in the best interests of Queensland racing. Mr Hanmer later took up corresponding with the government regarding the introduction of race fields legislation in Queensland.

63. In this regard, it should be pointed out that three propositions were put to Mr Bentley that were plainly wrong:

    a. First, it was suggested that the Queensland legislation never had the effect of making bookmakers contribute to the industry[44]. That is contradicted by the annual reports of the control bodies;

    b. Secondly, that when he promoted the legislation to the Queensland government, Mr Bentley knew that the outcome was only going to be

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40 T10-18.44

41 Letter 29 July 2008: Bentley 45, see also T2-84 and Bentley 54

42 T2-62.25

43 T2-63.15

44 T2-76.10

that Queensland comes back to line-ball[45]. Again, this belies the financial documents;

c. Thirdly, that despite the introduction of Queensland Race Fields legislation it never happened that Queensland Racing received additional revenue[46] – that is simply incorrect.

64. A board paper was prepared for the 8 August 2008 meeting of the board of QRL[47]. Its purpose was to determine the approach that QRL should take at the next meeting of the Australian Racing Board on 14 August 2008. It repeats what is extracted at paragraph 56 above and largely repeats Mr Lambert's earlier memorandum. On page 6 it states:

> "Racing NSW has access to data that has enabled [it] to make some broad assessments of the financial impacts once legislation is in place in all jurisdictions and allowing for additional non-TAB revenue. Their assessment is as follows:
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> - NSW, Victoria and Queensland are big winners . . . On NSW's calculations, if Queensland was to introduce similar legislation, it would achieve a positive financial outcome at a wagering rate set at or above 1.2%, excluding any consideration of non-TAB wagering. The addition of non-TAB wagering would provide a significant net benefit to Queensland. Racing NSW assesses the net benefit to Queensland at between $15M to $20M per annum
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> - . . . ."

65. On 4 October 2008 the Queensland Government announced[48] it would introduce similar race fields legislation, and intended it to be retrospective to 1 September 2008. That, it was thought, would bring Queensland into line with other States.

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45 T2-86.40

46 T2-76.10 - 45

47 Bentley 47

48 Bentley 55

66. Therefore, within a little over two months after receipt of the letter from UNiTAB foreshadowing a deduction under the PPA, Mr Bentley, and others at QRL, had achieved the agreement of the Queensland government to the introduction of race fields legislation in this State.

67. On 7 October 2008 Mr Tuttle requested Mr Carter[49] and Ms Murray to prepare a paper for Product Co. on the racefields legislation[50]. Mr Carter assessed the likely financial impact of the NSW legislation[51].

68. It was suggested to Mr Bentley[52] that he was involved at this time in discussion with Ms Tracey Harris and Mr Ron Mathofer about financial modeling concerning the likely impact of race field fees, and the deduction of fees paid interstate by Tatts. Mr Bentley was shown a supplementary statement of Mr Harris. He denied being involved in the discussions. Mr Bentley's denial should be accepted. Mr Hanmer did not recall such a meeting[53]. The Commission deliberately chose not to call Ms Harris to give evidence. Despite being requested to do so, it also refused to call Mr Mathofer and Mr Adam Carter.

69. Although Mr Bentley initially eschewed any involvement in discussions with the Queensland government regarding race fields legislation[54], there was nothing improper in him doing so. There is no evidence that Mr Bentley did anything other than encourage the government to bring in such legislation. He did not seek to exert influence in the sense that the legislation was drawn to favour Tatts. It plainly favoured Product Co. and the Queensland control bodies. Ultimately, Mr Bentley contended that there was no conflict in him raising the need for race fields legislation with government, because he was not part of the decision-making process in deciding to enact that legislation[55]. Mr Bentley was correct.

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49 Mr Adam Carter, the CFO of QRL

50 Tuttle 6

51 RQL.101.103.1195

52 T2-60.15, 34, 45; T2-60.12

53 T7-9

54 T2-62.30; T2-56.35

55 T2-84.45

70. The likely deduction by Tatts of fees paid by it to Racing NSW and others was therefore not a surprise to Product Co or QRL[56], nor was the likely amount of that deduction, which was calculated.

71. On 8 October 2008 Mr Bentley apparently spoke by telephone to Mr Grace[57] in which he discussed the PPA. The note contains:

> "if problem – renegotiate with Unitab/Tattersalls – role – me – not Tony Hamner"

72. It was suggested in the examination of Mr Bentley by Senior Counsel Assisting the Commission[58] that the "me" in this note was Mr Bentley. This was to convey the sinister interpretation that Mr Bentley was taking control of the negotiation with Tatts, which would have been inappropriate given his potential conflict of interest, discussed below. Subsequent enquiry with Mr Grace revealed that this interpretation was incorrect and the "me" referred to Mr Grace[59].

73. It was also wrongly suggested to Mr Bentley[60] that he went to see Mr Grace on this date, but it is clear from Mr Grace's file note [61] that it was a telephone conversation.

74. Mr Bentley did not recall speaking to Mr Grace on 8 October 2008, but it must be accepted that he apparently did so.

75. At the 13 October 2008 meeting of Product Co the minutes[62] reveal that Mr Carter and Ms Murray provided an update to the Board on various matters.

76. It was put to Mr Bentley that he attended this meeting of Product Co[63]. Mr Bentley denied doing so. He denied ever attending a meeting of Product

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56 or, it is assumed to the other control bodies

57 Bentley 56

58 T2-97.28

59 T3-2.45; The Commission was urged to contact Mr Grace T3-5.10. Apparently, it has not done so

60 T2-96.5-15; T3-6.35-45

61 Bentley 56

62 Tuttle 8 (also Bentley 270)

63 T2-98.37

Co.[64]The proposition put to Mr Bentley derived from two draft sets of minutes of the Product Co. meeting, which had Mr Bentley's name handwritten in[65]. No other witness agreed that Mr Bentley had attended this meeting[66]. Mr Hanmer suggested the draft minutes were inaccurate, possibly because they were prepared by Ms Donna Biddle. Mr Hanmer suggested that the Commission speak to Ms Biddle about the draft minutes. It has not done so. There are some peculiarities in the draft minutes, as if sections have been copied from elsewhere. Mr Bentley is recorded as disclosing his interest as a director of the Sunshine Coast Racing Trust. That had nothing to do with Product Co. business. The third page of document Bentley 58 is obviously not part of the minutes.

77. In light of such evidence, no finding can be made that Mr Bentley attended this meeting of Product Co. The fact that at a subsequent meeting those present may have approved the earlier minutes which included a recording of Mr Bentley disclosing his interest as a director of the Sunshine Coast Racing Trust (being the irrelevancy referred to above) is beside the point. There was obviously an administrative oversight.

78. With respect to the final draft of the minutes of the meeting, it was suggested to Mr Bentley[67] that 'somebody has not put in your attendance for one reason or another'. This was to suggest a sinister connotation when, with respect, none was open. An equally compelling hypothesis is that Mr Bentley was not at the meeting, and the minutes were corrected to accord with that. This is but another instance of, where two possible outcomes are possible, Senior Counsel Assisting being prepared to suggest the one unfavourable to Mr Bentley, and not countenance the possibility that he may be telling the truth.

79. Product Co. wrote to the Treasurer, under the hand of Mr Hanmer, on 14 October 2008[68] keeping him updated on what was occurring regarding race field fees. This accords with Mr Bentley's evidence that he left it to Mr

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64 T2-38.10

65 Bentley 58, Bentley 269

66 Hanmer at T7-2.15; Tuttle T10-20 - 30. Mr Lambert thought that Mr Bentley attended one meeting of Product Co, but in 2009, about race field fees: T9-23.10; 9-23.25

67 T2-100.15

68 Bentley 60

Hanmer to liaise with government, once he had alerted government to the need to enact race fields legislation[69]

80. On 23 October 2008 Mr Tuttle advised members of the Board of Product Co about a meeting he had attended with Government about the proposed race fields legislation[70]. Mr Tuttle thought that the email went to Mr Bentley[71], although Bentley had no recollection of seeing it[72]. There was nothing wrong with Bentley knowing about this information.

81. Mr Tuttle discussed the matter further with Mr Grace on 29 October 2008, and sent him a briefing note, presumably in anticipation of a meeting[73]. After referring to UNiTAB deducting fees it was paying to Racing NSW from the fee under the PPA it said:

> "Refer to PP agreement 10.2(c). We need to confirm that UNITAB is entitled to do this. I suspect that 7.4(f) confirms this without doubt but would like to be certain."

82. Importantly[74], after referring to the proposed Queensland legislation and charges that will be imposed in reliance on it, the note says:

> "My concern in this regard is with PP agreement 7.5(c) which seems to indicate that we can provide the Qld Racing Program but if we receive payment it is also deducted off the Product fee payable by UNITAB, If required the draft Bill will need to override this provision of the PP agreement."

83. Mr Tuttle said that his main concern was in ensuring that "we can charge a fee based on turnover and that the revenue we would be due to receive is not deducted by UNITAB from the Product Fee."

84. That is, like Mr Bentley, Mr Tuttle was striving to ensure that Queensland racing was not worse off by the introduction of Queensland race field fees.

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69 T2-63.15

70 Bentley 61; Tuttle 9

71 T10-25.34

72 T3-13.5

73 Bentley 271; Tuttle 10

74 Particularly having regard to the analysis of the PPA referred to earlier in these submissions

85. It is evident that Mr Bentley and Mr Tuttle met with Mr Grace on 31 October 2008[75]. Although he did not recall it, Mr Bentley accepted that he attended this meeting[76]. Mr Grace was not called to give evidence, and his file note of this meeting does not assist in explaining what advice was given, if any, at this meeting[77]. Mr Tuttle gave evidence that Mr Grace did not express any firm views at the meeting itself. Mr Tuttle said that the meeting primarily involved the race fields legislation to be introduced in Queensland[78].

