QUEENSLAND RACING COMMISSION OF INQUIRY

Commissions of Inquiry Act 1950

SUBMISSIONS

Part 1

Parties to whom these submissions relate

1. These submissions are made to the Commission of Inquiry on behalf of the following persons who have been granted leave to appear[1]:

   a. Robert Geoffrey Bentley who was, during the relevant period (as defined in the Terms of Reference[2]) the Chairman of the board of directors of Queensland Racing Limited ("QRL")[3] until 30 June 2010; and then Racing Queensland Limited ("RQL")[4];

   b. Anthony John Hanmer, who was a director of QRL and RQL during the relevant period, and the Chairman of Queensland Race Product Co Limited ("Product Co.") during the relevant period;

   c. William Patrick Ludwig, who was a director of QRL, RQL and Product Co. during the relevant period;

   d. Wayne Norman Milner, who was a director of QRL between 20 December 2009 and 30 June 2010; and a director of RQL from 1 July 2010 until June 2012;

1 By letter dated 10 July 2013

2 Order in Council 23 May 2013

3 Until 30 June 2010

4 from 1 July 2010 until his resignation effective from 30 April 2013

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e. Malcolm Nicholas Tuttle who was the Chief Operations Manager of QRL until 30 June 2010, and then Chief Executive Officer of RQL until 26 March 2012;

f. Paul Brennan, who was the Racing Services Manager of QRL until 30 June 2010 and then Director of Product Development of RQL until 26 March 2012;

g. Shara Louise Reid (formerly Murray) who was Senior Corporate Counsel and Company Secretary of QRL and subsequently RQL until 26 March 2012[5];

h. Alfred Jamie Orchard, the Director of Integrity Operations from July 2008 until 26 March 2012.

Structure of submissions

2. Given the number of issues that are required to be canvassed in relation to the parties on whose behalf these submissions are made, we have divided the submissions into a number of parts. Each subsequent part deals with a specific term of reference, other than part 2 which will deal with terms of reference 3 (a) and 3 (b) together. Paragraph references to terms of reference relate to the paragraphs in the Order in Council establishing this Commission[6].

The way in which the inquiry has been conducted

3. Before dealing with the matters specifically raised by the Terms of Reference, as defined or refined by counsel assisting during the public sittings of the Inquiry[7], submissions must be made about the manner in which the Commission of Inquiry has approached its task, and how that affects the findings or recommendations that can be made by it.

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[5] Mrs Reid is referred to in the documents primarily as Shara Murray, and will be so referred to in these submissions

[6] Commission of Inquiry Order (No. 1) 2003 dated 23 May 2013

[7] Including by reference to the document styled "Terms of Reference: Breakdown of Issues for Inquiry" posted on the Inquiry's website

4. In making these submissions, it is acknowledged that the Terms of Reference are broad, and in many instances vague. It is also apparent that the time within which the Inquiry had to be conducted[8] and was perhaps not commensurate with the amount of information that has to be dealt with. Nevertheless, fairness must never give way to expediency.

5. It is also appreciated that the racing 'industry' is unique[9] and has long been the subject of controversy and the scene of trenchant infighting[10]. The industry is comprised of many factions in which:

> "everyone has their own opinion in the industry. For each person who laments the passing of the "old ways" there is another who applauds innovation"[11]

6. It is also the fact, demonstrated in a number of the documents available to this Commission of Inquiry[12] that there is a regrettable tendency in the racing industry for debate to be personalized.[13] Some sections of the racing industry are still unforgiving of the removal of control first effected by the establishment of the Queensland Principal Club in 1992. This was recognized, as recently as 2004, as still being a matter of bitter regret, and even resentment, within some factions in the racing community[14]. That appears to remain the case[15]. On 26 September 2013 the existence of a website chat room posting quite insulting comments on a number of witnesses appearing before the Inquiry demonstrates the ongoing hostility in the industry.

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8 A total of approximately four and a half months, from 1 July until 18 October 2013, although the Commission on Inquiry has until 7 February 2014 to deliver its report. Despite this, only 14 days of public sittings were allocated, between 19 September and 4 October, and 14 – 16 October. The issue of time was a matter adverted to in *Mahon v Air New Zealand*, referred to below.

9 Report of the Queensland Thoroughbred Racing Inquiry**,** Daubney & Rafter, page xvi

10 ibid

11 ibid

12 See attachment 'ABC-325' to the Statement of Adam Carter dated 30 August 2013 enclosing a bundle of articles, blog posts and newspaper clippings that had been maintained by Mrs Murray, pages 6-16 of Annexure 'MP-1' to the Statement of Proctor dated 9 September 2013, paragraphs 34 and 37 of the Statement of Murray dated 26 July 2013; paragraph 29 of the Statement of Alred Orchard dated 19 October 2013; paragraph 26 of the Statement of Tuttle dated 23 October 2013, paragraphs 25 and 26 of the Statement of Brennan dated 26 July 2013; paragraphs 8-11 (inclusive) of the Statement of Bentley dated 21 October 2013, T6-3.15, T6-4.27-32.

13 Daubney & Rafter Report, page 127

14 Daubney & Rafter Report, page xxi

15 Mr Ludwig said, in his interview with the Queensland Audit Office on 1 May 2012,at page 5 that the politics was too much, even for him

7. It is appreciated that the Commission of Inquiry has been provided with very many documents[16] and statements[17]. It is also appreciated that the number of documents produced has largely emanated from the current control body, through its solicitors, and from the Queensland Government. More is said about this below. It is apparent that the Commission of Inquiry has also served Notices to Produce requiring the production of documents from at least Tatts Group Limited, Cooper Grace Ward, Norton Rose, and the Australian Securities & Investment Commission.

8. It is accepted that Commissions of Inquiry by their terms of appointment have a wide discretion as to the manner in which their inquiries are to be conducted.

