For your information P7322

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6 August 09.

The Honourable Peter Lawlor MP
Minister for Tourism, Fair Trading and Racing
GPO Box 1141
BRISBANE Q 4000

Dear Minister,

Re: Appointment of Directors Queensland Racing Limited (QRL)

Your answers to the questioner at the Estimates Committee F hearing on 22 July 2009 are matters which the racing community views with great concern. Those answers include the following -

- "Decisions on the process . . . for the appointment and selection of Directors to Queensland Racing are not matters which the Minister has any involvement in", and
- Whilst I may be concerned about it (the process) I do not have any control over it and I will not interfere . . ."

These assertions were made by you in relation to the process which was recently followed for the purposes of the, as yet incomplete, selection of 2 directors to vacancies on the Board of Queensland Racing Limited. They were made in response to an inquiry as to whether the process was "flawed" and "what steps will the Minister take to remedy the situation?" Many respected racing stakeholders and others have asked themselves the same question and share the same concern as you. Your answer that "whilst (you) might be concerned about it" you would do nothing, was for many a disappointing response and one which, with respect, you should review urgently.

My submission is that not only should you intervene (your comment concerning "misconduct" is noted), but that if you do not you will have failed to exercise your ministerial responsibilities under the Racing Act (The Act). The compelling argument is that the process involving QRL and the so called Independent Recruitment Consultant (IRC) has seriously miscarried and has been tainted with illegality, and therefore your intervention as the responsible Minister is a matter of considerable urgency.

It is fundamental to this issue to first observe that QRL, an "eligible corporation" within the meaning of the Act, applied to the Minister for a Control Body Approval pursuant to Section 10 of the Act. This Approval, having been granted by the Minister, entitles QRL to manage the thoroughbred racing code for a period of 6 years (Section 28), subject to certain conditions and the payment of an annual fee. Accordingly, whilst the Approval

empowers the Company to exercise the Control Body's statutory functions set out in the Act and to manager the code on a day to day basis, the thrust of the Act ensures that, like the recipient of any other licence, approval or authority, the recipient of a Control Body Approval also remains accountable, in this case to the racing industry, but also to Government through the responsible Minister. The Racing Act is designed to achieve this outcome.

I will develop this point further below but before doing that, I need to outline the factual matters which give rise to industry concern. Perhaps they coincide with yours. I will deal with them in turn.

1. Candidate Eligibility

The QRL Constitution (Appendix A) defines only the objective, rather than the subjective Directors Selection Criteria. They speak for themselves, except perhaps "mandatory requirement" 5, namely, "Knowledge of The Thoroughbred Racing Code". What is that?, many have asked. Is it the Australian Rules of Racing? or some code of conduct affecting Directors in their management of the code? or some policy document developed by the Control Body? Nobody seems to know, but that is a minor point.

Clearly the objective criteria in Appendix A are applicable to each candidate and constitute the first restriction or limitation which is imposed on all candidates before they can be considered as "eligible" candidates. As Appendix A expressly states:

> "Candidates must also be capable of demonstrating that they are an eligible individual within the meaning of the Racing Act."

There were 26 candidates who applied for selection to the 2 vacant positions. The IRC's obligation under the QRL Constitution (Clause 17.3) was to prepare a Short List "by reference to the selection criteria contained in Appendix A. The Short List contained only 4 names. This was barely enough to satisfy the requirement in the Constitution that for the process to be able to proceed to the next stages, the Short List "shall be no less than the number of Director positions plus 2." What a remarkable coincidence? you might think! Of the 26 candidates who applied the IRC concluded that only the minimum number required by the Constitution satisfied the objective Selection criteria in Appendix A."

I pause to emphasise the significance of the Short Listing in the overall process involved in the ultimate selection. The Selection Committee is made up of the Class A Member Representatives and the Class B Members (the 3 directors). After Short Listing is complete the Short List is given to each of the Class A Members and the Class B Members to determine "the order of preference of the Short Listed Director Candidates". Part 1 of Appendix B applies to this part of the process. Once the order of preference is determined the Selection Committee (the Class A Member Representatives and the Class B Directors) then also consider the Short List and if there is no agreement as to

"who is to be the preferred candidates to fill the vacancy" a ballot procedure in accordance with Part 2 of Appendix B is finally held.

It is critical to understand that both the Members in determining their individual order of preference and the Selection Committee which makes the final selection, have available for their consideration only those 4 candidates on the Short List. The 22 Candidates excluded from the Short List by the IRC are excluded from further consideration during the final 2 parts of the selection process. Therefore if the IRC excludes any candidate from the Short List, that ends his/her candidacy. It is only those which the IRC puts on the Short List who are considered further.