86. Mr Bentley accepted, with the benefit of hindsight, that what was discussed with Mr Grace at the meeting on 31 October 2008 fell within the area in which he had a potential conflict[79]. He conceded that perhaps he should have stayed further away from the matter[80]. However, as will shortly become clear, Mr Bentley was criticized by counsel assisting both for being involved, and also for not being involved in the matter further.

87. It was put to Mr Bentley that at the meeting Mr Grace explained his advice to him. This was an extraordinary proposition to put, given that Mr Grace was not called, or even interviewed by the Commission, to form a basis for the proposition. Mr Grace's file note certainly does not bear out the proposition put to Mr Bentley, and it should be flatly rejected.

88. It is accepted that there must have been some discussion of the clauses of the PPA and their potential effect at the meeting because on 1 November 2008 Mr Bentley wrote to Dick McIlwain[81] of Tatts and said:

> "David Grace of Cooper Grace Ward is acting for Queensland Racing and will contact you as soon as possible on Monday morning to discuss what appears to be an unintended outcome of the race fields legislation as it relates to clause 7.5(d) and clause 10.2(c) of the Product and Programme Agreement.

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75 Grace diary note of this meeting is Bentley 62; Tuttle 11. See Bentley's evidence at T2-33.35. Interestingly, Mr Grace's fee note (Bentley 99) makes no reference to any meeting on 31 October. This discrepancy could not be explored because Mr Grace was not called to give evidence.

76 T3-17.20

77 Bentley 62

78 T10-11.27

79 T3-18

80 T3-23.20

81 Bentley 63; Tuttle 12

> Malcolm Tuttle is handling the issue for Queensland Racing and is available and authorized to discuss the matter for Queensland Racing."

89. Mr Bentley volunteered that he had sent the email[82]. Despite the suggestion to the contrary[83], there was nothing improper in him doing so. Mr Bentley said that he sent the email to Mr McIlwain out of courtesy, as he had known him for 25 years, and thought it appropriate to tell him that he was going to be contacted by Mr Tuttle and Mr Grace[84]. Senior Counsel Assisting made much of this email. He accused Mr Bentley of liaising with Tatts as to what QRL's advice was[85]. He accused Mr Bentley of assisting Tatts to the detriment of Product Co[86]. Yet later, Mr Bentley was criticized for not providing Mr Grace's advice to Tatts[87].

90. Two observations can immediately be made about the email. First, there must be a real question whether Mr Bentley drafted its content. The content is typed in lowercase, whereas every other document that has been generated by Mr Bentley (including the subject matter line of this email) is invariably in uppercase. The importance of whether Mr Bentley drafted it relates to the second point, because there is no disputing that Mr Bentley sent the email to Mr McIlwain. The second point is that there is obviously an error in the clause numbers referred to in the email. That may be because the drafter of the email did not have a clear recollection of what Mr Grace had said the day before. It is submitted that the email most likely intended to refer to either clause 7.5(b) or (c), and to clause 10.2(d).

91. It was suggested to Mr Bentley that he spoke with Mr McIlwain immediately after sending the email. Mr Bentley denied that fact. The Commission made no apparent attempt to take a statement from Mr McIlwain, or call him to give evidence about this, amongst many, matters. It did not apparently seek to interrogate phone records. It was suggested to Mr Bentley[88] that it 'beggared belief' that he did not speak to Mr McIlwain on 1 or 2 November. It was said that the documents "don't stack up too well against you". This is another

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82 T2-32.45; T4-5.30

83 T3-20

84 T2-33.25

85 T3-20.25; T3-22.10

86 T3-20.25

87 T3-37.14

88 T3-26

example of counsel assisting focusing on the sinister possibility, when there was an equally plausible possibility – namely, that Mr Bentley did not speak to Mr McIlwain as was suggested. There is absolutely no evidence that he did. Of course, Mr Bentley accepted that he later spoke to Mr McIlwain, in the course of meeting him at Tatts' board meetings, but that is not what counsel assisting was suggesting.

92. Counsel assisting contended[89] that the 'unintended outcome' referred to in the email was the deduction of fees paid by Tatts to NSW Racing and doubted that it could be read any other way[90].

93. Notwithstanding Mr Tuttle's apparent acceptance of this construction, given that he was confronted with documents in the witness box without the benefit of any earlier consideration of them, it is plainly not correct. It is most unlikely that the reference to an unintended outcome was to the fees paid by Tatts in NSW being deducted from the fee payable under the PPA. That is because every witness who was asked accepted that this was entirely expected and accorded with the commercial intent of the PPA. It couldn't therefore be described as 'unintended'. Rather, the correct construction of the email is that the "unintended outcome" most likely referred to the fact that race field fees collected by Product Co may have to be remitted to Tatts under clause 7.5 of the PPA. That this is the correct or preferred construction is underscored by the reference to clause 7.5(d). Although the sub-clause may be wrong, reference to clause 7.5 at all is only explicable if what was being discussed was money received by Product Co. from the sale of information to entities other than Tatts.

94. This construction is further underscored by what happened next. Approaches to Tatts resulted in it agreeing that it would not 'double dip', meaning that it would not seek to both deduct fees it paid under interstate legislation, and also insist that the Queensland control bodies remit to it any monies they collected under the Queensland legislation.

95. On 3 November Mr Tuttle emailed Mr Grace asking him to call him "re Dick McIlwain". He continued:

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89 T10-28-20

90 T10-29.18

> "My understanding is that we may be able to sort this out with an initial call and a follow up letter"[91]

96. By reason of what followed in the next couple of weeks, this plainly referred to sorting out the retention by Product Co. of fees collected under the Queensland legislation, notwithstanding the terms of the agreement.

97. There was a discussion between Mr Grace and Mr McIlwain on 3 November 2008[92] in which they discussed various parts of the PPA, including Schedule 4, 7.5(b), 7.5(c), and the 7.5(b) consent required. Mr Grace drafted a letter on 3 November[93] which included:

> "Following our conversation today, it is my understanding that should any legislation be introduced in Queensland, enabling the control bodies in Queensland to charge wagering operators a percentage of wagering turnover or gross wagering revenue, (Race Fields Legislation or similar), that Tattersall's (UNiTAB), will not deduct the equivalent to any fee or benefit received by the control bodies in Queensland, or Product Co, from the Product fee payable to Product Co. in accordance with the Product and Program agreement."

98. Neither Mr Grace nor Mr McIlwain was called to give evidence about this discussion. Mr Tuttle said[94]:

> "The way that is written and conveyed to Dick McIlwain: it simply confirms an understand that if we introduced race information legislation in Queensland and we charge for the use of that information that we're able to retain that revenue that's generated and that that revenue will not be deducted from the funds that flow from the Product and Program Agreement. I don't believe this deals with the so-called third party charge."

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91 Bentley 65; Tuttle 14

92 David Grace file note is Bentley 66

93 Bentley 67; Tuttle 15. This letter was sent several days later: Bentley 75

94 T1-31.40

99. On 4 November 2008 there was a telephone conversation between Mr Grace and Mr Tuttle and Mr McIlwain. Mr McIlwain reported this conversation to Anne Tucker, corporate counsel for UNiTAB[95]:

> "David Grace and Malcolm Tuttle called this morning. They now consider that 7.5(c) applies only to entities listed in Schedule 4 and that 7.5(b) applies to the supply of Racing information to other racing bodies. They also said that the legislation only refers to charging for using the product not supplying race fields. Eerie eh! Consequently they are now OK.
>
> . . . I told them that we would give them approval to supply the information for the purpose of recovering our deductions from the PPA anyway. I made it clear that I didn't believe that the PPA ever contemplated that we could double dip and that it wasn't our intention to double-dip in any event."

100. This email is consistent with the earlier discussions, and documents, to the effect that QRL was attempting to have Tatts agree and commit to a position whereby Product Co. will be entitled to retain fees collected under the Queensland legislation, rather than remit them to Tatts.

101. It is also apparent from an exchange, that Senior Counsel Assisting did not appreciate the import of Tatts not 'double dipping'[96]

102. It was suggested to Mr Bentley that this email[97] records Mr McIlwain "thinking he's pulled the deal off"[98]. In fact, that is a quite unfair characterization of the discussions because, as discussed already, this 'deal' substantially benefits Product Co. and the control bodies.

103. There is also no sinister connotation to the words "Eerie eh" because they probably refer to the sort of arguments run in cases such as *Waterhouse v Racing NSW* which sought to draw such a distinction between use and supply. However, it would be nothing more than speculation to put meaning

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95 Tuttle 16

96 T7-19.35

97 Bentley 68

98 T3-29.1

to those words in the absence of calling the author of the document, which the Commission has steadfastly chosen not to do.

104. Mr Tuttle explained his understanding of what had occurred[99]:

> "Well, my recollection is that we were able to establish a position for the industry where the industry was able to retain the funds collected from race information legislation without completely committing to a third-party charge.
>
> Sorry, can you explain that a little bit more, please? --- My recollection of the initial engagement with Tattersalls was certainly to discuss all of this because this was coming up, but for the TAB, but as a result of all of this we were able to secure a position from the TAB where it had provided its consent in respect of 7.5(b) and (c), that revenue raised as a result of race information legislation could be retained by the industry and that Tattersalls wouldn't lay claim to any of the fees collected, and 7.5(b) and (c) relate to that."