9. However, whilst criticism was leveled at witnesses for not acting in a way that was 'transparent', it must be said that counsel assisting approached the public sittings of the Commission with certain pre-conceived conclusions firmly in mind, and examined witnesses on the basis that those conclusions would be reached, notwithstanding what the witnesses said[18]. If witnesses offered possible explanations that did not conform to the pre-ordained conclusions, they were aggressively cross-examined, and counsel assisting would not entertain the possibility that their own conclusions may be open to question.

10. There can be no doubt that the genesis of this Commission of Inquiry was political[19]. Many demonstrably false statements have been made both by members of the present government and the media:

    a. The transfer of $20 million by the former Government to Racing Queensland Limited in February 2012 immediately before the caretaker period for the State Election[20];

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16 Stated by Senior Counsel Assisting at T2-2.7 to be in excess of 200,000

17 At the date of these submissions there were 107 statements in the Data Room from persons other than those on whose behalf these submissions are made. Many of these statements have exhibits that comprise many hundreds of pages.

18 T3-74.15-23

19 Joint Ministerial Statement 6 May 2013

20 Media release by the Attorney General "Racing Inquiry Commissioner Appointed" 23 May 2013;

b. “Big shots from the Bligh and Beattie governments are set to face a commission of inquiry over decisions worth $200 million to the Queensland racing industry”[21];

c. “He's (the Attorney General) concerned Contour Engineers won tens of millions of dollars in work, however only one job went to tender. There have also been reports the former government approved more than $20 million in payments to the company in its final days”[22], and “$20m was paid to Contour Engineers two days before the Labor administration went into caretaker mode”[23];

d. An audit by accountancy firm Deloitte, commissioned by the government, found $150m worth of contracts were awarded to Contour Consulting Engineers without first going to tender[24];

e. "What I'm concerned about is the contracts, the very generous contracts, and the processes around those and the contracts being awarded to certain companies," he (the Attorney General) told ABC radio today[25];

f. Minister Dickson: “There are important questions which must be answered about alleged financial mismanagement which may stretch into the hundreds of millions, infamous ‘golden handshake’ payouts, and numerous instances of very murky backroom dealings[26]. "For example, I have heard of one company that won tens of millions of dollars' worth of work, however only one of its 37 contacts allegedly went to tender. There have also been allegations that the former Labor government approved more than $20 million worth of payments to this company in its dying

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21 http://www.brisbanetimes.com.au/queensland/labor-ministers-may-face-racing-inquiry-20130506-2j1yv.html#ixzz2hCllslTr (6 May 2013)

22 - http://www.theaustralian.com.au/national-affairs/ex-racing-qld-boss-bob-bentley-welcomes-inquiry/story-fn59niix-1226635952505#sthash.Ofsgwrnz.dpuf (6 May 2013)

23 See more at: http://www.theaustralian.com.au/national-affairs/ex-racing-qld-boss-bob-bentley-welcomes-inquiry/story-fn59niix-1226635952505#sthash.Np2Mxobr.dpuf

24 News Limited reports. - See more at: http://www.theaustralian.com.au/national-affairs/ex-racing-qld-boss-bob-bentley-welcomes-inquiry/story-fn59niix-1226635952505#sthash.Np2Mxobr.dpuf

25 - See more at: http://www.theaustralian.com.au/national-affairs/ex-racing-qld-boss-bob-bentley-welcomes-inquiry/story-fn59niix-1226635952505#sthash.Np2Mxobr.dpuf

26 (http://www.greyhoundracingqueensland.com/announcement/41/Commission-of-Inquiry-into-racing-industry)

days in what seems to have been a last minute cash dash before the election."[27]

g. The Courier Mail article referred to in Mr Lette's statement which asserted that Mr Brennan had a relative working at Contour.

11. It is urged that the Commission of Inquiry take the opportunity to correct these patently false statements.

12. There can also be no doubt that the 'targets' of this Inquiry are those persons on whose behalf these submissions are made.

Procedural fairness – principles

13. This Commission of Inquiry is unarguably obliged to comply with the rules of procedural fairness[28]. That is so not only in the conduct of hearings but also in its use of investigative powers[29]. The content of procedural fairness that must be afforded depends on a range of factors[30]. Generally speaking, the requirements of procedural fairness will be heightened in proportion to the gravity of the consequences involved.[31]

14. The protection given by the *Commissions of Inquiry Act* mean that he or she whose reputation has been traduced is deprived of any remedy by way of civil action to vindicate their reputation. It is therefore of the utmost importance that procedural fairness is accorded to those represented before the Commission of Inquiry.

15. In *National Companies and Securities Commission v News Corporation Ltd*[32] Gibbs CJ said:[33]

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27 (Attorney General quoted in http://www.news-mail.com.au/news/racing-inquiry-look-labors-multi-million-dollar-de/1856471/

28 *Commissioner of Police v Tanos* ((1958) 98 CLR 383; *Kioa v* West (1985) 159 CLR 550 at 584-5; Annetts *v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 per Brennan J at 585

29 Mahon v Air New Zealand [1984] 1 AC 808

30 *Barratt v Howard* (2000) 96 FCR 428 at [84]-[86]

31 *Gribbles Pathology (Vic.) Pty Ltd v Cassidy* (2002) 122 FCR 78 at [117]

32 (1984) 156 CLR 296

33 at 311-12

> "In *Russell v Duke of Norfolk,* Tucker L.J. said: "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth". The passage has frequently been approved . . . The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise."

16. The members of the Court made it clear that in determining how the rules of natural justice were to be satisfied, one had to look at the role and function of the body undertaking the investigation. In that case, an investigation was carried out in private, and there was no power to make adverse findings, although the Commission could make recommendations. Even in such a confined investigation, Mason, Wilson and Dawson JJ held that the Commission would comply with its obligation to observe the rules of natural justice if it proceeds to allow each witness who is called to give evidence to be legally represented, with freedom for that representative to participate in the examination of the witness, and for the provision of a transcript of his evidence.[34] (Underlining ours).

