

IN THE MATTER OF THE *COMMISSIONS OF INQUIRY ACT* 1950

QUEENSLAND RACING COMMISSION OF INQUIRY

Submissions on behalf of Andrew Fraser

- [1] These submissions are not made in response to any Notice of Allegation. Rather, they are advanced in the hope they might assist the Commission's deliberations on one point, that is, why no adverse finding should be made against Mr Fraser for failing to follow-up an investigation into Mr Ludwig's conduct after the CMC and ASIC declined to investigate (what has become known during the Commission's hearings as) the Proxy Issue.
- [2] The point is put in that way – a failure to follow-up – for a reason. Despite what was suggested to Mr Fraser when he was giving evidence,¹ in no sense did he stand in the way of a full investigation of the Proxy Issue. To the contrary, as soon as he became apprised of the issue, Mr Fraser authorised an investigation in the widest possible terms.
- [3] The allegations concerning misuse of the proxy are contained in the correspondence received from the Hon. W J Carter QC, ClarkeKann Lawyers and Mr Peoples² although, of these, the clearest exposition appears in the letter from Mr Carter QC dated 19 August 2008. On 21 August, Lachlan Smith of the Office of Treasurer reviewed a copy of the correspondence and, it appears, had a discussion with Mr Kelly of the Office of Racing.³
- [4] Mr Smith then gave Mr Kelly the following written direction:

“Pls commence investigation of the allegations made by Mr Carter and ClarkeKann lawyers/Mr People, as discussed.”⁴

¹ See, for example: TT. 13-10.18 to 25; 13-11.32 to 36; 13-12.23 to 28; 13-13.22 to 37; 13-30.2 and 3; 13-33.4 to 11; 13-35.29 to 34; 13-36.8 to 13.

² This correspondence is collected under Tab 38 Govt.

³ See: T.13-29.30 to 40.

⁴ See: Ministerial Correspondence Action Sheet, part of Tab 14 Govt. And see: T. 13-29.24 to 28.

- [5] Mr Fraser first became aware of the allegations (or, at least, those which were contained in Mr Carter QC's letter) at around midday the next day (22 August).⁵ At that time, he was the Treasurer in the Bligh Government and part of that portfolio including responsibility for the Office of Liquor, Gaming and Racing.⁶ Indeed, that remained the position at least until the caretaker period for the upcoming State Election commenced.⁷
- [6] According to the Media Release of 23 August, Mr Fraser convened a "meeting with officials" on 22 August to discuss the allegations contained in Mr Carter QC's letter.⁸ Mr Fraser directed the Department to:
- "... formally assess the material and refer the matter on to the CMC, and any other body, as necessary".⁹
- [7] That was an authority to investigate without limitation. To the extent that it is necessary to submit, it may be presumed that Mr Fraser gave that direction pursuant to the powers vested in him as responsible Minister under the *Racing Act* 2002.¹⁰ As such, and from the jump, Mr Fraser did not hesitate to give the very direction it was suggested to him when giving evidence had been "side-stepped".¹¹
- [8] It is also submitted to be important to keep in mind that, at the time the direction was given, Mr Fraser could have no way of knowing that the CMC would reject his referral on jurisdictional grounds.¹² But even if he did, his direction required the Office of Racing to "formally assess the material" and to refer the allegations to "any other body, as necessary". These were not the actions of a man endeavouring to keep the lid on any concerns about Mr Ludwig's integrity.

⁵ See: Tab 41 Govt.

⁶ See: Affidavit of Mr Fraser sworn on 5 August 2013 (*First Affidavit*); Paras 2 and 3. And see: TT. 13-2.24 to 33.

⁷ The State Election was held on 26 March 2009, and Mr Lawlor was appointed as the Minister responsible for racing following that Election.

⁸ See: Tab 41 Govt.

⁹ Ibid.

¹⁰ See: ss 47 and 48.

¹¹ See: TT. 13-12.23 to 28; 13-30.2 and 3.

¹² See: T. 13-11.1 to 4.