105. And he said further[100]:

> "As a result of what he's saying here is that's the 90 there, but you can keep the 117 million that will have been generated during the period of this inquiry, so the relevant figure is 117 million that the racing industry can retain, and the TAB for the period of this Commission of Inquiry has deducted 90 million. What McIlwain is saying there is that they're not just going to deduct the 90 million and lay claim to 117 million, he's saying you keep that but we will deduct that. That's the view he has; the view I had coming away from here is that he we had reserved a position in respect of the third-party charge, the figure of the 90 million."

106. In other words, Mr Bentley, Mr Tuttle and Mr Grace had engineered a position whereby the Queensland racing control bodies were substantially better off.

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99 T10-33.1

100 T10-33.40

107. At the meeting of QRL on 7 November 2008[101] the matter of race field legislation was discussed. Mr Bentley is recorded as having removed himself from any decision or discussion on this item. Mr Tuttle said that he understood this to mean that Mr Bentley did not leave the room, but did not take part in any discussion[102].

108. At the board meeting[103], the directors of QRL authorized Mr Tuttle to seek advice about the impact of race fields fees. This was ratification of what Mr Bentley and Mr Tuttle had already done, with Mr Grace.

109. It was suggested to Mr Bentley[104] that he did not disclose anything at the board meeting on 9 November 2008 because 'the deal' had already been done with Tatts. This was strongly denied by Bentley, and his denial should be accepted.

110. Mr Grace then sent a letter to Mr McIlwain on 11 November 2008[105]. This letter is important. It states, in part:

> "We confirm that we discussed clause 7.5(c) of Product and Program Agreement (PPA) and we confirm that we agreed with your view that such clause refers to the provision of the Queensland Racing Calendar and the Queensland Racing Program to persons specified in Schedule 4
>
> . . .
>
> We further note your comment that if Unitab was requested to consent to the supply of information for a consideration or benefit, it was not the intention of the agreement that there be a provision for double dipping and that you would consent to the provision of Australian Racing Information even if a consideration or benefit was to be directly or indirectly received by Queensland Racing Ltd, or Product Co."

111. It can be seen that Mr Grace's letter reflects the language of clause 7.5(b) of the PPA. This confirms the commercial resolution of a potential problem as

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101 Minutes are Tuttle 17

102 T10-35.27

103 Bentley 70

104 T3-32.5

105 Bentley 75

a consequence of the introduction of race fields legislation, to QRL's financial advantage.

112. The advice from Mr Grace dated 18 November 2008[106] on which so much attention has been focused, concluded that Tatts was not entitled to deduct, as a third party charge, the race fields fee that it paid to Racing NSW. The reasoning of Mr Grace appears to be as follows:

a. In essence, the PPA makes provision for, inter alia, the supply of certain information by Product Co to UNiTAB;

b. Under clause 7.4 of the PPA, Product Co. consents to the use by UNiTAB of the Queensland Racing Calendar and the Queensland Racing Program solely for the conduct of its Race Wagering Business;

c. The effect of sub-clause 7.4(f) is to permit UNiTAB to acquire any of the information or rights to use specified in the sub-clause in respect of Racing from any other party;

d. Clause 7.5 provides an exclusivity regime;

e. The supply of the Queensland Racing Calendar or the Queensland Racing Program to others is prohibited without the prior consent of Tatts. Mr Grace opines that this prohibition would "**include the supply of information to corporate bookmakers or to clubs outside of Queensland for the purpose of the conduct of racing galloping horses (as relevant to your code of racing)**" where an amount is payable or other consideration or benefit is directly or indirectly received. (emphasis added)

f. If a consideration or benefit is received the Product Fee reduces in accordance with clause 10.2(d) by such amounts as are payable or other considerations or benefits directly or indirectly received;

106 Bentley 80. The advice was earlier sent in draft (Tuttle 19). This is despite Senior Counsel Assisting asserting at T4-4.24 that the Commission had not been provided with the draft advice. It was in fact in the folders of documents put to Mr Bentley at Bentley 76

g. Under clause 10.2(d) UNiTAB is irrevocably authorized to deduct and set off from the fee payable pursuant to clause 10.1 the amount calculated in accordance with clause 7.5(c);

h. Clause 7.5(b) applies to the supply other than to persons set out in Schedule 4;

i. Clause 10.2(c) authorizes a deduction or an offset from the Product Fee of, inter alia, a Third Party Charge;

j. Clause 10.1 is quite specific about adjustments to the payment of the fee. It says only "subject to clause 10.2 . . ." It does not make it subject to any other clause, "and it is reasonable to assume that had it been intended that the fee payable, if it was to be affected by any other specific or general clause of the contract, it would have said so. The fact that the draftsman chose to confine the language of the adjustment to just clause 10.2 and nothing else, lends itself to the proposition that the extent of adjustment rights was to those matters outlined in clause 10.2 and nothing else;

k. Section 33A of the NSW legislation charges a fee for the publication of race field information (which is purchased from RISA);

l. The proposed Queensland legislation empowers the imposition of a fee for the use of information;

m. On the basis that the New South Wales legislation imposes a charge for the publication of information and not the supply of information, the amount payable is not for the "obtaining" of the Australian Racing Product or the "procuring" of it as provided in the definition of "Third Party Charge" in clause 1.1 of PPA;

n. The PPA makes express provision in clause 7.1 for the **supply** of the Queensland Racing Calendar and in 7.2 for the **supply** of the Queensland Racing Program and then after dealing with intellectual property rights in clause 7.3, specifically and separately deals with the permitted **use** of that information, then clause 7.5 deals with

restrictions on Product Co.'s and the Queensland Racing's **supply** of information elsewhere.

o. The amendments to the Queensland legislation do not authorize Queensland Racing to impose a charge on the supply of information. Indeed, Queensland Racing does not supply Australian Racing Product to other bodies, rather RISA supplies the information. The legislation imposes a right on Queensland Racing as the control body under the *Racing Act* to charge a fee for its use. That is, RISA will charge a fee for the supply of information but Queensland Racing, pursuant to its rights created by statute, will be empowered to impose a charge for its use subject to the provisions of clause 113E(6) of the draft Bill . . .

p. This charge is a new charge and is not one dealt with by PPA.

q. At summary point 3 on page 5:

> "In our opinion, the amount of the Product Fee payable under 10.1 will not be the subject of any offset or deduction under 10.2(c) as and by way of a Third Party Charge (as defined under the PPA) where that fee is not paid for obtaining or procuring the amount but rather for the use of publication of it under legislation empowering that body to charge a fee in respect of the publication or use of that information, as distinct from obtaining or procuring it;

r. The effect of the proposed Queensland legislation prevents 'double dipping' from QRL's point of view;

s. It is the intent of Parliament that the financial arrangements within Wagering be restructured to provide a benefit to industry through payments raised by the control body pursuant to the amending legislation. Accordingly, it is quite proper that these charges be collected without deduction. They are a charge imposed under statute which alters the way industry is funded by transferring a part of the wagering turnover to the industry control body for the benefit of the industry it serves;

t. Because the PPA has different paragraphs for “supply” and “use” this is consistent with those terms being seen as separate and distinct functions.

113. It can immediately be seen that Mr Grace’s opinion relies on a distinction being drawn between the use and supply of information, and is a highly technical, and some may argue un-commercial, construction of the PPA. Mr Grace has made no attempt to analyse the PPA according to the objective intent of the parties to it. It should also be noted that it does not appear that Mr Tuttle gave instructions to Mr Grace in relation to the historical context of the PPA and the understanding that had existed well before the PPA was entered into that the ‘Gentlemen’s Agreement’ would likely come to an end.[107]

114. It can also be seen that Mr Grace has not dealt with Product Co.’s right to retain race field fees collected under the Queensland legislation. That is explicable because, as the above discussion has revealed, an arrangement had already been made with Tatts about that.

115. Quite extraordinarily, no reference was made during questioning of Mr Bentley, Mr Hanmer or Mr Tuttle to the letter from Mr Grace of 3 February 2009[108] which states:

> “We refer to our telephone discussion with you of 2 February and to the Product and Programme Agreement made between UNiTAB (then TABO), Product Co and the three Queensland control bodies on 9 June 1999 (Agreement).
>
> The Agreement provides, *inter alia,* that there is a definition of "Australian Racing Product" which means Australian Racing Information in the format specified by TABQ to Product Co in accordance with clause 9.3 of the Agreement.
>
> Australian Racing Information means all the information relating to Racing in Australia that is necessary for the efficient and effective conduct of Race Wagering on Racing in Australia and includes information of the nature set out in Schedule One of the Agreement.

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107 Tuttle (23.10.13) paragraph 21

108 RQL.123.011.0482

Clause 9 of the Agreement deals with the supply of Australian Racing Product.

By clause 9.1 Product Co must supply Australian Racing Product to TABQ. The terms of clause 9 set out the timing and format of the information to be provided and by clause 9.4 Product Co is the exclusive supplier of Australian Racing Product to TABQ.

Clause 9.5 deals with the position where there is an inability to supply Australian Racing Product.

It provides that if Product Co cannot procure the Australian Racing Product it is required to supply to TABQ then TABQ may procure the equivalent of the Australian Racing Product from any other source and incur a Third Party Charge, defined to mean the amount of any fee payable or other consideration given by TABQ to obtain the equivalent of the Australian Racing Product and the costs and expenses incurred by TABQ from procuring it from another source.

The amount of that charge must be reasonably commercial in the circumstances, having regard to the need to maintain continuity of Australian Racing Product.

The amount of the Third Party Charge will be set off against the Product Fee.

By clause 10.2 TABQ is authorised to set off from the fee payable under 10.1 the amount of any Third Party Charge. 10.1 provides the amount of fee to be paid by TABQ to Product Co in respect of its performance of its obligations under the Agreement.

That is an amount of $2,833,333 per month and a variable amount equal to 39% of the Gross Wagering Revenue for the month (or pro rated for any part of the month) for which the Agreement applies.