17. In the present case, it will be submitted that the Commission has failed to comply with the underlined requirement.

18. Here, the Commission of Inquiry intends to publish a report. That report may contain findings adverse to particular individuals or corporations. In the case of this Commission of Inquiry, convened pursuant to the *Commissions of Inquiry Act* 1950, three sections of that Act are of particular relevance.

19. Section 17 of the Act provides:

> "A commission, in the exercise of any of its functions or powers, shall not be bound by the rules or practice of any court or tribunal as to procedure or evidence, but may conduct its proceedings and inform itself on any matter in such manner as it thinks proper; and, without limiting in any way

34 at 325-6

> the operation of this section, the commission may refer any technical matter to an expert and may accept the expert's report as evidence."

20. This provision does not exclude the obligation of the Commission of Inquiry to afford procedural fairness.

21. Section 21 of the Act provides:

> "Any lawyer appointed by the Crown to assist a commission, any person authorized by a commission to appear before it, or any barrister or solicitor authorized by a commission to appear before it for the purpose of representing any person, may, so far as the commission thinks proper, examine or cross-examine any witness on any matter which the commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by a commissioner."

22. The Commission of Inquiry has consistently refused to permit counsel, other than counsel assisting, to examine witnesses.[35] These submissions can only address the refusal insofar as it concerns the legal representatives for the persons of whose behalf these submissions are made. However, it is expected that applications by other interested persons to examine witnesses have also been refused. If they have not, that in itself raises serious concerns.

23. Section 21 of the Act envisages a right to cross-examine, provided it is proper. In this Inquiry, that right has been effectively abrogated.

24. Section 14B of the Act only affords protection to witnesses summonsed to attend or appearing before the Commission of Inquiry. It does not extend that protection to witnesses who have provided statements to the Commission of Inquiry, and who are not called to give evidence.

25. By publishing statements on a public web-site the Commission of Inquiry has potentially exposed the makers of statements to civil action.

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[35] Letters from Commission to RBG dated 11 and 16 September and 3 and 10 October 2013 denying application to cross examination witnesses.

26. The attempt by Senior Counsel Assisting[36] to make the publication of statements on a public web-site part of the public sittings of the Inquiry would be laughable, were it not so serious. This is dealt with further, below.

27. Natural justice also requires that any person represented at the Commission of Inquiry that might be affected adversely by a finding should know of the risk of such a finding being made and be given an opportunity to adduce additional material that might have deterred the Commissioner from making that finding. In *Mahon*, their Lordships said:[37]

> "The rules of natural justice that are germane to this appeal can, in their Lordships' view be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
>
> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory."

28. In *Annetts v McCann*[38] Brennan J said that the second 'rule' was a general principle which, subject to any contrary intention expressed or implied in the

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36 at T2-2.25

37 at 820.F-H

38 supra, at 608-609.

statute, applies to statutory inquiries in which the inquisitor is authorized to publish findings that might reflect unfavourably on a person's conduct.[39] There is no such contrary intention in the *Commissions of Inquiry Act*.

29. The law proceeds on the basis that reputation itself is to be protected[40]. The rules referred to must be applied substantively and not accorded mere lip service. The opportunity to be heard must be a real opportunity. As Lord Denning said in *re Pergamon Press Ltd*:[41]

> "The inspectors can obtain information in any way they think best, but before they condemn or criticize a man, they must give him a fair opportunity for correcting or contradicting what is said against him."

30. Further, the question whether a decision maker gave the kind of hearing required by procedural fairness is not to be confused with the question of whether the decision maker did not intend to apply or pay heed to the submissions of the aggrieved person in making his or her decision. That is, a fair hearing is not constituted by giving notice of potential adverse findings and an opportunity to make submissions as to why such findings should not be made.

31. As a minimum content of procedural fairness, a reasonable opportunity to present a case not only requires that notice be given that a decision will be made, but also that a reasonable opportunity to prepare the case will be given before the hearing is heard[42]. The question whether a reasonable opportunity has been given to the person affected to prepare the case will depend on a variety of factors including the complexity of the matter, the resources and ability of the affected person to prepare submissions and the quantity of material and evidence[43].

32. It is submitted that in this case of this Inquiry, the persons against whom adverse findings are contemplated, are entitled to be told the evidence on

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39 see also Toohey J at 619

40 *Ainsworth v Criminal Justice Commission* at 577-8

41 [1971] Ch 388 at 399-400

42 Halsbury's Laws of Australia at [10-1952]

43 *McGibbon v Linkenbagh* (1996) 41 ALD 219; *R v Thames Magistrates Court; ex parte Polemis* [1974] 2 All ER 1219.

which those findings will be based[44]. The Commission has, in response to requests that they do so for those persons on whose behalf these submissions are made[45], declined to do so[46].

33. Also, the content of any notification of potential adverse findings must convey to the recipient with reasonable clarity what is the duty, which its service imposes upon him or her[47].

34. The bias rule of procedural fairness is based upon the principle that justice should not only be done but should manifestly be seen to be done.[48]

35. The appearance of bias rule operates to invalidate a decision made by a decision maker where a fair-minded and informed lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question the decision-maker is required to decide[49].

36. These submissions as to the apprehension of pre-judgment or bias, are made in accordance with what was said in *Wentworth v Rogers (No. 12)*[50] that allegations of apprehended bias are to be made so that the judge (or Commissioner) has the opportunity to consider and, if thought fit, comment on the allegations. The test for a reasonable apprehension of bias is the same for administrative and judicial decision makers, though its content may vary depending on the nature of the decision maker. It is submitted that the test is, for all practical purposes, the same for a Commissioner conducting an Inquiry as it is for a judge conducting a trial.