- [9] It is also significant that Mr Carter expressly requested that the “Racing Division” not enquire into the allegations. In particular, he wrote:

“Minister, as you are no doubt aware, QRL is, by section 59 of the *Racing Act 2002*, a “unit of public administration” under the *Crime and Misconduct Act*. It is submitted that the circumstances relating to the purported exercise of the above proxy should be referred to the Crime and Misconduct Commission (CMC) for independent and proper investigation and/or to the Australian Securities and Investments Commission (ASIC).

...

Finally Minister I would urge you to initiate independent enquiry into matters relating to the 9 August meeting and that such enquiry be undertaken, not by the Racing Division, but preferably by the CMC and/or ASIC since the matters of concern comprehend the statutory jurisdiction of one or the other.”¹³

- [10] Of course, that was a logical request. A referral of the allegations to the CMC was “perfectly sensible” because its jurisdiction was “contemplated” by the Act.¹⁴ That was of course a different approach to the one directed by Mr Smith on the previous day (for the Office of Racing to commence an investigation into the allegations), but the decision to engage the CMC may have reflected a deeper appreciation of the seriousness of the allegations or, alternatively, it may simply have been to accede to Mr Carter QC’s request. Whatever the reason, referral to the CMC was completely appropriate. Moreover, given that referral, it then also became appropriate to await the outcome of the CMC’s investigation.

- [11] On the same day as the meeting (22 August), the Office of Racing generated a Briefing Note in response to a direction given by Mr Smith on 14 August to provide a briefing on the “voting system” and “Legislative options”.¹⁵ It appears to have been prepared by Mr Kelly and/or Ms Perrett, and signed by Mr Bradley on 22 August. Although Mr Smith’s direction was given prior to the Proxy Issue coming to light, it is a little surprising that the Briefing Note makes no mention of that issue given Mr

¹³ See: Tab 38 Govt. And see: T. 13-14.46 and 47.

¹⁴ See: T.13-11.6.

¹⁵ See: Tab 36 Govt. The due date for the Briefing Note was specified in the direction to be 28 August.

Smith's discussion with Mr Kelly the previous day and, even more so, given Mr Smith's direction to investigate.¹⁶

- [12] Be that as it may, the Briefing Note reached Mr Fraser on 26 August. Because it did not deal with the allegations made by Mr Carter QC, Mr Fraser considered it to be "inadequate" and, for that reason, "sent it back".¹⁷ He gave the following written direction:

"I will formally consider once matters of process have been investigated and assessed."¹⁸

- [13] Again, it is impossible to reconcile such a decision (to defer consideration of the constitutional issue until the allegations concerning conduct were investigated) with any desire on Mr Fraser's part to bury the allegations about Mr Ludwig's integrity. To the contrary, the Briefing Note supplied a clear basis to reject the constitutional amendments (as well as a draft letter to that effect),¹⁹ but Mr Fraser stayed his hand until the whole matter could be properly investigated.

- [14] In the meantime, the Under Treasurer, Mr Bradley, had duly referred the allegations to the CMC by letter dated 23 August.²⁰ As to this, Mr Fraser recalled when giving evidence:

"The matter had been brought to my attention that day,²¹ and I provided it to Mr Bradley because Mr Bradley as the CEO had an obligation under the CMC Act to refer matters of official misconduct. And so that was where the matter left."²²

- [15] At the time Mr Fraser gave his direction on 26 August, the CMC's response had not been received by Mr Bradley,²³ but it is likely that Mr Fraser was aware that the CMC

¹⁶ See: T.13-29.30 to 40.

¹⁷ See: T. 13-29.30 to 46.

¹⁸ See: Tabs 39 and 45 Govt.

¹⁹ Ibid.

²⁰ See: Tab 42 Govt.

²¹ Mr Fraser was referring to 22 August.

²² See: T. 13-30.36 to 40.

²³ The CMC's response was received by Mr Bradley the next day (27 August) - Tab 43 Govt.

had rejected the referral because of a CMC Media Release to that effect on 25 August.²⁴ It is certainly the case that Mr Bradley must have been aware of the rejection because, on 26 August, he referred the matter to ASIC.²⁵ That, of course, was the alternative investigative body suggested by Mr Carter QC. It was also the only investigative avenue recommended by the CMC in its Media Release:

“The allegations do not concern QRL’s operations for the purposes of performing its function as the thoroughbred control body, but are issues relating to the voting process to amend the corporation’s constitution.