Accordingly, the amount of back charge from TABQ appears to be lawful under the Agreement, subject to it being set off against the amounts of charge. There does not appear to be any provision under the Agreement

by which it should be paid by a Queensland Control Body, but rather that it be set off against the amount payable by TABO to the Queensland Control Body through its agent, Product Co under the Agreement."

116. This letter appears as exhibit "ABC-277" to the statement of Adam Carter, who simply says, at paragraph 253 of his statement that:

> "On 3 February 2009, Cooper Grace Ward provided a further advice to QRL."

117. Neither Mr Grace, who was not called to give evidence, nor Mr Carter, nor Ms Murray has addressed this letter. Mr Tuttle referred it to in passing[109]. The solicitors for Tatts in their submission to the Commission of Inquiry have referred to it. The failure to put this letter to any of the witnesses or seek to explain it is inexplicable.

118. Despite including it in the bundle of documents on which Mr Bentley was examined, the Commission chose not to reveal to Mr Bentley, Mr Hanmer or Mr Tuttle that an advice had subsequently been obtained by Tatts from Mr Gibson QC dated 2 May 2013[110]. Mr Gibson advised that in consequence of the enactment of the race fields throughout Australia, Product Co. was and is no longer able to procure Australian Racing Product for Tattsbet for use in its business as it was obliged to do by clause 9.1 of the PPA. Instead TattsBet has been required to pay additional fees to secure the right to use that information in its business[111]. Mr Gibson further advised that the information which, since 2008, TattsBet has been obliged to obtain from sources other than Product Co. is information that is Australian Racing Product as defined in the PPA[112]. Accordingly, Mr Gibson advised that the practical consequence of the legislation, throughout Australia, is that Product Co. has been unable to procure the Australian Racing Product it is required to supply to TattsBet for use in its business, and TattsBet has had no alternative other than to procure the equivalent of the Australian Racing Product from Queensland Racing and equivalent interstate racing bodies, and to pay the

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109 T10-54.35

110 Bentley 133

111 Gibson advice, paragraph 16

112 Gibson advice, paragraph 19

prescribed fees to use that information in its business[113]. Mr Gibson concluded, in respect of the fees paid by Tatts to Racing NSW and other interstate control bodies[114]:

> "The prescribed fees plainly satisfy the definition of Third Party Charge in the Agreement."

119. It is also relevant to note that advice was taken from the Crown Solicitor on 6 August 2008. Legal professional privilege is maintained in respect of that advice. For that reason, and to avoid argument, parts of the advice will not be extracted. However, the advice was plainly that Tatts is entitled to deduct the race field fees paid to NSW Racing from the product fee paid to Product Co. Senior Counsel Assisting plainly knew of this advice, which was only revealed during Mr Kelly's evidence, referred to below. However, Mr Bentley, Mr Hanmer and Mr Tuttle were examined on the premise that Mr Grace had given the only advice regarding the proper construction of the PPA.

120. The fact that the Crown Solicitor had given advice may also explain why certain members of Product Co. were keen on writing to the Office of Racing to elicit its view as to the proper construction of the PPA. Perhaps somebody knew that such advice existed[115]. Unfortunately, the Commission did not explore this further.

121. The two additional advices confirm the proposition put at the outset of the submissions directed to this term of reference, namely that there are competing arguments as to the proper construction of the PPA, and it would be unfair, for example, to conclude that Mr Hanmer acted unreasonably in disagreeing with the Grace advice. His opinion was, in fact, the same as that of Mr Gibson QC and the Crown Solicitor.

122. Evidence was given that further advice was obtained by QRL, although

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113 Gibson advice, paragraph 22

114 Gibson advice, paragraph 23

115 It is a reasonable assumption that Crown Law would have some advice in relation to issues relevant to race information fees, given the proposed Queensland legislation that was being drafted, the discussions that had taken place with the Office of Racing at around this time and also the participation of the Queensland Government as a party in Betfair Pty Limited v Western Australia [2008] HCA 11.

it has not been disclosed by the current control body[116].

123. Mr Tuttle provided the Grace advice to Mr Hanmer on 19 November 2008 at an early morning meeting at the Sofitel Hotel. He did not speak to Mr Bentley further about the PPA after receipt of the Grace advice[117]. Mr Tuttle says that he was instructed by Mr Bentley to deal with Mr Hanmer about the matter[118] and he did so.

124. Mr Bentley accepted that he knew the advice had been received[119], but maintained that he had not seen it, or been given a copy of it. Mr Tuttle informed him that the advice had been received. Mr Hanmer did not provide Mr Bentley with a copy of the advice[120].

125. Senior Counsel Assisting the Inquiry insinuated that he was going to demonstrate that Mr Bentley was in fact given a copy of the advice[121] but never did so. Mr Bentley's denial of having received a copy of the advice should be accepted.

126. What occurred thereafter was the subject of close scrutiny by the Commission. There was an exchange of emails between Mr Tuttle, Ms Murray and Mr Hanmer as to whether Mr Grace should attend the Product Co. meeting on 4 December 2008[122]. Mr Tuttle made a file note about these dealings[123].

127. It was suggested to Mr Bentley[124] that what occurred looked like a set-up for a "catch-22" so that Mr Grace would not attend either meeting. Mr Bentley said that he stayed out of the dispute between Mr Hanmer and Mr Tuttle, because he did not want to be involved, as it concerned a subject matter that fell within his area of conflict. As Mr McIlwain had sorted out a potential problem with Mr Tuttle and Mr Grace, Mr Bentley believed that Mr

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116 Hanmer T6-91.13; Kelly T11-72.35 – T11-73.15

117 T10-13.30. NB THERE IS PLAINLY A TYPOGRAPHICAL ERROR IN THE TRANSCRIPT AT T10-13.35. "COULDN'T BE" SHOULD READ "COULD'VE BEEN"

118 T10-39

119 T3-34.35; T3-36.35

120 T7-45.27 (Hanmer); T2-102.35 (Bentley)

121 T2-103.10; T3-22.15

122 Bentley 81, 82, 83, 84, 85, 86, 87, 88

123 Bentley 92

124 T3-41

Tuttle and Mr Hanmer could sort out their difficulties without his involvement[125]. Despite this Mr Bentley was ridiculed about his evidence[126].

128. Mr Bentley agreed that if he was involved, a further legal opinion would have been obtained, and Mr Grace would have been invited to the first meeting[127]. However, Mr Bentley was not involved.

129. However, it is submitted that all of what occurred is explicable by the simple fact that Mr Hanmer, as Chairman of Product Co., was upset that advice had been sought about the PPA without his involvement. He was annoyed about the circumstances in which the advice was obtained.

130. That Mr Hanmer was fiercely protective of his position as Chairman of Product Co. is evident from the evidence of Mr Bentley[128] and Mr Tuttle[129]. His response to receiving the Grace advice, and then being told that Mr Grace was going to attend the next meeting of Product Co. could be described, if taken in isolation, as petty, obstinate or even petulant, but it was not dishonest. Mr Lambert later said that he continued to be amazed at Mr Hanmer's capacity for contrariness[130]. Whatever his motive for acting as he did, it should not be found that Mr Hanmer did so to prefer the interests of Tatts. He had absolutely no reason for doing so[131]. Any suggestion that Mr Hanmer acted in the way that he did so as to conform to Mr Bentley's wishes is risible. It also is inconsistent with the statement made by Mr Hanmer in his 14 December 2008 email to Mr Lambert that "never being a person closed to an argument and because naturally you feel so strongly about this, we will again table the matter at the next product co meeting." [132] It is submitted that it ought be found that Mr Hanmer genuinely thought that if he had been at the meeting instructing Mr Grace, and explained the PPA, the Grace advice would probably have been different[133]. He was plainly irritated that Mr Bentley and Mr Tuttle had been conferring with Mr Grace without involving him[134]. He

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125 T3-47.8
126 T3-48
127 T3-50.38
128 T2-45.15; T2-61.34
129 T10-45.33 – 45; T10-52.25
130 Hanmer 338
131 T7-104.27
132 Bentley 98
133 T6-87.23; see also T6-104.5; T7-32.10
134 T7-14.40; T7-23.10

was annoyed that he was presented with what he called a fait accompli[135] or that he was being 'railroaded'. That goes a long way to explaining his subsequent conduct, and to why he sought to differentiate between advice being requested by QRL as opposed to Product Co., which otherwise, as he accepted when giving evidence, does not make any sense.

131. Mr Hanmer did not withhold the Grace advice from the other directors of Product Co. Indeed, he circulated that advice well in advance of the 4 December meeting. Mr Hanmer said[136]:

> "I showed a copy of that advice to the members of the board of Product Co. I wanted to discuss the advice with the board and to gauge their views to the draft legislation in relationship to their Codes and the opinion of Mr Grace. I also spoke to Bob Lette who had been on the board of Unitab at the time who understood detail and intent of the Product and Program Agreement. The view that he expressed to me was that he did not believe that the construction that Mr Grace had suggested was correct. Mr. Lette informed me that he also had one of his partners review the advice and he also disagreed with Mr. Grace's interpretation. We were both of the view that it would not have been the intention to have Unitab pay for the same race information twice."

132. Mr Hanmer explained why he did not want Mr Grace to attend the December 2008 meeting of Product Co.[137] This was, with respect, a storm in a teacup because Mr Grace attended the next meeting of Product Co., in March 2009, and the one following that.