Procedural fairness - submissions

37. Regrettably, it must be strongly submitted that procedural fairness has not been afforded to those persons on whose behalf these submissions have

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44 See *Hall v University of NSW* (2008) NSWSC 669 at [68] referred to in the submissions made on behalf of Mr Lawlor at paragraph 14

45 see letters to Commission dated 14 and 15 October 2013

46 see letters from Commission dated 15 and 18 October 2013

47 *Gribbles Pathology (Vic.) Pty Ltd v Cassidy* (2002) 122 FCR 78

48 *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259

49 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337

50 (1987) 9 NSWLR 400 at 422

been made, particularly Mr Bentley, Mr Hanmer, Mr Tuttle, Mr Ludwig and Ms Reid. This is a submission that is not made lightly. It is submitted that there has been a failure to proceed with fairness in at least eleven ways.

38. First, contrary to the authorities referred to at paragraphs 28 and 29 above, no proper opportunity has been afforded to the persons on whose behalf these submissions are made to properly prepare for, and present a case at the Commission of Inquiry. They have been literally inundated and overwhelmed with documents and statements. It has already been pointed out that 109 statements, many of which are extremely lengthy, and over 200,000 documents have been produced.

39. The solicitors for the current control body have produced, on a sporadic basis, 28 disks of documentation, four lever-arch files of board minutes (some with sections redacted) and a lever arch-file of documents pertaining to the Albion Park litigation (from several folders produced for inspection). Further, the Commission produced a lever arch folder of documents obtained from ASIC. The production of documents by Clayton Utz has continued. Three disks (with over 2,000 documents) were provided on the eve of the commencement of the public sittings[51] and during the public sittings[52]. Two further disks were provided on 14 October 2013 containing, inter alia, board minutes of Harness Racing Queensland dating back to 2008. No explanation has been offered as to why documents have been withheld from production in the way that they have. In the absence of any explanation it can only be concluded that it is strategic.

40. Statements have continued to be produced throughout the public sittings[53]. No attempt has been made to stem this avalanche of documentation.

41. Mr Bentley was shown seven folders of documents during his examination. A number of these documents had not been provided to his legal representatives before he began his examination. Similarly, Mr Tuttle was taken to three volumes of documents, a number of which his legal representatives had not seen before. Government witnesses were provided with six folders of documents.

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51 after business hours on 18 September

52 on 30 September a further 3 disks were delivered

53 the most recent statements at the time of preparing these submissions were uploaded on 10 October 2013

42. It is not known whether the Commission intends to rely solely on the documents contained in the folders put to witnesses. Based on responses received to correspondence that is referred to in more detail below no such assumption can be made.

43. The volume of documentation and statements is such that the persons on whose behalf these submissions are made have quite simply not had the opportunity to properly consider them all, and be properly prepared to advance their case at the Inquiry. The volume of material provided to the Commission does not obviate or relieve it from being required to observe the rules of procedural fairness. This matter has been raised in correspondence with the Commission[54].

44. Secondly, the way in which the Commission has published statements on its web-site is unfair to those persons on whose behalf these submissions are made.

45. In a Practice Guideline[55] it was stated that:

a. At an initial hearing on 15 July counsel assisting would provide a summary of the evidence intended to be adduced in relation to the terms of reference. That was not done then, and has not been done since.

b. At paragraph 24:

> "Subject to the protocols for confidentiality set out below, witness statements including exhibits, and other evidentiary documents including documents produced on summons, which are provided to the Commission will be accessible:
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> (a) where the material has been lodged but has not yet been admitted into evidence, only to persons with leave from the Commissioner to have this access, from a restricted data-hub accessible via the Commission's website with an allocated password; and

54 For example, refer letters from Rodgers Barnes & Green to the Commission dated 2 August 2013, 23 August 2013, 28 August 2013, 30 August 2013, 9 September 2013,

55 Practice Guideline 1 issued 2 July 2013

(b) once any witness statements and exhibits thereto have been admitted into evidence by the Commissioner at a public hearing, to the public at large via the Commission's website; and

(c) in the case of evidentiary material which is admitted into evidence other than witness statements and exhibits thereto, usually only via the restricted data hub (subject to the Commission's further consideration in light of the public importance and quantity of such material)."

46. It was thus clearly envisaged that statements would be admitted into evidence, in the conventional way.

47. On 21 August 2013 the Commission notified Rodgers Barnes & Green ("RBG") (and presumably others) that it proposed to publish on a public website all of the statements that it had received.

48. RBG immediately wrote to the Commission seeking clarification of what was proposed and stated, inter alia:

> "If it is proposed to put statements on the website of the Commission, and make them available to the general public before the statement is put into evidence, we respectfully submit that such a course is grossly unfair to those persons who may be adversely mentioned in one or more statements. Our clients strenuously oppose such a course. Our clients object to any statements being made public before the maker of the statement is called to give evidence and is cross-examined. Further, any parts of the statement struck out by the Commissioner on objection by any person given leave to appear (including counsel assisting) should not be made public. The ground of our objection is that it would be contrary to the principles of natural justice to act otherwise."

49. Reference was made to paragraph 24(b) of Practice Guideline 1.

50. The Commission's response was to propose a Practice Guideline 2 on 23 August, confirming that statements would be published on the publicly available web-site. Extraordinarily, the Commission said:

"The publication of statements on the web-site will not affect the capacity of any person to raise objections to statements or parts of statements being taken into account by the Commissioner."

51. Yet all of the statements were put into public circulation. If the makers of the statements were not entitled to protection under the *Commissions of Inquiry Act*, that publication exposed them to the risk of action being taken against them.

52. By letter dated 23 August, RBG recounted the timeline of what had occurred, and continued:

"What the Commission proposes is grossly unfair to our clients. We must express in the strongest possible terms our clients' objection to what the Commission proposes. As advised in our letter of 23 August, we have not yet even had the opportunity to consider and take instructions about all of the statements provided to the Commission. By putting the statements on the website is surely to invite persons with vested interests, including members of the media, to traduce the reputations of our clients (and perhaps other witnesses) before the public hearings even resume.

Statements were provided to the Commission against the background of Practice Guideline No. 1, in particular paragraph 24 thereof, which assured confidentiality until the statements were admitted into evidence.