I know of at least 5 of the 22 candidates - all suitable and honourable and experienced racing persons who satisfied the objective Directors Selection Committee but who were excluded from the Short List. There are no doubt others. They were thereby excluded from any further consideration by the Class A members and the Selection Committee. One can only ask: if those excluded satisfied the Objective Selection Criteria, on what basis and by reference to what considerations did the IRC exclude those candidates from any further participation in the constitutional selection process? Neither those candidates nor many other relevant persons seem to know. For instance, those excluded included a retiring QRL director who sought re-election and even though he satisfied all Selection Criteria having been a founding Director of the Company since 1 July 2006, he also was excluded.

A few of those excluded were interviewed by the IRC. Of those whom I know there are some who were not Short Listed and whose eligibility was beyond question but who were not even interviewed. On what basis was that done? Again no one seems to know. Whatever the other flaws in the whole process, those excluded were also denied procedural fairness.

Again, why were those who satisfied the selection criteria excluded? If they were excluded by the IRC by reference to subjective criteria based on merit or for any reason other than considerations relevant to eligibility, then the IRC acted beyond the power vested in him by the Constitution. It was entirely beyond the power of the IRC to Short List by reference to subjective criteria based on merit or on other extraneous matters. Otherwise what is the point of having the Class A members determine their order of preference of the eligible candidates, either by agreement or by ballot, or of the Selection Committee embarking on the process of selection, both of which processes necessarily involve merit based decision making. The IRC has no valid role which involves Short Listing on the basis of merit or on other considerations beyond those stated in Appendix A.

The later parts of the process are designed to give to the Members of the Company the right to decide who shall be the selected directors, not the IRC, whose role is a very limited one. Nor is it the role of other faceless persons among the membership of the Company who may be influential but who are only intent on discarding merit and other relevant factors in favour of cronyism or patronage. In this case, the IRC has decided

either for himself or in association with other unidentified persons what candidates will be included on the Short List and who shall be excluded, and this decision was obviously made by reference to matters other than "by reference to the Selection Criteria contained in Appendix A."

2. Club Committee Members and Directors of QRL

You are probably well aware of the statutory composition of the Queensland Principal Club, which was established by legislation in 1991 as the Control Body but which was abolished by Act No.90 of 2001. The majority of its members were members of the committees of the various racing clubs. The present Chair QRL was for some years its Chairman. It soon became faction ridden and infected with internal strife and division. It was therefore abolished.

Accordingly in 2002 with the enactment of the Racing Act and the unprecedented model of governance that any "eligible corporation" could apply to the Minister to be the Control Body, it was necessary for the Act to define "eligible corporation" and "eligible individual". This was because the Act (Section 12) required that any corporate applicant for a Control Body Approval had to evidence not only its own eligibility (Section 8) but also that "each of its executive officers is an eligible individual." A director by definition (see Schedule 3) is included as an "executive officer". Therefore a person cannot be a director of the Control Body company unless he is an eligible individual and by Section 9 a "member of a Committee" of a licensed club is expressly excluded and therefore is NOT an eligible individual.

The relevant facts are that 2 candidates who were Short Listed, and were known to the Chairman, are both known to have been members of the committee of a licensed club when they applied to be directors of QRL. One of them still is; the other resigned his membership of the committee of a licensed club at some time after the closing date for applications (29 May 2009). These are probably the 2 persons referred to by you on page 13 of Hansard when you said:

> "My understanding is that they will not be members of the Committee <u>when they are appointed</u>. That will satisfy the requirements of the Constitution."

Was this a Freudian slip!

The relevant requirement is not one required by the QRL Constitution but by the Act. Your "understanding" that they will not be members of the Committee of a licensed club "when they are appointed" QRL directors is, with respect, incorrect. I need to say why.

Appendix A provides that "candidates", that is, applicants for the vacant positions must be able to demonstrate "that they are an eligible individual" within the meaning of the Act. That requirement is imposed on all" candidates" when they apply, not only to those who are selected or "appointed". Each candidate has to be able to satisfy this

additional objective criterion as a "candidate" not as an appointee. In short if at the time of application a person remains a member of a committee of a licensed club and therefore not an "eligible individual" that person is disqualified as a candidate and from participating in the ensuing selection process. As will appear, any selection of a person to be a director is synonomous with that person's appointment as a director, so that the selection of an ineligible individual is expressly contrary to the requirements of the Act.