133. The note of Mr Lette's message for Mr Hanmer is at Hanmer 308.

134. Mr Hanmer also spoke to either Mr Fletton or Mr Tamer of Tatts after he received a copy of Mr Grace's advice. Mr Hanmer's assertion that he did not discuss the substance of Mr Grace's advice with Tatts was treated with derision by Senior Counsel Assisting, who behaved in a quite intemperate way[138]. Neither Mr Fletton nor Mr Tamer were interviewed by the

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135 T7-25.18

136 Hanmer first statement para. 23

137 T7-29.22

138 T7-73; T7-81.45; T7-84.5

Commission, and no statement was taken from them. In the absence of contradictory evidence, Mr Hanmer's evidence should be accepted.

135. As pointed out in the earlier parts of these submissions, when dealing with the findings open to the Commission, it is not permissible to reject Mr Hanmer's evidence, because a view is taken that he cannot be believed, and thereby find the opposite of his evidence, by inference, in the absence of any positive evidence.

136. The Product Co meeting on 4 December 2008[139] was attended by Messrs Hanmer, Ludwig, Andrews, and Godber and Mrs Watson. Messrs Lambert and Lette were absent[140]. There was a discussion of the proposed Queensland Race Fields legislation, and of the Grace advice.

137. Mr Hanmer states[141] that Mrs Watson[142] told the Product Co meeting that her board was not in agreement with the advice. No evidence was called from Mrs Watson to the contrary.

138. The minutes of the meeting of Product Co. record[143]:

> "Mr Hanmer updated the meeting on advice he had sought from alternative legal practitioners and the Racing Office, and on the letter received from Cooper Grace Ward. This letter, already previously circulated to all members, addressed to Queensland Racing is code specific. However its contents were **NOTED** by the Board."

139. The advice that Mr Hanmer had sought was from Mr Lette, and from one of Mr Lette's partners.

140. Mr Hanmer agreed[144] that when questions arose in relation to Mr Grace's advice the position he took was influenced by his judgment of what the PPA meant. He thought that Mr Grace was wrong. So did Mr Lette, Mr Ludwig and Mrs Watson. It should be found that Mr Hanmer's view was honestly held. He

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139 Minutes are Bentley 90

140 Mr Godber was Mr Lette's alternate director

141 at paragraph 24 of his first statement

142 representing Greyhounds Queensland Limited

143 at section 2.2

144 T6-82.20

did not ignore Mr Grace's advice, or make a capricious decision to disregard it. He reached this view after studying the PPA, and speaking to Mr Lette[145]. Mr Tuttle gave evidence that Mr Hanmer had a very good understanding of the PPA[146].

141. Mr Andrews' evidence about this was interesting. He said that he thought the Grace advice 'had legs'. However, he took the view that if Tatts' position was challenged, the matter would be litigated, and he assumed that it would go to the High Court[147]. Mr Ludwig was of the same view. Mr Andrews said the Grace advice came as a surprise to him[148]. Mr Andrews was at pains to correct counsel when it was suggested to him that he thought the Grace advice was correct.[149]. He would not go that far. That is consistent with the amendment sought to the board minutes of a subsequent Product Co. meeting, referred to below.

142. It was incorrectly suggested to Mr Bentley[150] that the meeting on 4 December was the first occasion when the advice from Grace was available to anybody. The advice was circulated before the meeting, as the minutes themselves record, and as a number of witnesses acknowledged.

143. On 5 December 2008 the board of QRL met[151]. Mr Hanmer updated the meeting regarding the Product Co meeting on 4 December. The minutes record that Mr Bentley offered to exit the meeting if there were any conflicting matters. Nothing of substance was discussed.

144. Despite Mr Lambert not having attended the 4 December meeting of Product Co., he was given a copy of the Grace advice. He discussed the matter on the telephone with Mr Hanmer. That conversation obviously became strained. Mr Hanmer explained that due to a personal circumstance, the period leading up to Christmas is a bad time for him, and that might explain why some of the language used by him was somewhat intemperate.

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145 T6-86.45

146 T10-46.39

147 T9-7.31

148 T9-8.8

149 T9-13.37

150 T3-42.22

151 Minutes are at, amongst other places, Tuttle 23

145. On 11 December 2008 Mr Lambert sent an email to Mr Hanmer, referring to their telephone conversation[152]:

> "I was and am stunned at your reaction to the issue I raised. I thought I was clear in the way I raised the matter but the verocity of your reaction must mean I failed in this regard.
>
> First, I am not concerned with how the grace letter arose or the motivation of mal.
>
> Second I agree with your lay person interpretation and assessment of the issue.
>
> Third I have no problem with how you have handled the matter, at least up to the time of our phone conversation/diatribe.
>
> My sole issue is to ensure that we and qr are not exposed in respect to our duties under corporations law. The matter that has arisen is not a run of the mill matter but has a potential financial impact of 10 m pa, would have a major impact on tatts and exposes bob to a potential major conflict of interest issue. My suggestion to avoid these potential problems is simply to get senior counsel advice. I see this as insurance policy at the modest cost of say 5000 dollars. I also think I am entitled to raise such a matter and not to subject to an emotional dump".

146. It is significant that in this email, and subsequently, Mr Lambert has never said that he disagreed with Mr Hanmer's view about the PPA. Indeed, as will be discussed shortly, he went to the trouble of correcting board minutes to disclaim agreement with the Grace advice.

147. Mr Hanmer replied on 14 December 2008[153]:

> "Michael, I'm disappointed that you found my honest appraisal of the Grace advice unpalatable. Taking the points in your note specifically, I disagree with you when you say the origins of the Grace advice are of no concern to you. The Grace letter was briefed without any involvement by

152 Tuttle 26

153 Tuttle 26

Product Co., or any reference to Product Co. The letter is addressed to Queensland Racing and Malcolm Tuttle is not an officer of Product Co. The letter was written code specific to Thoroughbreds, a different outcome could be imagined if it was briefed by the other codes or Product Co. If we all rushed off and sought advice on every issue we would enjoy anarchy.

This brings me to your second point – you say you agree with my layperson interpretation and assessment of the issue. This is damning me with faint praise. In initially reading David Grace's advice, my judgement was that it was exceptionally tortured, unconvincing and extremely thin on its assessment. On that basis I sought advice from the Racing Office, they concurred with my view. However, not satisfied with that I asked Bob Lette from Mullins, who Bill Andrews describes "from Top End of Town" for his opinion. Bob, is extremely well respected and as Chairman of Harness has a depth of understanding of the issues. He confirmed to me this was a long bow and in a telephone conversation, a transcript of which you can obtain from Shara Murray, he confirmed he had checked his own advice with one of his partners – same result.

So, we are now looking at 4 people who all concur, I circulated the letter from Cooper Grace Ward to all Product Co. directors on 1st December, again, with no dissent. At the Product Co. meeting which you did not attend, this item was discussed and a determination was made for no further action. A week later, you decide you want it changed.

I have exercised my judgement way beyond the extent of Corporations law, which as you are aware, cannot expect you to be right but does expect you to take care, caution and advice. So, you now want a 5th opinion at a "modest cost of say $5000", an insurance policy.

Again, I am surprised and disappointed because the advice to date from Cooper Grace Ward has cost a shade under $9000. If we were to proceed with this adventure we would need to obtain the very best advice, knowing that Unitab would defend this issue vigorously. So, I would suggest that we would go to Jackson who provided our Constitutional advice at a cost of $52,000 to QR. A long way from your modest $5000, but, never being a person closed to an argument and

because naturally you feel so strongly about this we will again table the matter at the next Product Co. meeting.

On a lighter note, when I read your email I was flattered to hear you refer to my verocity – expecting this to be a compliment but not being aware of the word and sharing a common love of the English language I reached for my Oxford Dictionary but, no definition, similarly with my Websters and my Collins – no definition of verocity I can only assume this is a figment of your vocabulary – perhaps a Lambertism!"

148. This email further demonstrates the fact that Mr Hanmer was clearly upset about not being involved in the obtaining of the Grace advice. His reference to "anarchy" if everyone took legal advice is plainly a reference to Mr Tuttle engaging Mr Grace[154].

149. QRL met on 6 February 2009[155]. The Chairman (Bentley) signed resolutions under the new provisions of the *Racing Act*. There was nothing improper about him doing so.

150. The directors of Product Co. met again on 5 March 2009[156]. Messrs Andrews and Lambert attended that meeting. Mr Grace was also present. The minutes of this meeting were subsequently amended so that section 2.1.3 read:

> "Mr Lambert and Mr Andrews noted advice from Mr Grace, if correct, raised fundamental issues that needed to be formally resolved either by Senior Counsel advice or by obtaining advice from Government of the original intent of the Product and Program Agreement (Agreement).

151. What had been previously recorded was:

> "Mr Lambert and Mr Andrews noted that they fundamentally agree with the advice provided by Mr Grace, and as such, action should be taken against UNiTAB"

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154 See Hanmer's evidence at T7-23.45 to T7-24.2

155 Minutes are at Tuttle 28

156 Bentley 111; Tuttle 29

152. What had earlier been recorded was something much stronger. By seeking the amendment that they did, Mr Andrews and Mr Lambert were making it clear that they did not necessarily agree with Mr Grace, but thought that something should be done given that his advice had been received.

153. Those present at the meeting resolved to write to the Office of Racing. Mr Andrews thought that this was probably Mr Lambert's suggestion[157]. Nevertheless he agreed with that course[158]. Mr Lambert's evidence was that at this meeting he (and Mr Andrews) wanted to ensure that they had complete confidence in Mr Grace's advice[159]. It was for that reason that he suggested seeking a second opinion, or taking the views of government.