To issue the Practice Guideline at 11:41 am demonstrates that, not only were our clients' objections not even considered, the Commission proceeded on a pre-determined path. The Practice Guideline No. 2 was obviously complete or nearly complete at 9:52 am. The Commission did not even wait until the time it imposed for the receipt of objections, before issuing the Practice Guideline.

The Commission also may not have considered the protection afforded to witnesses by s. 14B *Commissions of Inquiry Act.* It seems to us that none of the persons who have provided statements to date (probably on the understanding of confidentiality set out in Practice Guideline No. 1) are given any protection if the statements are published to the world at large before they are admitted into evidence. We enquire whether the

> Commission sought the permission of persons who provided statements to publish them in the manner intended."

53. On 26 August 2013 the Commission responded to this letter. It stated, inter alia:

> "Publication does not indicate acceptance by the Commissioner of any matters contained in the statements, nor does it preclude the provision of further statements in response to any matters so far raised . . .
>
> Further, it also does not preclude any submissions being made as to the relevance of any part of any statement or the weight which should be given to it by the Commissioner."

54. By letter dated 30 August, the Commission stated:

> "The publication of any statement in the data room or on the website, or both, is irrelevant to whether (and the extent to which) the Commission will rely on it."

55. One must therefore ask, why were the statements published in their entirety on a public web-site? Many of the statements contain allegations or statements adverse to the persons on whose behalf these submissions are made. It was palpably unfair to those persons for the statements to be published to the world at large, before the Commissioner had even decided whether the statements were admissible, or whether she intended to rely upon them.

56. This action perpetrated a gross unfairness to those persons on whose behalf these submissions are made.

57. Thirdly, the Commission has steadfastly refused to identify those documents or statements upon which it intends to rely, so as to afford witnesses the opportunity to know, from the hundreds of thousands of potentially relevant documents, and the 107 statements, which ones they should refresh their memory about, and address. It was patently obvious from counsel assisting's response to our submission that we be allowed to inspect the folders of material that were sprung on Mr Bentley at the start of his evidence. On 20

September 2013, after we made our request and submission as to the unfairness of having to deal with documents that were sprung on Mr Bentley, counsel assisting said:

> "Commissioner, we oppose the application for us to provide each witness in advance with our arrangement of the documents that we're going to show the witness. The reason we do it is because, firstly, this is an investigation. This is a public hearing where people's credibility is being tested and it's the arrangement of the documents, and not the documents themselves, that really is the focus of the complaint by our learned friend, because the documents that I show to Mr Bentley, for example, are documents that he will be left with, with his lawyers"[56].

58. It should be noted that much of the material that was in issue dated back several years. It was unfair to Mr Bentley to be put on the spot to try to recall in detail communications that flowed between various parties several years earlier, especially when documents were often referred to out of chronological order. It is clear that the tactic adopted by counsel in devising his 'arrangement of documents' was designed to obtain maximum impact on the credibility of a witness trying to recall matters occurring many years earlier, when the proper objective in this instance should have been to try to inquire as to the witness's properly considered recollection.

59. On 2 August 2013 RBG pointed out the resources available to their clients, and the fact that others control all of the documents potentially relevant to the Inquiry. They asked for guidance as to particular topics or documents the Commission wanted their clients to address. Quite unhelpfully, on 2 August the Commission replied stating that RBG's clients were "encouraged to provide supplementary statements on such matters as they consider appropriate."

60. On 30 August 2013 RBG again invited the Commission to identify those statements on which it intended to rely. RBG noted that the Commission had not raised any specific issues or questions for their clients to address. They contrasted this with the fact that specific questions were asked of a number of other persons who had provided statements.

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56 T3-3.22-28

61. On 2 September 2013 the Commission wrote to RBG and again refused to give any particulars of allegations made against individuals, and refused to indicate which statements would be relied upon. It also stated that there was no requirement for the identification in advance of specific issues that may be the subject of examination at the public hearings. That refusal has continued to as recently as 18 October 2013.

62. A list of witnesses intended to be called in the public sittings was published on 4 September 2013. That list has since been modified on a number of occasions. At the date of these submissions, the Commission proposed to call only 14 witnesses to give evidence in the public sittings.

63. On 6 September 2013 RBG wrote to the Commission and stated:

> "We are currently unsure, because the Commission has not advised of its position, of the status of statements of witnesses that have been received and published (either on the limited basis in the data room or on the public website) where those witnesses are not identified as being called to give evidence. We are proceeding on the assumption that the Commission will only be relying on those statements where the maker of the statement is called to give evidence at the public hearing. The same assumption applies to documents. That is, the Commission will only rely on documents put into evidence at the public hearing. If our assumption is incorrect, then please let us know as soon as possible."

64. In its letter of 6 September 2013, the Commission simply said, "the assumptions set out in your second paragraph are incorrect", referring to the extracted passage in paragraph 63 above.

65. In a letter to the Commission dated 9 September 2012, RBG stated, in part:

> "You have told us that our assumption is incorrect. Presumably that means that the Commission intends to rely on the statements of witnesses who will not be called to give evidence, and on documents that will not be tendered into evidence. The Commission has not yet identified those documents on which it proposes to rely. We ask it to do so.

We appreciate that this is an Inquiry and not adversarial litigation. However, if information is to be used as the basis for making findings against our clients, they are entitled to be given an opportunity to respond to that information and to test the evidence. That is why we have repeatedly asked the Commission to provide details of the specific matters that it wants our clients to address. The Commission has refused to do so.

It is also why we submitted that information should not be put into the public domain (via the website) until it was admitted into evidence. As our clients see it, statements have been put on the website, for members of the public, including the media, to use at it sees fit, and the Commission does not intend to call all of the witnesses who have provided statements to give evidence and be cross-examined; yet reserves to itself the right to rely on that evidence, without giving our clients the right to test it. That is fundamentally unfair. It is even more unfair when one considers that many of the statements contain hearsay, objectionable opinion or material that is not properly within the terms of reference.