There are 2 compelling reasons why this is so.

Firstly, it should be noted that in accordance with the QRL Constitution there are 5 identifiable steps in the process.

- the application,
- the closure date for applications,
- the short listing,
- the determination of the order of preference by Class A and Class B members (Part 2 of Appendix B,
- the Selection Committee process (Clause 17.6 and Part 2 of Appendix (B)).

If the proper time for determining the eligibility of an individual is at the time of selection/appointment, then it must follow that the Constitution, in spite of the provisions of the Racing Act, permits -

- the making of an application by a person who is not an eligible individual,
- requires the IRC to receive that application and to process it for short listing,
- permits the short listing of that ineligible person to go forward to the final stages,
- permits, indeed requires, the Class A and Class B members to determine their order of preference for a person or persons who is or are not eligible individuals, and
- requires the Selection Committee to engage upon the selection of directors even though one or more of the candidates is not an eligible person.

That clearly is an absurdity and is inconsistent with both the Constitution and the Act concerning eligibility. This absurdity is avoided if the critical time for determining eligibility for all persons is the time of the application. The correctness of this conclusion can be tested by applying the same test to the other disqualifying factors in Section 9 of the Act which relate to eligibility. Take for example the case of an individual who has "a disqualifying conviction." That is an objective fact and if it is the fact when the application is made that person is clearly an ineligible person. Likewise with the persons who are subject to bankruptcy or who are members of the Committee of a licensed club and so on.

If your statement of the position is to prevail then the absurdity escalates. Every person shortlisted might conceivably be a member of a Committee of a race club and at the

same time be able to participate in determining the order of preference of the shortlisted candidates of which he/she is one. That surely is the height of absurdity.

By way of analogy, consider the eligibility of a corporate applicant for a Control Body approval. Sections 10 and 12 clearly proceed on the basis that eligibility is to be determined at the time of the application.

Secondly, the express provisions of the QRL Constitution make clear the fallacy in your statement to the Estimates Committee to the effect that eligibility is to be determined "when they are appointed".

Clause 17.11 of the Constitution provides:

> "The decision of the Selection Committee shall effect the election of directors from the close of the next AGM."

In short, selection and appointment are not separate parts of the process. Immediately the selection decision is made and an ineligible individual is selected, ipso facto, the ineligible person or persons are thereby appointed Directors of QRL from the close of the AGM. That is, the selection of the ineligible individuals automatically appoints them Directors. There is nothing else to be done. The fact of selection is itself the fact of appointment, which means that if at the time of selection the 2 persons are ineligible individuals they are excluded by law from the point of selection to be appointed directors of the Company.

The consequences of this for the company and in particular the Minister are dealt with further below.

3. The Independence of the IRC

I return to the short-listing process and the critical relationship between short listing and selection. Clause 17.3 defines the limited role of the recruitment consultant and expressly requires his/her "independence". One needs to ask: Independent of who? The preferable view clearly is that it requires decision making by reference only to the objective criteria in Appendix A, independently of the Company, its directors (the Class B members) and of the Class A members. The short-listing role is for the IRC; the selection role is for the Members. The role of each is different but the short listing is to be effected by a person independent of, in particular, QRL and the Class B members. That is to say, that the decision of the IRC is to be made without reference to QRL or its directors and is to be the product of the IRC's own independent assessment of eligibility by reference only to the objective criteria. Because of the critical relationship between the short listing and the later selection processes and given that in other relevant respects there is an established imbalance between the power of the Class B members and the industry stakeholders (the Class A members), the Constitution seeks to ensure that short listing occur without reference to and without the influence of, in particular, the Class B members. Hence the need for independence.

The IRC firm has had over a lengthy period a significant commercial relationship with QRL, its Board and officers. It is demonstrable that QRL is and has been a significant client of the recruitment consultant and that between consultant and longstanding client there has developed a relationship based on familiarity and an acute appreciation of the requirements of the one or of the other. Which raises the question whether having regard to the requirements of the Constitution, the critical short-listing process should devolve, by the decision of the Directors (the Class B members), to the body with which it has and has had a significant client/consultant relationship.

Independence in this context must not only be present but must be seen to be present.

Given the shortcomings referred to in the short-listing process and its apparent acceptance by the QRL Board without question, it is relevant to inquire whether these flaws may have resulted from a perceived lack of independence in the consultant firm. In short, did the IRC produce a short-listing result which the remaining directors wanted or preferred?