These are more properly issues for the Australian Securities and Investment Corporation.”²⁶

- [16] Whatever the position, a formal letter in response from the CMC (under the hand of Mr Needham) was received by Mr Bradley on 27 August.²⁷ In it, Mr Needham advised that the matter was not within the CMC’s jurisdiction, but then made the following two suggestions:

“ ... I note that QRL is an ‘eligible corporation’ registered under the *Corporations Act*, which is within the jurisdiction of the Australian Securities and Investment Commission (ASIC). I also note that there are provisions under the *Racing Act* for the chief executive to investigate the suitability of a control body to continue to manage its code of racing.”

- [17] As to these suggestions, the first had of course already been acted on – that is, by Mr Bradley on the previous day when he referred the matter to ASIC. Further, for the same reason that it was appropriate to await the outcome of the CMC investigation, it was equally appropriate to allow ASIC to investigate the matter before the second

²⁴ See: Tab 44 Govt.

²⁵ Although the letter of referral does not appear to be in evidence, ASIC’s response is: Tab 51 Govt. It is addressed to Mr Bradley and refers to his letter of 26 August.

²⁶ No suggestion is made in the Media Release about the possible exercise of investigative powers under the *Racing Act* 2002. In fact, the Media Release positively declares that the allegations are “more properly matters for” ASIC. As such, the Media Release is to be contrasted with Mr Needham’s letter to Mr Bradley that suggests, as an alternative to ASIC investigating the matter, the exercise of powers under the Act. This difference is important because, at the time Mr Fraser considered the matter on 26 August, he may have been aware that the CMC had rejected the referral and/or had expressed the view that ASIC was the appropriate body to investigate, but he cannot have been aware of the alternative suggestion made by Mr Needham in his letter to Mr Bradley.

²⁷ See: Tab 43 Govt.

suggestion (an investigation by the chief executive) was considered. Quite apart from anything else, the ASIC investigation might have been such that no further investigation was required.

[18] The point of present relevance though is that in no sense was there a process of “picking or choosing” the avenue of investigation; the CMC was a logical first port of call and, when that was rejected, ASIC was the next most logical. Both accorded with Mr Carter QC’s request that the “Racing Division” not investigate, and both referrals occurred before the CMC’s suggestion about the exercise of powers under the *Racing Act* was received. That said, it is by no means clear that Mr Fraser even saw a copy of Mr Needham’s letter,²⁸ although he became aware of the substance of it.²⁹

[19] As events transpired, the matter was not brought to Mr Fraser’s attention again until October 2008. In the intervening period, Ms Perrett sought advice from Mr Dunphy of Clayton Utz on 8 September,³⁰ and that advice was provided by letter dated 15 September.³¹

[20] The following features of Mr Dunphy’s advice are submitted to be important:

- The Minister was advised not to decide the issue whilst ASIC was “still considering the matters referred to it”,³²
- The decision whether to ratify or not would be open to review under Part 3 and/or Part 5 of the *Judicial Review Act 1991*;³³
- Ratification could be refused on the basis that the “apparent non-compliance with the *Racing Act* is of a sufficient concern to cause the Minister to be concerned about the overall legitimacy of the process that was undertaken”,³⁴

²⁸ See: T. 13-31.20 to 23.

²⁹ See: T. 13-31.5 to 22.

³⁰ See: Tab 48 Govt.

³¹ See: Tab 48A Govt.

³² Para 1.0(a).

³³ Paras 1.10(b) and 4.0 to 4.3.