We have previously protested that the timing and arrangements for parties to make objections to various statements have been unfair. Our clients have limited resources and yet if they are not otherwise able to review every document that has been uploaded to the data room and every statement, and to make detailed responses and objections then they run the risk of adverse findings against them. This is even more unfair when one considers that the process of uploading statements and documents is continuing.

In the circumstances, the only course open to our clients is to require that every witness whose statement is to be relied upon by the Commission be called to give evidence, and to require that every document to be relied upon by the Commission be identified, and put into evidence.

66. The refusal to provide any further details was forcefully stated in the Commission's letter dated 9 September 2013.

67. Therefore, the persons on whose behalf these submissions are made still do not know what evidence, which statements, and which documents[57] are to be relied on by the Commission. That is grossly unfair.

68. Fourthly, the Commission has refused to call witnesses that it has been requested to call during the public sittings.

69. By letter dated (Wednesday) 4 September 2013 sent by email at 4:40 pm the Commission invited RBG to identify:

    a. Which persons identified on the website listed to be called as witnesses they wished to have the opportunity to examine;

    b. Which witnesses who had provided the Commission with a statement, but who were not so listed, they wished to have the opportunity to examine;

    c. For each person the topics of examination and how long it was anticipated such examination would take.

70. The solicitors were given effectively two business days to respond to this letter. A response was required by Monday 9 September. That in itself was unfair.

71. However, by letter dated 6 September 2013 RBG invited the Commission to call:

    a. Robert Cooke of Tatts Group Limited[58];

    b. Chris Fulcher of Contour Consulting Engineers Pty Ltd;

    c. Adam Carter, previously the Chief Financial Officer of Racing Queensland Limited, and after 1 May 2012, the acting Chief Executive Officer;

    d. Raphaele Nicaud, a recruitment consultant;

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57 other than those put to them in their examination during the public sittings

58 who, at paragraph 10 of his statement disclosed by the Commission, stated that he had provided a separate confidential statement to the Commission. A copy of that statement has not been provided to RBG

e. Neville Stewart, former Chairman of the Toowoomba Turf Club; and

f. Ron Mathofer, an employee in the finance department of Racing Queensland Limited

72. It was explained why the evidence of these witnesses was particularly relevant, and should be dealt with in public. It also stated that it would examine its own witnesses when they were called to give evidence.

73. Subsequently, RBG enquired whether Mr Dunphy would be called as a witness. At the time this request was made Mr Procter was on the list of witnesses intended to be called.

74. In its letter of (Saturday) 14 September 2013 the Commission:

a. Refused to call any of the six witnesses identified in paragraph 71 above;

b. Refused to call Mr Dunphy;

c. Took issue with the suggestion by RBG that their counsel would be entitled to examine his own clients and "[took] this as a request to do so";

d. Re-stated that it was not possible to identify which documents and which parts of which statements the Commission intended to rely upon at that stage.

75. In letter dated 24 September 2013 RBG re-iterated that if any evidence was to be relied upon by the Commission to make findings adverse to any of their clients, the maker of the statement or document that contains such evidence should be required to give oral evidence. That reinforced what had been said in RBG's letter of 30 August:

> "If there is any allegation of fact mentioned in a witness statement that is not already specifically addressed in our clients' statements, then unless we submit a supplementary statement dealing with that particular allegation, the Commission should proceed on the basis that our clients do not accept the allegation unless it is specifically drawn to our clients'

attention either in writing or during the public hearings, and they are given the opportunity to respond."

76. The Commission has declined to call further evidence, and has not yet stated which evidence it will rely upon.

77. At this point it is necessary to return to the suggestion, made both in correspondence[59] and by Senior Counsel Assisting the Inquiry, that the publication of statements on the public website somehow amounts to public sittings of the Inquiry. That simply cannot be right. As the correspondence referred to above makes clear, the Commission has not yet decided which statements, or which parts of statements, it intends to rely upon. No opportunity has been given to object to statements or parts of statements[60]. The makers of statements have not been subjected to public questioning.

78. Fifthly, the Commission has refused to call a number of important witnesses so that their evidence could be tested or expanded upon in the public hearings:

a. Mr Dunphy, who:

i. Advised the Board of RQL as to the employment contracts the subject of term of reference 3e;

ii. Was the author of advices (and draft advices) upon which Mr Bentley and Mr Tuttle were examined at length;

iii. Was the author of the 14 June 2011 file note[61];

iv. Advised the Office of Racing on the matters referred to in Mr Kelly's evidence[62]

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59 Refer to letter from Commission to RBG dated 2 September 2013 wherein it was stated, "It is not therefore a question of indicating which of the statements are going to be relied upon".

60 indeed, at the commencement of the public sittings (Day 2) Senior Counsel Assisting eschewed the tender of statements and the taking of objections

61 containing reference to a 'poison pill', which was suggested by Counsel Assisting to have emanated from either Mr Tuttle or Ms Reid

62 T11-52.20

b. Mr Procter who advised the four senior executives of RQL as to their renegotiated employment contracts and provided the letters of advice (and drafts) and handwritten file notes upon which Mr Bentley and Mr Tuttle, in particular were examined[63];

c. Mr Ryan, who was a director of RQL when the variations to the employment contracts were unanimously approved by the board of directors[64];

d. Mr Grace[65], who:

   i. provided the advice of 18 November 2008 concerning the Product and Program Agreement;

   ii. was the author of a number of file notes upon which Mr Bentley, Mr Hanmer and Mr Tuttle were examined at length;

   iii. attended meetings of QRL, RQL and Product Co;

   iv. was the author of a number of letters and emails relevant to term of reference 3f.

e. Ms Watson:

   i. Whose removal from the Board of RQL was the subject of extensive questioning of Mr Bentley and Mr Hanmer;

   ii. Who is alleged by Mr Milner to have breached board confidentiality by disclosing information to others, and could not be tested about this;

   iii. Who was a director of Product Co who acquiesced in the action taken regarding the Product and Program Agreement.