5. The Anti-Discrimination Act 1991

There is an additional concern which relates to the short-listing process and a perceived lack of sufficient independence.

I am aware, as are many other persons, that at least one particular candidate was excluded from the shortlist in spite of the fact that he easily satisfied all of the Appendix A objective criteria. He enjoys an enviable reputation not only as a person but as an experienced and successful professional and business man. As well he has been and remains a respected sports administrator at a State and National level. He was asked by the IRC when interviewed to name the school he attended and when that was given was then asked: Are you a practicing Catholic?

That questioning, which was not only irrelevant and objectionable, was also unlawful, being in breach of Section 124 of the Anti Discrimination Act 1991. That section provides:

> "A person must not ask another person, either orally or in writing to supply information on which unlawful discrimination might be based."

Section 7 of that Act provides that the Act "prohibits discrimination on the basis of . . . religious belief or religious activity . . . "

It is clearly demonstrable that the short-listing process was, as pointed out above, tainted with illegality. It has miscarried.

6. Summary

In summary therefore, the process provided for in Clause 17.3 of the Constitution of QRL and accordingly any future processes required to be executed in accordance with Clause 17, are and will be fatally flawed on account of the following:

- The Short List excluded several candidates who were entitled to inclusion on the list "by reference to the Selection Criteria contained in Appendix A.
- An interview process adopted by the IRC was applied to some who satisfied Appendix A and who were excluded but was not applied to others who also satisfied the Appendix A criteria but who were also excluded.
- If an interview process was a necessary component in the short-listing process, several candidates who satisfied the selection criteria were not interviewed and therefore denied the opportunity of being heard in respect of any matter relied on by the IRC to exclude them. They were denied procedural fairness or were, at least, the victims of an unacceptable corporate governance practice.
- Prima facie, the IRC determined the Short List not by reference to criteria contained in Appendix A but by reference to other matters which were entirely subjective and referable only to questions of merit or perceived merit or to other irrelevant considerations.
- In the latter respect the IRC acted beyond the power given to him by Clause 17.3 of the Constitution.
- To the extent that the short list was based on other than objective criteria, the IRC thereby sought to abrogate or at least to manipulate and/or influence the selection process vested by the Constitution in the Class A members and the Selection Committee.
- The short-listing process, of which interviewing was in the case of certain candidates a part, was unlawful because the questions asked of at least one candidate were unlawful and in breach of Section 124 of the Anti Discrimination Act 1991. Besides it was expressly in breach of QRL's own policies which reject discriminatory decision making in respect of appointments.
- Candidates who were short listed and whose names were provided to Class A members for determining an order of preference by 13 August 2009 include 2 persons who were not eligible individuals when they applied as candidates for the vacant director positions and who therefore remained ineligible for short listing, for the determination of order of preference and for consideration by the Selection Committee.
- The short-listing process was executed in a way which was designed to and has had the effect of unduly restricting the decision making of the Selection Committee.
- If the 2 candidates in question are selected/appointed directors of QRL, that outcome breaches a fundamental requirement of the Racing Act.

7. The Need for Ministerial Intervention

Reference was made above to the ministerial grant of a Control Body Approval to this company subject to conditions. Your statement to the Estimates Committee that any intervention by you in respect of Control Body matters would constitute misconduct is simply wrong. Rather than suggest that your intervention may amount to misconduct, it is more correct to suggest that your intervention is critical; indeed it is a matter of statutory obligation. Minister, in granting the Control Body Approval to the company, the Minister is required to approve the Constitution of that company (Section 11(1)©. Furthermore, the Minister made this approval subject to the condition that any changes to the Constitution required the Minister's consent. Is, therefore the Minister to be denied the right to ensure that the Constitution, which he approved, is properly administered and to interfere if it is not, for instance, if the Selection Committee proposes to select/appoint as directors 2 ineligible persons? This company whose Class A membership consists of 16 industry stakeholders is, after all, the holder of a Control Body Approval for the time being, which was granted by the Minister for a limited period only - it is not BHP! Furthermore, if the Minister does intervene for good reason, does he thereby leave himself open to an accusation of misconduct?

That suggestion is fanciful.