- Mr Dunphy was aware that “on 19 August 2008, the Hon. W J Carter QC wrote to the Minister to raise a number of issues including an issue with respect to the meeting of the Class A Members of QRL and the validity of the vote cast by the representative of the Queensland Country Racing Committee (QCRC) at the relevant meeting held on 6 August 2008”;³⁵
- Mr Dunphy was instructed that those allegations had been referred to the CMC and, when the CMC announced that it would not investigate, to ASIC;³⁶
- There was non-compliance with s 76 of the *Racing Act* “in light of the matters raised in the referrals to the CMC and ASIC”;³⁷
- The legal effect of that non-compliance was considered;³⁸
- The Minister’s position that “he will not make any decision” until “such time as ASIC has completed its review” was noted and agreed with – on the basis that the “Minister might be seen as pre-empting or pre-judging the outcome of the ASIC investigation”;³⁹
- Detailed advice was given concerning “Potential Scenarios, Risks and Way Forward”.⁴⁰ Three options were discussed – (1) Rejection on policy grounds,⁴¹ (2) Refusal to ratify based on non-compliance with the *Racing Act*⁴² and (3) Approval of the proposed amendments to the Constitution of QRL;⁴³

³⁴ Para 1.0(c)(ii).

³⁵ Last complete paragraph on page 4.

³⁶ Paragraph spanning pages 4 and 5.

³⁷ Pages 7 and 8.

³⁸ Pages 8 and 9.

³⁹ Para 3.4.

⁴⁰ Para 5.0.

⁴¹ Para 5.1.

⁴² Para 5.2.

⁴³ Para 5.3.

- As to (2), the relevance of the Minister’s “continuing oversight of QRL” as a control body is emphasised together with the “significant public importance” of the proposed amendments. The Minister is then advised as follows:

“In our view, if the Minister were to ratify the current application, he may well be open to criticism that he has then endorsed this non-compliance by allowing the current application to proceed”.⁴⁴

- [21] It may therefore be observed that, bound up in Mr Dunphy’s advice, was a consideration of the significance of the allegations made regarding the Proxy Issue. To the point, it is with respect not correct to assert that Mr Dunphy’s advice had “nothing to do with”⁴⁵ the integrity issues that had been raised. Certainly the advice did not extend to what might be done to further investigate the integrity question if ASIC was unable or unwilling to do so, but it does raise the same issues as a possible basis to refuse to ratify the amendments. Indeed, this was the very point referred to by Mr Ford in his email to Mr Kelly of 17 October when Mr Fraser was overseas:

“Early indications from Lachlan (Smith) are that the Treasurer’s Office supports the approach we have outlined, although I’m not sure whether he’ll reject the proposed constitutional changes on integrity grounds or content grounds”.⁴⁶ [Emphasis added]

- [22] By then, ASIC had met with Mr Ford, Mr Turnbull and Mr Kelly to advise that it would not be commencing a formal investigation.⁴⁷ A letter to that effect was then sent by ASIC to Mr Bradley on 22 October,⁴⁸ and a Briefing Note was prepared by the Office of Racing on 24 October.⁴⁹ Amongst other things, it mentioned the allegations made regarding the Proxy Issue⁵⁰ and the referrals to the CMC and ASIC.⁵¹ It then advised that:

⁴⁴ First paragraph on page 16.

⁴⁵ See: TT. 13.11.24, 13-13.16 and 13.30.9.

⁴⁶ See: Tab 50 Govt.

⁴⁷ See: Tab 49 Govt.

⁴⁸ See: Tab 51 Govt.

⁴⁹ See: Tab 53 Govt.

⁵⁰ Para 7.

⁵¹ Paras 8 and 9.

“Legal advice has been obtained from Clayton Utz on the Minister’s options in deciding whether or not to ratify the proposed amendments to the QRL constitution (**Attachment 4**)”.

[23] Then, adopting Mr Ford’s descriptions, the Briefing Note discussed the “content ground” followed by the “integrity ground”. On the latter, it informs that the non-compliance was to the effect that:

“ ... no meeting of the Committee had been held and only verbal approval to cast the vote had been obtained”.⁵²

[24] That information was attributed to the Secretary and Chair of QRL,⁵³ and the point was also made that no formal investigation had been conducted, but its inclusion in the Briefing Note does rather suggest to the reader that the non-compliance was merely one of form rather than substance.