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63 Mr Procter was originally on the list of witnesses to be called, but once he provided a statement, he was removed from the list. Yet a serious issue remains as to whether he provided legal advice to the four senior executives of RQL, the board, or both

64 letter RBG to Commission 26 September 2013

65 despite a specific request being made [T3-5.11] that the Commission speak to him, there is no evidence that has been done

f. Mr Dixon, the current chairman of the control body, as to:

i. Why no action has been taken under the Product and Program Agreement since 30 April 2012;

ii. What advice the current board has obtained as to its right to recover any monies from Tatts Group Limited under that agreement[66].

g. Tracey Harris, about whose statement Mr Bentley was cross-examined[67], yet Ms Harris' evidence has not been tested.

h. Mr Fletton; and

i. Mr Dick McIlwain

79. Sixthly, the Commission has refused to permit examination of witnesses, except to a very limited extent. Such examination is envisaged by s. 21 *Commissions of Inquiry Act* and by Practice Guideline 1[68]. Nevertheless those persons on whose behalf these submissions are made have been refused permission to ask questions of Mr Kelly, Mr Fraser and Mr Ryan.

80. The only witnesses that they were permitted to examine were Mr Lambert, Mr Andrews, Mr Godber and Mr Lette. Given that only 10 witnesses are proposed to be called, other than the persons on whose behalf these submissions are made, they have been effectively denied the opportunity to test the evidence put before the Inquiry.

81. It is quite extraordinary that a number of persons or entities have been granted leave to be represented at the Inquiry, and yet none of them have been permitted to ask any questions during the public sittings. A fair-minded lay observer must surely ask: what is going on? The inflexibility of the Commission's procedures, which seem to have in mind only expediency, have perpetrated an unfairness on those represented before the Inquiry.

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66 it is noted that legal privilege has been claimed for this advice, yet its contents have been disclosed in the minutes attached to Mr Dixon's supplementary statement. The Commission has been requested to follow this up, but has apparently chosen not to do so. See letter RBG to Commission dated 26 September 2013

67 T2-60ff

68 paragraph 14; see also Practice Guideline 2 paragraph 8(c)

82. Seventhly, and partly allied to the first and third grounds, the Commission has acted quite unfairly in the way certain witnesses were asked questions about documents. As noted above, Senior Counsel Assisting took Mr Bentley to seven folders of documents during his examination. Despite requests being made,[69] his legal representatives and Mr Bentley were not permitted to see these documents before he was taken to them. Almost all of the documents were those of RQL or its advisers. It was claimed that Mr Bentley's credibility was in issue[70] and this was the reason why he, and his legal advisers, were not permitted to see documents in advance. However, given that the events with which the Commission of Inquiry is concerned occurred over a period of over 5 years, and his examination was presumably not a memory test of particular documents, Mr Bentley should have been permitted to refresh his memory before he gave evidence. Indeed, on one occasion, the Commission had to stop Mr Bentley giving evidence that it knew was contradicted by documents he had not been taken to, and which were in his favour[71].

83. Mr Hanmer and Mr Tuttle were subjected to the same treatment.

84. By contrast, government witnesses were not. Six folders of documents were given to the legal representatives of Mr Kelly and Ms Perrett, and Mr Fraser, before Mr Kelly was examined. Also a number of witnesses were asked to address specific documents or topics.[72]

85. No explanation of this differential treatment was offered. The suggestion that supplementary statements be provided will be taken up, but it defies credulity to suggest that the Commission will not be influenced, indeed strongly influenced, by the performance of Mr Bentley and Mr Hanmer, and others, in the witnesses box. The Commission has, it is submitted respectfully, contrived a situation where witnesses are made to look bad by the way in which they are denied access to documents or particulars before they give their evidence.

86. Eighthly, the way in which claims to legal professional privilege were decided, and then witnesses were cross examined about those matters was quite unfair.

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69 T3-2-20, T3-2.28-30, T3-2.33-35, T3-2.37-46, T3-3.6-7, T3-3.14-17.

70 T3-3.22

71 T6-36. 20-24.

72 For example, M Kelly, D Beavis, D Stitt, K Seymour, M Lambert, P Felgate and W Andrews.

87. RBG made claims to legal professional privilege in respect of documents created by Norton Rose and Clayton Utz[73]. The claim to joint privilege was denied[74]. It is respectfully submitted that, having regard to the evidence of Tuttle and Bentley, and to the report of the Auditor-General, referred to below, that decision was erroneous. However, having rejected the claim to privilege on the ground that these firms were both acting for RQL, and RQL alone, counsel assisting then cross-examined Mr Bentley and Mr Tuttle on the basis that, particularly Norton Rose, was acting in a dual capacity[75]. That was quite unfair. If the firm was acting in a dual capacity the claim to privilege ought to have been upheld. To deny the claim to privilege and then to use the documents against the witnesses in this way was unfair.

88. Ninthly, the Commission pursued the issue of the proxy concerning the Queensland Country Racing Committee, despite the fact that it was outside of the Terms of Reference. Objection to this course was taken[76]. This matter is further addressed below in relation to Term of Reference 2b. However, at this stage it is necessary to note that objection has been taken to the statements of those witnesses that address this issue. The Commission has said that it will take account of the submissions in due course[77]. However, the fact that the Commission permitted examination of Mr Bentley, Mr Ludwig and Mr Kelly on this issue strongly suggests that the Commission has determined to treat the evidence as relevant and probative. Indeed, Senior Counsel Assisting said on several occasions[78] that the statements of these people 'on oath' should be taken as accepted, despite the fact that none of them were called to enable their evidence to be tested.