154. Section 2.1.3 of the minutes otherwise records:

> The Chairman expressed his concerns and noted that the Company should meet with UNiTAB to seek a variation of the Agreement in order to reflect the legal position at hand and the commercial intention of 'supply' and 'use' when the Agreement was first drafted
>
> The Chairman also stated that the Office of Racing was of the similar view; the commercial intention of the Agreement differs to that of the legal position at hand. Mr Godber and Ms Watson concurred with the Chairman
>
> The Board **RESOLVED** that the Chairman correspond with Mr Mike Kelly of the Office of Racing in relation to this matter. The Chairman is to seek the view of Government in relation to the commercial intent of the Agreement when first drafted and the current legal views in relation to Race Fields Legislation and its impact on the Agreement"

155. That is what occurred.

156. Whilst one may be critical of the members of the boards of the control bodies and of Product Co. for not seeking further legal advice to ascertain the

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157 T9-15.40

158 T9-14.45

159 T9-33.30

'correctness' of the Grace advice, one must think through that criticism before accepting it.

157. It is not correct to say that nothing was done. First, an understanding had been reached with Tatts concerning the retention of fees collected under the Queensland legislation, as already discussed. Secondly, the Board resolved to pursue the matter with government. That took some time, and was ultimately unproductive, but at the time the decision was made it was reasonable.

158. Had further legal advice been obtained that agreed with the Grace advice, what then? Litigation against Tatts would have been expensive and would have taken considerable time. A number of witnesses said they expected the matter would be litigated to the High Court. The litigation would have been conducted against the background of litigation already on foot challenging the validity of the amendments to the NSW legislation. Why would further litigation be embarked upon, when that uncertainty prevailed, as it did until 30 March 2012, when the decision of the High Court in the *Betfair*[160] case was handed down? Why would Product Co. embark on litigation against the entity that provided almost all of its funding?

159. If further legal advice had been obtained that disagreed with the Grace advice, what then? We now know that Mr Gibson QC and the Crown Solicitor have given contrary advice. Were the board expected to obtain yet further advice to resolve the impasse?

160. The board of Product Co., and through it the control entities, took a sensible and pragmatic course, that was open to them. They did not do so for any ulterior purpose, and certainly not to prefer the interests of Tatts. To suggest that Mr Hanmer could force the other board members of Product Co. to act according to his will is not only wrong, but an insult to the other members of the board, and those who they represented.

161. David Grace's file note of this meeting[161] records the following:

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160 Betfair Pty Ltd v Racing New South Wales [2012] HCA 12

161 Bentley 112; Tuttle 30

> "Discussion revolved around directors' duties. I advised that having given a letter of advice to Queensland Racing and that matter had not been taken into the Board of Product Co and the Board of Product Co haven't been aware of our views on the interpretation of the Act and its interaction with the product and program agreement, the board would be unwise to ignore the advice because auditors looking at the accounts may, if they became aware of the advice, query the directors' treatment of the contractual arrangements. It was therefore necessary to address the issue and if it was not intended to take an adversarial role with Unitab, then to consider whether the existing agreements should be changed in order to remove any ambiguity that may exist as a result of the 2008 amendments to the Racing Act"

162. The views of the Mr Hanmer, recorded in the minutes, reflect the last point made by Mr Grace. Mr Hanmer did not ignore legal advice; he followed it.

163. Mr Tuttle said[162] that there was "robust discussion" at this meeting about the 18 November advice, and that Mr Grace was involved in this discussion.

164. Mr Bentley became aware that there was some disagreement at board level at Product Co[163] but chose to stay out of the matter.

165. It was suggested to Mr Bentley that he wrongly became involved in the PPA issue, for example by attending the meeting with Mr Grace. Yet he was also criticized for failing to give the Grace advice to Tatts[164]. When Mr Bentley explained that he was trying to stay out of the matter[165] he was criticized for that[166]. According to Senior Counsel Assisting, Mr Bentley was damned if he did; and damned if he didn't. Such an argument is, it is respectfully submitted, untenable.

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162 T10-50.40

163 T2-66.38-45

164 T3-37.14

165 T3-37.48

166 T3-38.4

166. Mr Hanmer wrote the letter to Kelly on 31 March 2009[167]. Mr Kelly responded on 28 May[168]. His reply included:

> "I would recommend the Queensland Race Product Co Ltd obtains its own legal advice on the issues you have raised.

167. No doubt Mr Kelly thought that if Product Co. took its own legal advice it would accord with that he knew existed in the Office of Racing, being the advice from the Crown Solicitor.

168. Mr Kelly was aware that there was a difference of opinion between Mr Hanmer and Mr Lambert who were trying to draw him into their dispute[169].

169. Again the suggestion that there was something inappropriate in Mr Kelly sending a draft of his letter to Mr Hanmer and then delaying sending his final letter at Mr Hanmer's request is entirely without substance. Mr Kelly acted entirely appropriately. As he said in his evidence:

> "You see, I'll tell you why it's a concern and I'm pushing on it, Mr Kelly, so you're completely clear. Every month that nothing's happening on this, the stakeholders in the industry in Queensland are missing out on about $500,000; you see? A month.
>
> A month?--- Well - - - So three went - - -?--- Potentially. Potentially.
>
> Potentially, exactly?--- Not based on something else that exists.
>
> Sorry?--- Well, I'm referring to the Crown Law advice that - - -
>
> But you didn't tell anybody about the Crown Law advice; did you?--- And – and that's exactly right, I didn't. I could've solved this problem on day 1 by saying hey, got this advice and here's a copy of it."

170. It seems the reason why this advice was not disclosed earlier was because Senior Counsel Assisting thought it was wrong[170]. This is ironic,

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167 Bentley 114

168 Bentley 117

169 T11-71.20 - 45

given that when directors of Product Co. thought Mr Grace's advice was wrong, and decided not to bring proceedings against Tatts, they were strongly berated.

171. At the Product Co. meeting on 4 June 2009[171] the directors noted Mr Kelly's response and resolved that Mr Hanmer meet with Mr Kelly to discuss the matters and send him a further letter. As directed, Mr Hanmer wrote to Mr Kelly on 4 June 2009[172]

172. On 15 June 2009 Mr Hanmer wrote an email to Ms Murray[173]. Much was made of this. It refers to a note from Mr Lambert. Mr Hanmer says:

> "Shara, the attached note from Michael is self explanatory. I have told him that I will not be speaking to Mr Kelly on behalf of Product Co about a subject Product Co require advice on where we do not have an issue, to report back to a board that have been told that we have no agreement to have advice upon. This catch 22 situation is at an end as far as Product Co is concerned. But, you will now see that Michael wants to do it all over again with QR. In the unlikely event that this does get on to the board papers I'll probably be called upon to carry the day so, I will just need a copy of the minute from the Board of QR that killed this letter as far as QR were concerned in the first place. From memory the letter was presented to the Board who noted it for no further action. I'll just need to remind Michael of the date . . . "

173. On 23 June 2009 Mr Lambert wrote a memo regarding the PPA[174] in which he said, inter alia:

> > "It is considered highly advisable to resolve this matter given that it raises issues of a substantial financial and strategic nature. To do nothing opens the Board to the accusation that it acted to favour UNITAB at the substantial cost of the industry and possible (sic) leaves open the members of the board to legal action by members of the racing industry

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170 T11-812.1

171 Minutes of this meeting are Bentley 118

172 Bentley 119

173 Tuttle 31

174 Bentley 126

> At the same time it is accepted that to reject the offsetting of race fields fees by UNITAB against the product and program agreement will raise a major issue with UNITAB and adversely affect our relationship. The suggested next step is to undertake what has been commenced and obtain the advice of the government on its intention in regard to clause 10 . . ."

174. QRL met 26 June 2009[175]. At section 10.4 of the minutes it is recorded:

> "Mr Lambert previously circulated a paper on the advice QRL had originally received from Cooper Grace Ward Lawyers on 18 November 2008. In essence this advice related to the distinction between the right of access to race information and the right to use that information for wagering purposes.
>
> Mr Lambert informed the Board he had spoken to Mr Mike Kelly at the Office of Racing and on Mr Kelly's advice QRL's executive should write to the Minister seeking clarification of Clause 10 of the Product and Program Agreement.

175. Mr Bentley was not at this part of the meeting.

176. Mr Tuttle wrote a letter dated 23 July 2009 to Mr Kelly[176]. He provided him with a copy of Mr Grace's letter of 18 November 2008. Relevantly, it provided:

> "In essence, the attached opinion, on page five at point three, outlines that the product fee payable under 10.1, *"will not be the subject of any offset or deduction under 10.2(c) as and by way of a Third Party Charge in respect of monies paid to anyone else for the provision of Australian Racing Product..."*.
>
> This opinion has been provided notwithstanding Clause 7.4(f) of the PPA, which seems to clearly point out that, "*nothing in this Agreement prevents or restricts TABQ using or acquiring the rights to use the Queensland Racing Calendar, Queensland Racing Program,*

175 Minutes are at Tuttle 32

176 Tuttle 33

Australian Racing Product, Marketing Rights or any other information or intellectual Property rights in respect of Racing from any other party in connection with any other business, product or service of TABQ other than the Race Wagering Business or Existing Purpose and TABQ shall have no liability to pay or otherwise compensate any Queensland Control Body or Product Co for or in respect of such uses".

As you are aware, with the introduction of Race Information (or Race Fields) Legislation by other States in Australia, UNiTAB is incurring a charge for the use of interstate information and is currently deducting that charge from the product fee payable to Product Co under Clause 10.1 of the PPA. You will also be aware that at the time the PPA was entered into the so called "*Gentlemen's Agreement"* was intact, which provided for the free exchange of Australian racing information, enabling wagering operators to use that information, without incurring a charge.