[25] In any event, the Briefing Note concluded with a recommendation that the ratification be refused on the “content ground”. No other options were advanced and no advice was given to, for example, direct a Departmental investigation into the Proxy Issue.

[26] Mr Fraser was provided with the Briefing Note and the attached advice from Mr Dunphy on (or about) 27 October on his return to the country.⁵⁴ That occurred in the following circumstances:

“It was my decision to make, and I recall that I’d been overseas for the two weeks prior on a Queensland Treasury roadshow at the height of the global financial crisis, that I landed one day and flew to Cairns the next for the regional Parliament and was handed a copy of the advice. I don’t think I had a long time to consider it, and certainly I thought at the time I was acting, it was very good advice from Mr Dunphy, and in the course of the last couple of weeks, I’ve had to review that, and I would readily concede that in the end, the public interest would likely have been served if other advice was included in that briefing note to me that recommended a different course of action in addition.”⁵⁵

⁵² Para 19.

⁵³ Ibid. And see: T. 11-63.39 and 40 (Kelly).

⁵⁴ See: T. 13-31.43.

⁵⁵ TT. 13-11.46 to 13-12.7.

- [27] Leaving to one side the observation made in the last sentence, it cannot be thought that Mr Fraser had a great deal of time to scrutinise either the Briefing Note or the advice in the sense of subjecting them to a close, critical analysis. The Briefing Note contained a single recommendation and the advice supplied the basis for it. It is hardly surprising that Mr Fraser did not turn his mind to the feature that the integrity questions had not been resolved. He saw, as he said in evidence, a clear basis to refuse the ratification and that was undoubtedly what he wanted to achieve.⁵⁶ Nothing was otherwise raised in the Briefing Note for action and the information that was conveyed concerning the nature of the non-compliance (verbal approval had been obtained) was relatively benign. As for Mr Dunphy's advice, for the reasons earlier submitted, it did consider the integrity issues as a possible basis for refusing ratification and, as such, the distinction between the use of those issues for that purpose and their use from an industry-wide integrity perspective may not have been readily appreciated.
- [28] Of course, as Mr Fraser's observation referred to above makes clear, Mr Fraser now readily accepts that the integrity questions raised by the Proxy Issue ought to have been the subject of advice.⁵⁷ To the point, in circumstances where the CMC and ASIC had declined to investigate, the Departmental investigation of those allegations should have been followed up. That was of course what Mr Fraser's office (through Mr Smith) had originally directed the Department to do, but it was overtaken by the referrals to the CMC and ASIC.
- [29] It was therefore premature to regard the matter as closed⁵⁸ but, in so regarding it, Mr Fraser was at one with his Departmental advisers. It cannot, for example, be suggested that he formed that view independently of advice or, even worse, against advice. The overall Government response to the allegations underlying the Proxy Issue was incomplete, but it is not as though there is any evidence to suggest that any of Mr Fraser's advisers was consciously aware at the time that this was the case.

⁵⁶ See: TT. 13-32.37 to 42; 13-33.4 to 11 and 13-35.18 to 27.

⁵⁷ And see: T. 13-22.18 to 29; 13-31.10 to 18.

⁵⁸ See: Tab 55 Govt.

[30] In any event, when giving evidence, Mr Fraser accepted ultimate responsibility for this oversight.⁵⁹ When doing so, it was suggested that he was casting blame on his advisers and, while he denied endeavouring to do so,⁶⁰ he also made it very clear in his First Affidavit that he relied heavily on the briefing system.⁶¹ In his most recent affidavit⁶² (which was of course sworn with respect to a different issue) he had this to say:

“I do not mean to unfairly criticise those who were responsible for briefing me. Rather, as I deposed in my First Affidavit, a Minister is heavily dependent on the briefing system and reliant on any issues of significance being brought to their attention. That is how I operated and, by my observation, how most Ministers operated. Of course, in a perfect world with boundless time to consider every issue, it might be possible to retrieve and then assemble all of the material ever provided to you on a topic in order to assess for yourself the merits or otherwise of a particular proposal and/or to initiate investigations or to require a deeper consideration of a specific point, but I only rarely had the luxury of spare time.⁶³

...