89. Tenthly, and by way of contrast to the ninth ground, the Commission has:

    a. Refused to investigate the circumstances in which the current control body has failed to take up the issue of fees under the Product and

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73 RBG letters to Commission 8 August 2013, 13 August 2013, 6 September 2013

74 Commission letters to RBG 9 August 2013, 13 August 2013, 9 September 2013

75 T9-69.41-43

76 T8-6.9-11 and T8-6.34 where objection was twice taken

77 Letter Commission to RBG 6 September 2013

78 T8-15.2-9

Program Agreement[79] despite Senior Counsel Assisting saying he intended to do so[80];

b. Failed to exercise any control over the way in which the current control body has provided documents sporadically, and in a quite unhelpful manner;

c. Seemingly failed to verify that all relevant documents have been produced by the control body. For example, RBG have not been given[81] any board minutes of Queensland Harness Racing Limited or Greyhounds Queensland Limited during the relevant period[82] that would be relevant to how those bodies handled the issue in Term of Reference 3f.

90. Eleventh, it will be unfair to individuals if findings are made adversely to them, if the same findings are not made against persons acting in the same capacity.

91. For example, the board of directors of RQL unanimously approved the variations to the four employees' contracts the subject of terms of reference 3e. Yet neither Mr Milner nor Mr Ryan have been called to give evidence and given the opportunity to answer these allegations.

92. The directors of Product Co resolved to act in a certain way regarding the collection of fees from Tatts Group Limited. Mr Hanmer and Mr Ludwig were questioned about that. Mrs Watson was not called and required to answer why she acted in the way that she did. Counsel Assisting asked no questions of Mr Andrews or Mr Lambert about this matter.

93. There was no examination of the directors of the greyhound or harness racing control board who acted in the relevant period up until 30 June 2010, about any of the terms of reference.

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79 Letter Commission to RBG 3 October 2013

80 T3-73.6, T5-62.20

81 and presumably the Commission has not been given

82 That such documents exist is obvious from, for example RQL.123.006.0001; RQL.123.006.0007

94. It is quite evident that counsel assisting approached the public hearings with a case theory, particularly about term of reference 3f. They were unwilling to accept any evidence that did not align with that case theory.

95. It was also said[83] , and it has been repeated, that no finding will be made adverse to an individual or corporation unless appropriate opportunity is given to those persons to be heard in relation to the matter. Exactly what that entails has not been made clear. Supplementary statements have been provided, and are relied upon. The Inquiry has insisted that submissions of these interested persons be delivered by 30 October 2013[84].

96. It is submitted that the Commission of Inquiry has not afforded procedural fairness to the persons on whose behalf these submissions are made. The consequence is that the Commission of Inquiry cannot, fairly, report adversely to those individuals. To do so would be in breach of the fundamental tenets of natural justice.

97. It is noteworthy that in its conduct of the Inquiry the Commission has not adduced **any** positive evidence of steps taken by the control bodies in the relevant period defined in the Terms of Reference. Mr Kelly attempted to address some of these matters in his evidence, and Senior Counsel Assisting the Inquiry did acknowledge that the focus had been on 'negative' matters. However, when one is examining a topic as wide as "the operations of the former racing control bodies in Queensland" and "the workplace culture and practices of the relevant entities" one would think that credit could be given for matters such as:

a. The way in which the Equine Influenza outbreak was managed;

b. The healthy financial position of the Thoroughbred code, as reflected in its annual reports;

c. The scale of infrastructure improvements to facilities, making them safer, more sustainable, and of greater comfort to participants in the racing industry;

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83 T2-3.5

84 despite foreshadowing calling five additional witnesses in the week commencing 14 October

d. The way in which integrity matters were handled, and the confidence of the industry in those processes; and

e. The dedication of staff (and the directors), the long hours worked, and the commitment they gave to furthering the best interests of the racing industry.

98. Sadly, those matters were ignored.

Evidence – the making of findings

99. Whilst the rules of evidence are expressly stated not to apply to Commissions of Inquiry, nevertheless some intellectual discipline is required before any findings of fact are made. That is certainly so before any findings are made adverse to an individual.

100. The evidence may raise suspicion, even strong suspicion. However, discreditable conduct does not prove guilt, and suspicion, even strong suspicion falls well short of proof to a requisite standard. Suspicion and conjecture, is not a proper basis for a finding of fact.

101. Indeed it is submitted that the Commission of Inquiry should proceed according to the *Briginshaw* principles in determining whether the make findings of fact, and in deciding whether to draw inferences. That the principles apply to the drawing of inferences was recently reinforced in *Con Karakatsanis v Racing Victoria Ltd*[85].

102. The classic statement of the principle is contained in the leading judgment of Dixon J in *Briginshaw v Briginshaw*, where his Honour stated[86]:

> "But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been

85 [2013] VSC 434 at [41] – [42]

86 (1938) 60 CLR 336 at 362

> proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

103. If findings are made that individuals have acted unlawfully, or in breach of some duty, the Commission of Inquiry must, it is submitted set out the facts on which those findings are made, based on the evidence, and be satisfied to a standard reflective of the seriousness of the findings made.

104. Further, the evidence is to be weighed according to the proof which it is in the power of one side to have produced[87]. Here, it is within the power of the Commission, and not those persons granted leave to appear, to compel the production of documents, or to compel the attendance of witnesses for examination.

105. If there is a shortfall in evidence sufficient to make a finding, then such a finding should not be made. Speculation should not take the place of evidence. The Commission has chosen to call a very limited number of witnesses. If assertions are made to those witnesses based on the evidence of uncalled witnesses, and they are refuted then the Commission has a choice. It can accept the evidence of the witness giving oral testimony, or not. If it does not, it is submitted that it is improper and unfair to accept the untested evidence of somebody not called to give evidence, and have that evidence tested. In such circumstances, if the Commission does not accept the evidence of a witness called to give oral evidence, it cannot fill the void left by the rejection of that evidence by either untested evidence or, worse, by speculation.

106. The approach taken by the Commission, of calling very limited evidence in public sittings, leaves it with a dilemma. It is submitted that the approach taken leaves the Commission in the position where it can make very limited findings, because of the paucity of witnesses called in public hearings.

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87 *Blatch v Archer* (1774) 98 ER 969 at 970 adopted in *Swain v Waverley Municipal Council* (2005) 220 CLR 517