To assist the Board of QRL in its consideration of this matter, a response from the Queensland Government is required, particularly in relation to the application of Clause 10.2(c) (Third Party Charge) and whether it is the Government's view that the intention of the PPA was to ensure a commitment by Product Co to guarantee the provision of Australian racing information to UNiTAB, for its use based on the "*Gentlemen's Agreement"* that existed intact at that time. Should it be the Government's view that as a result of PPA, Product Co undertakes to provide Australian racing information to UNiTAB for its use without charge, then it would appear to flow that in the event UNiTAB incurs a charge for the use of Australian racing information, it is entitled to deduct that amount from the product fee payable under the provisions of 10.2(c) of the PPA."

177. Mr Kelly did not respond until 6 January 2010[177] He stated:

> "Specifically you seek a Government view in respect of an interpretation of the Agreement's provisions concerning the

177 Tuttle 33

> determination of consideration for the supply of Australian racing product and Queensland racing program.
>
> Unfortunately, I advise that this Office, following exhaustive searches of our records and enquiries of relevant Government agencies, including the Office of Liquor and Gaming, is unable to provide you with any definitive view in relation to this matter in addition to what we've already provided."

178. The delay in response was entirely innocent. Mr Kelly explained how busy he was at this time, and the letter was overlooked[178].

179. It must be accepted that nothing further appears to have been done about the Tatts deductions after this time. However, Product Co retained the fees collected under the race fields legislation.

180. When asked why nothing further was done, Mr Tuttle said[179]:

> "And I don't purport to suggest that this is a very simple matter to deal with. Certainly the seeking of a further opinion may be – it may be quick and easy to do that. Having a meeting with the TAB may appear to be quick and easy. But this particular issue was not without some challenges. And when you have such a significant and strong relationship with a business partner that is providing the bulk of the revenue for the industry, it's not without – it's not without the requirement to have exhaustive consideration of the matter. And I know that it's been tossed around that, you know, the prospect of simply obtaining a further opinion ought to have been done. But there is a practical – there's a practical outcome to all of this in respect of the discussions that would be required with the industry's most significant business partner. So it's not just that easy."

181. The change in the control body that was effected in April 2012 made no difference. Still nothing was done. Senior Counsel Assisting said that he would ask questions about this but never did. The supplementary statement from Mr Dixon raised more questions than it answered. Despite being invited

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178 T11-77-88

179 T1-55.10

to do so, the Commission has declined to investigate further why the current control body has done nothing to advance the legitimacy of the Tatts offset since 1 May 2012, a period now approaching 18 months.

182. By reference to the terms of reference, it is submitted that the Commission should conclude that:

a. Product Co. responded to the introduction of race information fees in New South Wales by persuading the State government to introduce amendments to the *Racing Act* such that fees could be collected by the Queensland control bodies that exceeded the fees paid by Tatts under the NSW legislation, and which were deducted from the Product Fee paid under the PPA;

b. Product Co. also secured an understanding (at least) or an agreement from Tatts that it (or the control bodies) could retain any fees imposed under the Queensland legislation;

c. QRL and/or Product Co. also sought advice about Tatts' entitlement to offset the race information fees paid by it interstate from the Product Fee;

d. The board of QRL did seek expert legal advice;

e. Advice was also sought from the Office of Racing by both Product Co. and QRL;

f. The Grace advice was not acted upon, in the sense that Tatts was not challenged about the legitimacy of its deducting interstate race field fees, because the board of Product Co. resolved to instead seek the views of the Office of Racing as to the commercial intent of the PPA, and because of the important concession obtained from Tatts whereby Product Co could retain fees received under the Queensland legislation;

g. The directors of QRL and Product Co acted in good faith and consistently with their responsibilities, duties and legal obligation; and

h. Their actions were not influenced by any conflict of interest.

183. Turning to the letters addressed to Messrs Bentley, Hanmer, Milner, Ludwig and Ms Murray that pertain to this term of reference.

184. Mr Bentley accepted[180] that his directorship of Unitab Limited and Tatts Group Limited, and his chairmanship of the racing control body placed him in a position of potential conflict and required management systems to be put in place to ensure that such a conflict did not affect decisions.

185. Mr Bentley was a director of Tatts Group Limited, and a shareholder in that company during the relevant period. He made no secret of the fact and it was well known to his fellow directors at both QRL and RQL, and to senior executives such as Mr Tuttle and Ms Murray. Mr Bentley had been appointed to the board of what was then Tattersalls Limited on 1 October 1998.

186. In a letter to Mr Bentley dated 10 October 2013, at paragraph 3(c) it is asserted that Mr Bentley did not give the other directors of QRL or RQL notice of his interest as a shareholder of Tatts, as required by s. 191 *Corporations Act*. Section 191(1) provides:

> " A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless subsection (2) says otherwise."

187. The suggestion previously floated, that there had been a contravention of s. 195 *Corporations Act*, is apparently, with good reason, no longer pursued.

188. Section 191, is, with respect to those assisting the Commission, irrelevant. First, Mr Bentley was not a director of Product Co. Therefore, anything to do with the affairs of that company, such as taking action under the PPA, is outside the scope of s. 191(1). Secondly, as a director of QRL, and later RQL, there was no 'matter that relates to the affairs of' either of those companies in which Mr Bentley has a material personal interest. Certainly none has been identified by the Commission in its letter. The subsection applies where a company is proposing to enter into a particular

180 T2-27.5-10

transaction, and a director may stand to make a personal profit as a result of that transaction. That is not the case here.

189. As Robson, *Annotated Corporations Act*, at [191.30] states:

> "No formal declaration is necessary if the nature of the interest is made known and recorded: *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189; but note the strong dissent of Kirby P. The declaration need only be made to the board, not the members (*Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31), unless the particular transaction is of the extraordinary kind that places the director in a fiduciary relationship with the members, such as a directors' proposal to buy out the members . . . Section 191 may be satisfied by a meeting, even if the company has only one director; but if another person is present at the meeting then the declaration must be voiced: *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch 274; [1995] 3 All ER 811; [1995] 3 WLR 108 [*Companies Act 1985* (UK) s 317 1994].
>
> The director has no obligation to play devil's advocate in spelling out the risks of the contract or to put forward alternative contracts. Once the disclosure of the nature of the interest is made, the director refrains from voting and is dealing at arm's length with the company (*Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31), unless the constitution expressly permits the director to vote."

190. The nature of Mr Bentley's interest, as both a director and shareholder of Tatts, was known to each of the directors of QRL and RQL. If disclosure had to be made of Mr Bentley's shareholding (which is denied) it was made.

191. There was no attempt by the Commission to demonstrate that what occurred under the PPA, in particular by Tatts making the deductions on account of third party charges, had any effect on the share price of Tatts. Unless it did, Mr Bentley could not be said to have a material personal interest as required by the subsection. That is, he did not stand to gain personally (via an increase in share price) by what happened vis-à-vis the PPA.

192. No finding should be made that there has been any breach of s. 191(1) *Corporations Act*.

193. Mr Bentley's potential conflict as a director of two companies was managed in at least four ways:

a. Mr Bentley declared his potential conflict at each meeting of QRL and RQL;

b. Mr Bentley was not a director of Product Co. which was the entity that conducted the business under the PPA;

c. Mr Bentley did not participate in any decisions made by Product Co. under the PPA;

d. Mr Bentley either excused himself, or offered to excuse himself from meetings of QRL and RQL whenever Product Co. business was discussed, or any business was discussed that might involve Tatts.

194. Mr Bentley accepted[181] that he could not participate in any decisions that would affect Product Co.

195. Mr Bentley denied attending any meeting of Product Co.[182]

196. There is no evidence that Tatts position under the PPA was ever discussed at board level within that company. Mr Bentley denied participating in any such decisions for Tatts[183]. Despite Senior Counsel Assisting saying that he would come back to whether the matter ever came up at board level at Tatts, he never did so[184].

197. Mr Bentley did not cause QRL or RQL not to seek the advice of senior counsel or any other legal advice in relation to the correctness or otherwise of the Grace advice[185]. Nor did he proactively promote the obtaining of such

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181 T2-30.33

182 T2-38.10

183 T2-32.30; T2-32.44

184 T2-34.10

185 Commission's letter dated 10 October 2013 to Mr Bentley, paragraph 3(d)(i)

advice[186]. Mr Bentley's position, repeated many times, was that he decided to stay out of the matter and leave it to the directors of Product Co.[187] Mr Bentley also said that if Product Co. wanted to obtain further legal advice he would not have stood in its way[188]

198. It must be understood that Mr Bentley did not have any conflict of duty or interest as a result of being a director and chairman of QRL and RQL, whilst being a director of Tatts and a shareholder in that company[189]. It is accepted that Mr Bentley had a potential conflict of interest if an issue arose at either company of which he was director, which necessitated a decision that may impact adversely on the other company.

199. It is submitted that Mr Bentley managed that potential conflict appropriately by not participating in any decision with the consequence referred to. Indeed, he went further and withdrew almost completely from consideration of the PPA issues. He was criticized for doing so. It is not known on what basis the Commission could possibly find in accordance with paragraph 3(b) of its letter to Mr Bentley dated 10 October 2013. Those findings cannot be made. If anything, Mr Bentley favoured the interests of Tatts by promoting race fields legislation in Queensland, and initiating the discussions that led to an understanding being reached that Product Co. could retain monies received under the Queensland race fields legislation.

200. Mr Bentley was certainly involved in discussions with directors of QRL, Mr Tuttle and Mr Grace about the potential operation of Queensland race fields legislation. There was nothing wrong with him doing so, and such discussions did not create an actual conflict of interest, in the sense discussed above.

201. There is no evidence, and indeed the evidence is to the contrary, that Mr Bentley discussed the Grace advice, the question of construction of the PPA, the possibility of renegotiating the PPA or the consequence of the construction question with any of the persons identified in paragraph 3(d) of the Commission's letter. Accordingly, no findings can be made as outlined.