Again, this is where the reliability of the briefing system comes into focus. Ministers rely on issues of significance being flagged for them. Of course, the lot of Government employees in this regard is not an enviable one. In addition to their workloads, they are required to produce succinct Briefing Notes and would not be thanked, for example, by the provision of every conceivable document on a topic any more than they would be thanked for producing unduly lengthy Briefing Notes. So, leaving to one side the proper checking of information conveyed to a Minister, the authors of Briefing Notes have to exercise judgment as to (1) what the real issues are and (2) how much information and/or advice is imparted with respect to those issues.”⁶⁴

[31] Further, it is submitted that Mr Fraser’s dependence on the briefing system was even more acute given his role as Treasurer, engaging as it did every other portfolio. In addition, his responsibilities as a member of the Cabinet Review Committee (with the Premier, Deputy Premier and a rotating Minister) would have only added to his workload. In addition, by the time Mr Fraser was called on to consider this matter in

⁵⁹ See: T. 13-14.6 to 23.

⁶⁰ See: T. 13-14.19.

⁶¹ See: Paras 30 to 34.

⁶² Sworn on 12 October 2013.

⁶³ Para 16(a)(xv).

⁶⁴ Para 17.

October 2008, the full-blown effects of the Global Financial Crisis had unfolded; indeed, they were at their height.⁶⁵

- [32] It is submitted to also be significant that Mr Fraser's decision and declaration that the matter should be regarded as closed was made on the floor of Parliament.⁶⁶ Such a public announcement drew a prompt response from Mr Carter QC who, by letter dated 5 November, requested that Mr Fraser refer the matter to the Commissioner of Police for investigation.⁶⁷ He did not request a Departmental investigation. Mr Dart responded on behalf of the Office of Treasurer, recommending that Mr Carter QC do so directly.⁶⁸ The Commissioner of Police was then separately provided by the Office of Treasurer with a copy of Mr Carter QC's letter and Mr Dart's response⁶⁹ and an investigation by the Fraud and Corporate Crimes Group ensued. On 13 February 2009, the QPS announced that it had concluded its investigation after finding that there was "insufficient evidence to pursue charges against anyone involved".⁷⁰
- [33] In the result, the allegations the subject of the Proxy Issue went through three pairs of statutory hands. That they were not also the subject of a Departmental investigation has been conceded as an incomplete response, but the response that was made was nevertheless significant. If Mr Fraser was at any time motivated to protect Mr Ludwig, co-opting the investigative firepower of three external agencies was hardly a reliable way to go about achieving that objective.
- [34] His preparedness to do so, and the speedy way in which he reacted when the allegations first came to his attention (on 22 August) is revealing of a Minister acting entirely properly. In addition, the breadth of the direction he first gave at that meeting is in no way reflective of any concern on his part to constrain the proper investigation of the allegations in any respect.

⁶⁵ See: First Affidavit; Para 48 and Attachment AF-12, page 39. And see: TT. 13-11.46 to 13-12.7.

⁶⁶ See: Tab 55 Govt. As there appears, it is noteworthy that a copy of ASIC's response of was also tabled.

⁶⁷ See: Tab 58 Govt.

⁶⁸ See: Tab 59 Govt.

⁶⁹ See: Tab 60 Govt.

⁷⁰ See: Tab 75 Govt. This finding was also independently assessed by Mr Carmody SC who agreed with it.

[35] The position might be otherwise if, for instance, Mr Fraser was:

- Advised to exercise his powers of investigation under the *Racing Act* 2002, but chose not to do so; or
- Consciously aware that the integrity issue remained unresolved, decided not to pursue it;

but there was no advice to that effect and no evidence that Mr Fraser turned his mind to the adequacy of the Governmental response to the allegations until he was preparing to give evidence at the Commission's hearings.

[36] For the above reasons, it is submitted that no adverse finding should be made against Mr Fraser for failing to follow-up an investigation into Mr Ludwig's conduct.

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Counsel for Mr Fraser
22 October 2013