You may be aware of Minister Fraser's intervention in 2008 to reject the QRL directors' attempt to amend the Constitution of QRL by seeking to extend their terms of office. That intervention was made pursuant to a condition attached to the Control Body approval. The matters of concern here range from on the one hand, accepting and advancing as candidates certain ineligible individuals to, on the other, resorting to the use of unlawful discriminatory practices. Accordingly for the Minister to fail to intervene here involves a failure to recognize the Ministerial responsibilities in Chapter 1 Part 4 Divisions 1, 2 and 3 of the Racing Act (Sections 46-58). These include the giving by the Minister of a direction to a Control Body; the definition of an annual program for assessing the on-going suitability of a Control Body which the Minister has to apply; and the requirement for investigation of a Control Body with provisions for disciplinary action against a control body by the Chief Executive in a proper case (Section 45).

Division 1 empowers the Minister to give a direction of the kind referred to in Section 45(2) "to ensure that the control body's actions are accountable and its decision-making processes are transparent." Division 2 (Section 46) provides for the preparation by the Chief Executive for the Minister of an annual program for assessing the suitability of the Control Body to manage its code of racing. What are the contents of the current program? Does the current program ensure that the Control Body will act to ensure that its Constitution which was approved by the Minister when granted a Control Body Approval, is properly administered especially in relation to the appointment of Directors to the Company? Is not the question of how the Control Body manages its own Constitution relevant to the on-going assessment of the suitability of a Control Body to manage its code of racing?

Section 47 empowers the Chief Executive to investigate the Control Body's ongoing suitability. Given the manner in which the constitutional processes of QRL have been managed, as set out above, does not that raise the issue of suitability?

Section 48 empowers the Chief Executive to decide whether a Control Body associate is a suitable person to continue to be associated with the Control Body. The definition of "control body associate" includes a "business associate" which is also defined "for a corporation" approved as a Control Body. Is a consultant engaged by the Company to manage its recruitment processes, including the recruitment of persons to fill vacant Director positions of the Company, a suitable person or firm if it enjoys a substantial commercial relationship with the Board and acts unlawfully in relation to discrimination issues.

Division 3 provides for the Minister to take disciplinary action if, for example, the Company or its Board proposes to condone the appointment to the Board of persons who are not eligible individuals (Section 52(1)(b)). Disciplinary action may involve cancelation or suspension of an Approval or other remedy, subject to procedural requirements.

The Racing Act makes it plain that "ensuring public confidence in the integrity of the racing industry" (Section 45(1)(a)), "ensuring that the Control Body's action's are accountable and its decision making transparent" (Section 45(1)(d)) and for "ensuring that a Control Body is suitable to continue to manage" its code of racing, are primary objectives of the legislation. Are those objectives met if it appears that the now annual selection of QRL directors by the industry can be targeted as another victim of cronyism?

This is the first opportunity since the Control Body Approval was granted to QRL (1 July 2006) for the industry to commence to renew the Board of the Company. Are the Act's primary objectives met, for example, if the Board and its chosen business associate engage in practices for the purpose of appointing Board members which offend the Constitution of the company and the spirit of the legislation and which are unlawful? By way of example, disciplinary action can be taken by the Minister if persons selected/appointed as directors of the company are not eligible individuals (Section 52(1)(b)).

Do you still maintain that these issues of concern are matters you can ignore and have no "involvement" in? With respect Minister, these are all relevant matters for your consideration. Your peremptory dismissal of these valid concerns as matters beyond your area of statutory responsibility, as evidenced by your statements to the Estimates Committee F is, with respect, fatuous. I return to your statement to Estimates Committee F, in particular to your own personal "concerns about it", that is, the process of the short listing. Are those concerns comprehended by the several matters of concern referred to above? If they are, and I suspect that they are, non interference is not an option. You may or may not be aware that on account of the short listing process here, many good racing people have simply had enough. It is entirely predictable that

the Board of QRL will plead, loud and long, that "we had nothing to do with it" and that it is for the Class A members to decide. Minister you know full well the kind of imbalance between the Directors and the Class A members of this company and the capacity of the Board to influence decision making by some of the Class A members for any number of reasons. Is that also a part of your publicly stated concern? Minister the racing industry wants you to act and to intervene appropriately or as you may be advised and to use your undoubted influence to ensure that both the concerns of your good self and those of the many other decent concerned honorable racing people and stakeholders are relieved.

By letter dated 15 July 2009, the Class A members were informed by QRL that each had to complete the determination of its order of preference (Clause 17.5) by 13 August 2009 although that can easily be postponed and should be.

Accordingly your urgent response would be applauded.

I propose to forward a copy of this letter to the Honorable the Premier, to Queensland Racing Limited, to the Opposition Spokesperson on Racing and to each of the Class A members.

Yours sincerely

Hon. W.J. Carter QC