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186 Commission's letter dated 10 October 2013 to Mr Bentley, paragraph 3(d)(ii)

187 T2-75.16; T2-76.25; T2-91.41; T2-92.10; T3-24.15; T3-26.50; T3-30.15; T3-38.12; T3-51.2; T3-69.38; T3-86.24; T4-6.2

188 T2-87.10

189 As asserted in the Commission's letter dated 10 October 2013 at paragraph 3(a)

202. Nor can it be found that Mr Grace discussed the role of Product Co. in relation to the implementation of the Queensland. However, even if he had, in doing so Mr Bentley would not have had any conflict of duty or interest that precluded him from doing so.

203. Mr Bentley did not act contrary to his duties to QRL and RQL. He acted at all times in the best interests of Queensland racing. The application of the *Public Sector Act* has been dealt with earlier in these submissions, as have the applicable principles concerning ss. 180-184 *Corporations Act.* Mr Bentley did not act in contravention of either statute.

204. Mr Hanmer did not cause QRL or RQL not to seek the advice of senior counsel or any other legal advice in relation to the correctness or otherwise of the Grace advice[190]. Nor did he proactively promote the obtaining of such advice[191]. As is apparent from his contemporaneous documents, he was open to such advice being obtained. He said that he was but one of the directors of Product Co. and of QRL/RQL and it was the decision of the Board not to take such further advice[192].

205. Mr Hanmer knew that Mr Bentley had a potential conflict of duty and interest given his dual directorship. Mr Hanmer did not discuss Mr Grace's advice with Mr Bentley, and therefore the potential finding at paragraph 2(d)(ii) cannot be made. On any view of the evidence Mr Hanmer acted according to his own conscience. He was not influenced by Mr Bentley. Mr Hanmer was quite rightly offended by the suggestion that he acted as he did because of some relationship with Mr Bentley[193]. The proposed finding at paragraph 2(d)(iii) of the Commission's letter cannot sensibly be made.

206. Mr Milner was not even called to give oral evidence. Yet potential findings are proposed regarding this term of reference. Mr Milner did not cause QRL or RQL not to seek the advice of senior counsel or any other legal advice in

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190 Commission's letter dated 10 October 2013 to Mr Hanmer, paragraph 2(c)(i)

191 Commission's letter dated 10 October 2013 to Mr Hanmer, paragraph 2(c)(ii)

192 T6-81.45; T6-88.10; T6-103.25

193 T6-107.10; T7-86.12; T7-85.35 – T7-86.9

relation to the correctness or otherwise of the Grace advice[194]. Nor did he proactively promote the obtaining of such advice[195].

207. Mr Milner did not act contrary to his duties to QRL and RQL. He acted at all times in the best interests of Queensland racing. The application of the *Public Sector Act* has been dealt with earlier in these submissions, as have the applicable principles concerning ss. 180-184 *Corporations Act.* Mr Milner did not act in contravention of either statute.

208. Mr Milner would have known that Mr Bentley had a potential conflict of interest due to his dual directorships. There is not one skerrick of evidence that Mr Milner was influenced by Mr Bentley, nor that he knew Mr Bentley's state of mind regarding the Grace advice. To promote these findings, including a finding that Mr Milner likely acted criminally, in the absence of even calling him and giving him an opportunity to respond to those assertions is nothing short of scandalous.

209. Mr Ludwig's position is the same as that of Mr Milner, Mr Hanmer and Mr Bentley. He was not influenced by Mr Bentley. He did not act in contravention of any statute.

210. Ms Murray rejects each of the potential findings set out at paragraph 5 of the letter from the Commission to her dated 10 October 2013. Ms Murray was unable to give evidence, so none of the propositions were put to her. It would, in Ms Murray's circumstances, be unfair to make the proposed findings. There is no evidence to support them.

211. Each of the witnesses on whose behalf these submissions are made held the honest view that the PPA allowed Tatts to make the deduction that it did. Each acted in the best interests of Queensland racing in securing the outcome whereby the control bodies were able to retain the race field fees collected under the Queensland legislation.

212. The submissions made earlier concerning the appropriate approach to an alleged breach of ss. 180-184 *Corporations Act*, are adopted *mutatis mutandis* to this term of reference.

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194 Commission's letter dated 10 October 2013 to Mr Milner, paragraph 2(c)(i)

195 Commission's letter dated 10 October 2013 to Mr Hanmer, paragraph 2(c)(ii)

213. Two further matters must be dealt with under this term of reference, notwithstanding that it is not referred to in the letters to the various witnesses, given that the Commission has stated that it also intends to take into account matters put to witnesses who actually gave evidence. First, is the suggestion that Mr Bentley and Mr Hanmer conspired to act in the interests of Tatts, and to the detriment of Product Co. and the control bodies.

214. The alleged conspiracy was the basis for Counsel Assisting the Inquiry to seek to investigate the circumstances of Mr Lambert's retirement from the board of QRL and the failure of Mr Andrews to make the shortlist of candidates for election of directors in 2009, each of which are matters that are not, of themselves, within the Terms of Reference. Rather, the line of inquiry was to try to draw some connection between those matters and term of reference (f) dealing with Product Co.

215. It is informative to examine where this conspiracy theory comes from. Mr Carter QC, in his unsolicited submission to the Commission on 8 July 2013, formulated theories in relation to matters which he admits he has no personal knowledge[196]. In his submission[197], he stated:

> "Given the publicly stated concern of Messrs Lambert and Andrews to the arrangements entered into by Product Co and the Tatts Group consequential upon the Race Fields legislation 2008 (term of Reference F) and the retirement of Messrs Lambert and Andrews, a question arises: was Mr Lambert's retirement and the failure of Mr Andrews to be shortlisted for the 2009 election related to Term of Reference (f)?"

216. There was also a throwaway line in Mr Lambert's statement to the Commission. That is hardly the basis of a serious contention that there was such a conspiracy.

217. Mr Carter refers to "publicly stated" concerns of Mr Lambert and Mr Andrews, yet no evidence of any public statements emerged during the public hearings.

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196 statement, paragraph 5

197 ex. WJC1

218. No purpose is advanced for the alleged conspiracy. If there was a conspiracy to benefit Unitab, then such conspiracy has failed miserably. As discussed above, Mr Grace and Mr Tuttle actually secured a benefit for QRL that would not have been available if Tatts had not agreed.

219. Other facts contradict any suggestion of a conspiracy:

i. Mr Lambert did not actually appreciate the terms of the PPA or the likely impact of the introduction of race fields legislation in Queensland. So much emerges from the following passage in his evidence[198]:

> "And if race field legislation is brought in in Queensland, that entitles the Queensland control body not only to charge the corporate bookmakers but also interstate Tatts?---No.
>
> Why not?--- I believe that wasn't the intention. The intention was, as I believe the Queensland legislation, was to charge corporate bookmakers.
>
> Only corporate bookmakers?--- Yes.
>
> And not interstate?--- That's right.
>
> Tatts?--- Yes."

ii. Mr Lambert and Mr Andrews actually resolved not to seek further legal advice but rather to seek the views of the government, as evidenced by the Board minutes referred to above;

iii. There is no evidence to link the nomination of Mr Lambert as a retiring director to the alleged conspiracy. Rather, the evidence of Mr Hanmer was that Mr Lambert said he would retire if the Palm Meadows project did not proceed. While Mr Lambert later sought to dispute that he had said that, his dispute was well after the fact.

198 T9-23

iv. Mr Bentley did not interfere with the recruitment process as asserted by Senior Counsel Assisting the Inquiry:

(1) Mr Bentley was questioned on a false assumption as to the nature of the discussions and meetings that Mr Bentley had with the independent recruitment consultant;

(2) He was questioned on the assumption that Mr Bentley indicated particular qualities that he would like to have on the board at a time when the applications had closed and that he would have known who was on the shortlist[199];

(3) That line of questioning was misleading and, if the Commission has reviewed the transcript of evidence in the Andrews' case, then Counsel Assisting the Inquiry should have known the true position;

(4) From the evidence that was tested in that case (which was only a matter of weeks after the events took place), it is clear that Mr Bentley had three meetings with Mr Wilson. The first was on 1 April 2009 when the initial instructions were given and a discussion ensued about the sort of qualities that would be desired on the board. That was before anyone had applied for the positions. The second meeting was on 12 June on a private matter involving Mr Bentley's son-in-law that had nothing to do with QRL. The third was after the shortlist of four candidates had been determined;

(5) It should also be noted that despite it being pursued in the Andrews case, no finding was made that Mr Bentley interfered with the selection process. If Wilson J could not make such a finding after having heard far more detailed evidence so soon after the events, then we submit that the Commission cannot do so now.

199 T4-18.39; T4-18.12-15

v. If it was so essential to remove Mr Andrews from the board and to ensure that he would not come back onto the board, then Mr Bentley's encouragement to seek Mr Andrews to be reappointed to the board when the board was expanded runs counter to that suggestion[200].

220. The suggestion of a conspiracy between Mr Hanmer and Mr Bentley has absolutely no evidential support. It is disappointing that such a suggestion was made publicly.

221. Finally, under this term of reference, the point was made to Mr Bentley that he had sought to mislead Mr Kelly in a letter sent in response to an article written by Mr Sinclair in the Courier Mail. It is not known whether this assertion is being pressed.

222. Mr Bentley accepts that he probably over-stated things a little when asserting that he was regarded as an independent director at Tatts[201]. However, Mr Kelly was plainly not misled[202]. This point is, with respect, not worth pursuing further.

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200 See the evidence of Mr Andrews in the litigation brought by him in the Supreme Court

201 T2-37ff; Bentley 23

202 Bentley 265; Kelly's oral evidence